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DEPARTMENT OF ENERGY

10 CFR Part 1045

[AU60-2016-1045]

RIN 1992-AA49

Nuclear Classification and Declassification

AGENCY: Department of Energy.

ACTION: Final rule.

SUMMARY: In this final rule, the Department of Energy (DOE) revises its regulations concerning the requirements for classification and declassification of Restricted Data (RD) and Formerly Restricted Data (FRD). Since 1997, when DOE issued the regulation, changes in legislation and DOE and national policies have rendered portions of the existing regulations outdated. In this final rule, DOE addresses these changes. Additional changes clarify requirements, as well as allow agencies more flexibility in implementing RD/FRD programs. DOE has also made revisions for clarity and reorganized for ease of use.

DATES: This final rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

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I. Background.

A. Authority and Reasons for Regulation.

The Atomic Energy Act of 1954, as amended, 42 U.S.C. 2011 *et seq.* (AEA), is the basis for the classification of nuclear-weapons related information as Restricted Data (RD), and information transclassified from the RD category. The AEA grants the Department of Energy (DOE) Government-wide authority for RD and the control of information as RD. Title 10 of the Code of Federal Regulations (CFR) part 1045 (this part) implements DOE authority under the AEA to manage the Government-wide system of classifying and declassifying RD. This part prescribes procedures for the identification of RD, FRD, and TFNI, describes how members of

the public may request the release of RD, FRD, TFNI, and DOE National Security Information (NSI), and sets forth the process to appeal decisions regarding such requests.

In 1997, DOE issued a final rule in 10 CFR part 1045 that established the Government-wide responsibilities and requirements for RD and FRD. 62 FR 68502 (Dec. 31, 1997). The DOE affirmed in the preamble to the final rule that this DOE rule would establish the policies and procedures implementing the requirements of the AEA for the classification and declassification of RD and FRD. The rule also implemented the provisions of the E.O. 12958 pertaining to NSI that directly affect the public. The final rule included several requirements intended to provide increased transparency and accountability to the process of classifying and declassifying RD and FRD. These included options for the public to submit suggestions and complaints about classification policy, and for persons to submit challenges to classification determinations and declassification proposals. The rule also identified the specific criteria to be used to determine if information is RD, to declassify RD, and prohibitions on the application of classification.

B. Reasons for Revisions.

On April 23, 2018, DOE issued a proposed rule to amend part 1045 (2018-07990). For background on the proposed rule and a discussion of the changes DOE proposed and the reasons for those changes, please see proposed rule. DOE received comments on the rule and has addressed those comments in section II. DOE made changes to the proposal in response to the comments, as described in section I.C.

In this final rule, DOE revises this part to: update DOE organizational responsibilities; incorporate changes in the Atomic Energy Act; Executive Order 13526, *Classified National Security Information*; and 32 CFR part 2001, *Classified National Security Information; Final Rule*, as well as to improve policies and procedures due to lessons learned and feedback from other Federal agencies (agencies).

Section 142(e) of the AEA authorizes the transclassification of information concerning the atomic programs of other nations. Under section 142(e), RD concerning the atomic energy programs of other nations is transclassified by joint agreement with the Director of Central Intelligence (DCI) or the DNI to facilitate sharing in the Intelligence Community (IC). Information transclassified under section 142 of the AEA, did not have a unique name or marking prior to being named TFNI in 2010 under 32 CFR part 2001. Prior to 2010, documents containing this information had no special identifier, were handled in a manner similar to NSI, and were not marked as exempt from automatic declassification. Although the information concerns foreign nuclear programs, the information may be the same or similar to U.S. RD, which is never automatically declassified due to its sensitivity. To ensure this information is not automatically declassified and inadvertently released, E.O. 13526 recognized the Secretary of Energy's authority to determine its declassification. The Information Security Oversight Office (ISOO) of the National Archives and Records Administration, in coordination with DOE, developed language to incorporate TFNI marking requirements into 32 CFR 2001.24(i).

Revisions to this part mirror the marking policies jointly developed by DOE and ISOO contained in 32 CFR part 2001 and ISOO Notice 2011-02. These policies ensure matter containing RD, FRD, and TFNI are not automatically declassified. These policies are publicly available from the ISOO website at <https://www.archives.gov/isoo>.

In addition, revisions to this part define specific responsibilities and authorities for TFNI, authorities for the return of FRD and TFNI to the RD category as permitted by changes to Section 142 of the AEA, and the marking of matter that commingles RD/FRD/TFNI with NSI or Controlled Unclassified Information (CUI). Many changes are based on DOE's experience assisting other agencies in implementing this part.

E.O. 12866 states regulations must be "simple and easy to understand, with the goal of minimizing uncertainty and litigation..." (Sec. 1, Par. (b)(12)) and E.O. 12988 states that each regulation must specify its effect "in clear language" (Sec. 3 Par. (b)(2)). In accordance with these E.O.s, this regulation is rewritten for clarity and reorganized for ease of use.

DOE consulted with other agencies and incorporated many of their recommendations in the revision to this part. For example, the rule permits RD Derivative Classifiers to remove RD, FRD, and TFNI from matter under certain circumstances when the resulting matter remains classified. The changes to this part do not significantly impact current practices and many of the changes provide greater flexibility for agencies in implementing their RD programs.

C. Summary of Revisions.

For ease of use, this section serves as a crosswalk from the previous rule to this final rule. Each subpart notes the location of content in the previous rule and its new location. Changes to the content are discussed where the new location is noted.

1. Subpart A.

Subpart A, previously titled, "Program Management of the Restricted Data and Formerly Restricted Data Classification System," was renamed "Introduction."

Subpart A previously contained §1045.1 to §1045.9. It now contains §1045.5 to §1045.35. Sections are now numbered by fives to allow for future additions. The new sections contain introductory information on this part including: the purpose and application of this part; how to submit comments and requests for equivalencies and exemptions; sanctions that may be implemented against violators of this regulation; and definitions and acronyms used in this part. Information concerning program management and individual responsibilities was moved to Subpart B.

The sections of Subpart A were changed as follows:

- §1045.1: This content was moved to §1045.5.
- §1045.2: This content was moved to §1045.10(a).
- §1045.3: This content was moved to §1045.30.
- §1045.4: This content was moved to §1045.45.
- §1045.5: This content was moved to §1045.25.
- §1045.6: This content was deleted. The Openness Advisory Panel (OAP) was a subcommittee of the Secretary of Energy Advisory Board (SEAB). In May 2006, the Secretary abolished the SEAB and the OAP was not reconstituted when the SEAB was re-established in 2010. To encourage persons with access to RD, FRD, or TFNI and the public to inform DOE of records of interest, DOE has revised the sections in this part on classification

challenges and declassification proposals to provide more information on these processes.

- §1045.7: This content was moved to §1045.15.
- §1045.8: This content was moved to §1045.20.
- §1045.9: This content was moved to §1045.45(g).

The sections of Subpart A are now as follows:

- §1045.5: This content was previously in sections §1045.1, §1045.10, and §1045.30. It now addresses the purpose of 10 CFR part 1045 and its subparts. The descriptions of the purpose of each subpart have been changed to reflect the new content and organization of each subpart.
- §1045.10: To lessen duplication, this content now consolidates the applicability sections of each subpart, (formerly §1045.2, §1045.11, §1045.31, and §1045.51). The requirements for generating information and matter are in separate sections in the rule to clarify the distinct authorities and processes for each.
- §1045.15: This content was previously in §1045.7. The address for the DOE Office of Classification was updated.
- §1045.20: This content was previously in §1045.8. The term “procedural exemption” has been changed to “equivalencies and exemptions” for greater

clarity and to increase flexibility. Rather than requesting a complete exemption to a requirement, DOE permits agencies request an equivalency, by providing an alternate but sufficient method of meeting a requirement. Due to the addition of equivalencies, the information required in a submission for an exemption or equivalency has been expanded. The addresses were also updated.

- §1045.25: This content was previously in §1045.5. There have been no substantive changes to this content.
- §1045.30: This content was previously in §1045.3. Several definitions were added, removed, or revised as follows:
 - Associate RD Management Official (ARDMO) - added to formalize existing practice of Restricted Data Management Officials (RDMOs) acting through deputies.
 - Associate Under Secretary for Environment, Health, Safety and Security replaced “Chief Health, Safety and Security officer” to reflect DOE reorganizations.
 - Classification Category - new definition to clarify the specific authority for RD, FRD, and TFNI.
 - Classification Guidance - new definition to clarify that guidance is approved by an appropriate authority and to provide examples of types of guidance.

- Classified Matter - replaced “documents and material” to be consistent with current policies.
- Downgrading - defined to describe downgrading of information and matter.
- Initial Determination - defined to identify the process by which new information is determined to be RD.
- Originating Activity – defined to clarify the circumstances in which matter may be distributed as a working paper.
- Restricted Data Derivative Classifier - replaced Restricted Data Classifier to clarify all decisions of an RD Classifier are derivative.
- TFNI - added to define information removed from the RD category under section 142(e) of the AEA.
- TFNI Guidelines - added to define TFNI-specific policies issued by agencies.
- Upgrading – added for persons to better understand the difference between upgrading information (DOE-only) and matter (any RD Derivative Classifier) to ensure in both cases the appropriate authority is exercised.
- The following existing definitions were revised for clarity:
- Agency - added TFNI.

- Automatic Declassification - revised to reflect E.O. 13526.
- Classification - includes information classified by statute (the AEA).
- Classification Guide – edited for clarity.
- Classification Level
 - Added TFNI.
 - Removed definition of Confidential for NSI because this is defined in E.O. 13526 and should not be duplicated here because it does not apply to RD, FRD, or TFNI.
- Classified Information - added TFNI; clarified that classified NSI includes information classified under E.O. 13526.
- Declassification - edited for clarity.
- Director, Office of Classification - removed reference to organizational placement of Director, Office of Classification as it is not necessary
- Interagency Security Classification Appeals Panel (ISCAP) - updated to reflect E.O. 13526.
- National Security - definition changed to refer to definition used by E.O. 13526.

- National Security Information - defined as pursuant to E.O. 13526.
Removed clause describing “defense information” as used in the AEA because it is obsolete and not pertinent to this rule.
- Portion Marking - edited for clarity.
- RD Management Official - edited to streamline definition.
- Source Document - edited to emphasize the requirement for RD Derivative Classifiers to use only portion marked source documents.

The following definitions were deleted as they are not used in this part:

- Authorized Holder - this term was replaced by “person with access.”
- Document - removed. All references are now to “matter.”
- §1045.35: This new content contains the acronyms used in the regulation.

2. *Subpart B.*

Subpart B, previously titled, “Identification of Restricted Data and Formerly Restricted Data Information,” was renamed “Program Management of Restricted Data (RD), Formerly Restricted Data (FRD), and Transclassified Foreign Nuclear Information (TFNI) Classification Programs.” Subpart B previously contained §1045.10 to §1045.22. It now contains Sections from §1045.40 to §1045.65. Sections from Subparts A, B, and C were moved to this Subpart to locate agency and individual responsibilities and authorities in a single subpart. The section of Subpart B describing processes for

classification and declassification of RD and FRD (formerly §1045.14) has been broken up and distributed throughout the regulation, with each component relocated to its appropriate section. The Subpart also includes new sections on responsibility for TFNI and reflects the comprehensive development of TFNI policy by generally including TFNI wherever it should be included with RD and FRD.

The existing sections of Subpart B were changed as follows:

- §1045.10: This content was moved to §1045.5.
- §1045.11: This content was moved to §1045.10.
- §1045.12: This content was moved to §1045.45.
- §1045.13: This content was moved to §1045.75.
- §1045.14: This was moved and subdivided in the following manner:
 - Content regarding the initial classification of RD was moved to §1045.45(c), §1045.70, and §1045.135.
 - Content regarding the declassification of RD was moved to §1045.45(b), §1045.100, and §1045.105(a) and (b).
 - Content regarding the classification of FRD was moved to §1045.45(b) and §1045.85(a).
 - Content regarding the declassification of FRD was moved to §1045.45(b), §1045.100, and §1045.105.

- §1045.15: This content was moved to §1045.80.
- §1045.16: This content was moved to §1045.70.
- §1045.17: This content was moved to §1045.45(c) and §1045.95.
- §1045.18: This content was moved to §1045.45(c).
- §1045.19: This content was deleted. Classification determinations concerning RD or FRD, as specified in paragraph (a), follow the criteria in §1045.80, which provides the rationale for classification and declassification of RD or FRD. Justifications for the exemptions are removed because the presumptions are a starting point to classify or declassify information as the Director, Office of Classification evaluates the criteria, he or she would also justify any exception to the presumptions. No separate justification is necessary. The annual report required by paragraph (b) has not been of interest to the public. DOE has had only one request for the annual report since 1997. Any specific information of interest to the public may be requested under the FOIA.
- §1045.20: The content of this paragraph was moved to §1045.105.
- §1045.21: This content was moved to §1045.90.
- §1045.22: This content was moved to §1045.60 and §1045.65.

The sections of Subpart B are now as follows:

- §1045.40: This content was previously in §1045.33. A timeframe for agencies to notify the Director, Office of Classification, of new RDMO appointments was added. This change ensures that points of contact are accurate and that a senior point of contact is available to address questions or concerns.

- §1045.45: This content was previously in §1045.4, §1045.14, §1045.17, §1045.18, and §1045.32. The section on responsibilities incorporates changes that describe current obligations in more detail. Responsibilities concerning the return of FRD or TFNI to the RD category were added. This addition was due to an amendment to sections 142(d) and (e) of the AEA which permits this action. Other changes were due to the implementation of TFNI and the consolidation of responsibilities which were previously distributed throughout the regulation. Additional changes were made to clarify or codify existing practices. The description of the authority of the Associate Under Secretary for Environment, Health, Safety and Security now appears in §1045.45(b).

The substantive changes are as follows:

- §1045.45(b): Changed title of position to reflect DOE reorganizations. Implied responsibilities are now explicitly stated. The content was edited to include additional information on cooperation with DoD in the classification and declassification of FRD and to codify existing practices.

- §1045.45(c): This content was previously in §1045.4(a), Director, Office of Classification:
 - Added TFNI guidelines in the development of joint classification guides (to include clarification of who must perform assigned duties).
 - Content was expanded to address agency and Director, Office of Classification roles in implementing this part.

- §1045.45(g): This content was previously in §1045.4(e), Head of Agencies with Access to RD, FRD, and TFNI, with the following changes:
 - Added requirement to develop and promulgate procedures for classification challenges and declassification proposals for RD, FRD, and TFNI.
 - Deleted redundant information about parallel procedures for NSI. This information is governed by E.O. 13526 and should not be duplicated here.
 - Added responsibilities of DOE, DNI, and the IC for TFNI;
 - Added responsibility for review of NSI records of permanent historical value under the “Special Historical Records Review Plan (Supplement)” (established under Public Laws (Pub. Laws 105-261 and 106-65); and

- Added requirement for contacting officer to be notified of contracts that have access to or generate matter containing RD, FRD, or TFNI, to ensure agencies are aware of such contracts and that contracts incorporate the requirements of 10 CFR part 1045.
- §1045.45(h): This content was previously in §1045.4(f), RDMOs, with the following changes:
 - Established procedures for the designation of Associate RDMOs (ARDMOs). This codifies current practices and allows agencies flexibility in delegating the responsibilities of RDMOs;
 - Incorporates RDMO responsibilities for TFNI;
 - Adds responsibility for periodic reviews of agency classification decisions of matter containing RD, FRD, or TFNI. Agencies currently conduct annual reviews of classification decisions under 32 CFR part 2001 to ensure the appropriate identification and marking of National Security Information. The periodic review of matter containing RD, FRD, or TFNI may be done during these reviews to ensure agencies are aware of any systematic issues regarding compliance with this part; and
 - Added the Director of National Intelligence (DNI) responsibility for IC elements.
- §1045.45(i), (j), and (k): This content was previously in §1045.32

- Added descriptions of the limits of the authority regarding declassification, downgrading, and using portion-marked source documents. This description was added to clarify requirements and allow agencies greater flexibility in the classification of documents containing RD, FRD, or TFNI, while ensuring documents are coordinated with DOE or DoD, when necessary. For clarity, the list of responsibilities for RD DCs now explicitly requires that source documents be portion-marked, and gives examples of classification upgrading and downgrading.
- Added training required for access to and to derivatively classify TFNI.
- §1045.55: This content was moved from §1045.37 and §1045.43. The language was edited for clarity, and the mailing address for the Director of Classification was added for accuracy. The requirement for declassification proposals from persons with access to RD, FRD, or TFNI to be transmitted through secure means was added to ensure the proper protection of classified information.
- §1045.60: This content was moved from §1045.22. The content did not change.
- §1045.65: This content was moved from §1045.22. To be consistent with DOE policies and for accuracy, the term “public domain” was replaced by “open literature.” The content also now explains:

- The possible damage to national security resulting from commenting on information in the open literature that is or may be RD, FRD or TFNI;
and
- Required reviews of new documents which incorporate information from the open literature which may be classified.

3. *Subpart C.*

Subpart C, previously titled, “Generation and Review of Documents Containing Restricted Data and Formerly Restricted Data,” was renamed “Determining if Information is RD, FRD, or TFNI.” Subpart C previously contained §1045.30 to §1045.46. It now contains §1045.70 to §1045.110. Subpart C consolidates content from other subparts on the following subjects: the processes for classification and declassification; the presumptions that guide those processes; the status of privately generated information in the RD realm; classification levels; and classification challenges. Subpart C also contains a new section on the transclassification of information from the RD category into the TFNI category which is part of the addition of TFNI policy.

The existing sections of Subpart C were changed as follows:

- §1045.30: This content was moved to §1045.5.
- §1045.31: This content was moved to §1045.10(a).

- §1045.32: This content was moved to §1045.45(i) and §1045.155.
- §1045.33: This content was moved to §1045.40.
- §1045.34: This content was moved to §1045.115(b) and (c).
- §1045.35: This paragraph was moved to §1045.45(c) and §1045.120.
- §1045.36: This content was moved to §1045.45(c).
- §1045.37: The content regarding classification guides was moved to §1045.45. The requirement regarding the 5-year review of guides was moved to §1045.45(g)(9).
- §1045.38: This content was moved to §1045.155.
- §1045.39: This content was moved to §1045.110.
- §1045.40: This content was moved to §1045.140 and §1045.165.
- §1045.41: This content was moved to §1045.130(d).
- §1045.42: This content was moved to §1045.170, §1045.175, and §1045.180.
- §1045.43: This content was moved to §1045.55.
- §1045.44: This content was moved to §1045.125(b).
- §1045.45: This content was moved to §1045.125.
- §1045.46: This content was moved to 1045.130(c) and (d).

The sections of Subpart C are now as follows:

- §1045.70: This content was previously in §1045.14 and §1045.16. To address current concerns, the consideration as to whether declassification would assist terrorism was added.
- §1045.75: This content was previously in §1045.13. There are no changes to the content.
- §1045.80: This content was previously in §1045.15. The introduction was revised for clarity.
- §1045.85: This content was previously in §1045.14. The content was edited to include information on coordination with DoD in the classification of FRD, to codify existing practices. It also adds content concerning the transclassification of TFNI, which is added due to the comprehensive implementation of TFNI. Lastly, it adds content regarding the return of FRD or TFNI information to the RD category, codifying a revision to sections 142(d) and (e) of the AEA that allows this action.
- §1045.90: This content was previously in §1045.21. The content was reworded for clarity.
- §1045.95: This content was previously in §1045.17. Examples of RD in each classification level were removed as unnecessary and the language was revised and reorganized for clarity.

- §1045.100: This content was previously in §1045.14. There have been no substantive changes to this content.
- §1045.105: This content was previously in §1045.14 and §1045.20. To give more detail on an existing process, the paragraph now specifies that declassification proposals must be in writing, and include a reason for the proposal. The paragraph also provides greater detail on the process used to adjudicate declassification proposals to codify existing practices. Information on coordination with DoD in FRD declassification was added to codify existing practices.
- §1045.110: This content was previously in §1045.39. The changes are: additional content on agency responsibilities regarding classification challenges for RD, FRD, and TFNI information; an emphasis on the right of challengers to submit challenges directly to the Director, Office of Classification, at any time; more information on the actions required of the Director, Office of Classification; and the challenger's appeal rights. This section also clarifies that agency responses to challenges (except for DoD for FRD) are limited to interpreting the application of guidance to derivatively classify matter. This is to ensure RD, FRD, and TFNI challenges are referred to the appropriate agency for consideration and any changes to guidance based on a challenge will be promulgated.

4. *Subpart D.*

Subpart D, previously titled, “Executive Order 12958: ‘Classified National Security Information’ Requirements Affecting the Public,” was renamed “Classifying and Declassifying Matter Containing RD, FRD, or TFNI.” Subpart D previously contained §1045.50 to §1045.53. It now contains §1045.115 to §1045.165. The sections of Subpart D that deal with DOE’s NSI classification program were moved to Subpart F. Sections from Subparts B and C were moved into Subpart D.

Subpart D contains a number of new sections. The new sections addressing TFNI cover: the requirement for a person trained to classify TFNI to review any matter that could potentially contain TFNI; the requirement for classification of TFNI by a person with appropriate authority; and the appropriate procedure for when TFNI guidance cannot be located.

A description of authorities and procedures for redacting RD, FRD, or TFNI from a document was also added to this Subpart. Authorities and procedures for redacting RD, FRD, or TFNI were added to clarify when other agencies may remove RD, FRD, or TFNI from matter.

To assist agencies in developing proper training materials, detail was added to descriptions of training requirements for RD Derivative Classifiers and for persons with access to RD, FRD, or TFNI. The section describing classification by compilation or association provides more detail about these training requirements.

The existing sections of Subpart D were changed as follows:

- §1045.50: This content was moved to §1045.5.

- §1045.51: This content was moved to §1045.10(a).
- §1045.52: This content was moved to §1045.185 and §1045.190.
- §1045.53: This content was moved to §1045.205 and §1045.210.

The sections of Subpart D are now as follows:

- §1045.115: This content was previously in §1045.34. It contains two amendments. The authority for agencies to recognize RD DC authorities granted by other agencies was added to allow agencies flexibility and save agencies the time and resources spent repeating training already provided when the previous authority is the same and to allow agencies greater flexibility in authorities for Strategic Partnership Projects when persons may require classification authority for other agency work. Content was added to address authority and training to classify matter containing TFNI.
- §1045.120: This content was previously in §1045.35. Content was added to provide more detail regarding training for persons with access to RD, FRD, or TFNI, and for RD DC training. Periodic refresher training was added for persons with access to RD, FRD, or TFNI and refresher training every 2 years is required for RD DCs. This requirement is consistent with requirements for other classified information. Content was also added concerning officials and training for TFNI classification which was added to implement TFNI.

- §1045.125: This content was previously in §1045.44. To codify existing practices, the section provides greater detail on the process for reviewing matter that potentially contains RD, FRD or TFNI. The requirement for review of such matter by an RD DC was changed from “any authorized holder who believes he or she has information which may be RD shall submit it to an RD Classifier for evaluation” to “Matter that potentially contains RD or FRD must be reviewed by an RD Derivative Classifier.” This change reflects the current DOE requirement for classification reviews, and adds FRD because FRD and RD often have similar content. The requirement for review no longer relies on the authorized holder’s subjective belief that information may be RD, since it may be unreliable. New content was added to address TFNI.
- §1045.130: This content was previously §1045.41 and §1045.46. Content, was added to address classification of TFNI. Content was also added to address when source documents may be used as a basis for classifying matter containing RD or FRD. The section provides more detail for existing practices dealing with the process of classification by association or compilation.
- §1045.135: This content was previously in §1045.14. For the RDMO to be aware of guidance available to RD DCs and to resolve issues at the agency level, when possible, the RDMO and ARDMO were added as contacts for when RD DCs have potentially classified information for which they cannot find guidance. Also, the Director, Office of Classification, is now explicitly required to notify the RDMO of the agency originating information of the

results of any initial determination requests transmitted to the Director.

Potentially classified documents pending determination are now protected at a minimum of SRD or SFRD, instead of CRD required by the current regulation. This is due to the fact that since the majority of RD is Secret, this is the most appropriate level of protection until the specific level is identified. Additional information was added regarding the proper procedure when TFNI guidance cannot be located.

- §1045.140: This content was previously in §1045.40. New sub-paragraphs were added to cover markings for: the IC; working papers containing RD, FRD, or TFNI; commingled RD/FRD/TFNI with NSI or CUI; special format matter; and TFNI markings. All revisions to the marking sections were based on national policy, with content added to fully address and clarify requirements.
- §1045.145: This section was added to address matter printed from an IT system.
- §1045.150: This new section addresses authorities and procedures for redacting RD, FRD, or TFNI from matter. This content was added to clarify procedures for removing RD, FRD, or TFNI from matter and ensure the resulting document does not potentially contain RD, FRD, or TFNI.
- §1045.155: This content was previously in §1045.32 and §1045.38. TFNI was added and new content addresses who may redact RD, FRD, or TFNI from a document being prepared for public release. This was added to ensure

matter containing RD, FRD, or TFNI is reviewed by a person with subject matter expertise and authority so that RD, FRD, or TFNI is not inadvertently released.

- §1045.160: This content is a new addition. It was added at the request of other agencies to ensure documents from which RD, FRD, or TFNI is removed that still contain NSI are reviewed and marked appropriately.
- §1045.165: This content was previously in §1045.40. TFNI was added.

5. *Subpart E.*

Subpart E, “Government-wide Procedures for Handling Freedom of Information Act (FOIA) and Mandatory Declassification Review (MDR) Requests for Matter Marked as or Potentially Containing RD, FRD, or TFNI,” is a new addition containing content currently contained in Subpart C and new content. This section describes requirements for other Government agencies when they receive a FOIA or MDR request that potentially contains RD, FRD, or TFNI. Subpart E contains §1045.170 to §1045.180. Sections from Subpart C that deal with RD and FRD under a FOIA or an MDR request were moved to this subpart. These sections were also expanded to provide greater detail regarding the processes for appeals and requests.

The sections of Subpart E are as follows:

- §1045.170 – This section was added to clarify that this section applies to other Government agencies who receive FOIA and MDR requests for matter that is

marked as or potentially contains RD, FRD, or TFNI. RD, FRD, and TFNI, is classified under the Atomic Energy Act and therefore does not fall under the MDR provisions of E.O. 13526, which only applies to NSI. This section ensures that RD, FRD, and TFNI are also considered for declassification and the appropriate authority reviews matter that is marked as or potentially contains this information.

- §1045.175: This content was previously in §1045.42. This section now clarifies that it applies to matter that potentially contains RD, FRD, or TFNI as well as matter marked as containing RD, FRD, or TFNI. The Denying Official for Naval Nuclear Propulsion was changed to the Deputy Director, Deputy Administrator for Naval Reactors, so that the Denying Official and the appeal authority are no longer the same. Language for the DoD Initial Denying Authority was incorporated from DoD Manual 5400.07, DoD Freedom of Information Act (FOIA) Program.
- §1045.180: This content was previously in §1045.42. The content was expanded to clarify the process and provide greater detail regarding FOIA and MDR appeals for matter containing RD, FRD, or TFNI and to ensure RD, FRD, or TFNI portions are not included in NSI appeals to ISCAP. Since DOE may receive appeals from individuals or from agencies, both circumstances are now addressed to ensure all appeals for RD and TFNI are sent to DOE and all appeals for FRD are sent to DOE or DoD. Paragraph (a) was revised to clarify that FOIA appeals involving RD, FRD or TFNI are required to be submitted within 90 days of receipt of the denial, consistent with the

procedures in DOE's FOIA regulations in 10 CFR part 1004. In 2016, DOE revised its regulations in part 1004 to implement the requirement in the FOIA Improvement Act of 2016 that FOIA appeals are required to be submitted within 90 days. Paragraph (b) was revised to clarify that appeal timeframes for MDR Appeals are 60 days. For consistency with the MDR appeal procedures involving NSI, which are contained in 32 CFR §2001.33(a)(2), and require submission of an appeal within 60 days of the receipt of the denial, MDR appeals involving RD, FRD, or TFNI are also required to be submitted within 60 days of the receipt of the denial. This section was also revised to clarify the different timeframes and process for FOIA and MDR requests and to identify appropriate appellate authorities.

6. *Subpart F.*

Subpart F, "DOE-specific procedures for MDR Requests," is a new addition containing content currently contained in Subpart C and new content. This section describes how a person submits an MDR request to DOE for matter that is marked as or potentially contains NSI, RD, FRD, or TFNI. This section also describes how MDR requests are processed within DOE. As recognized in section 6.2 of E.O. 13526, RD, FRD, and TFNI, which are classified under the Atomic Energy Act. Therefore, MDR procedures in E.O. 13526, which only applies to NSI, do not apply to RD, FRD, or TFNI. This subpart implements DOE procedures for processing MDR requests for NSI, under E.O. 13526, and also ensures the public may request declassification reviews of documents containing RD, FRD, or TFNI. Subpart F contains §1045.185 to §1045.225. Sections from Subpart D that deal with MDR requests and appeals by the public were

moved to this Subpart. Subpart F contains new sections that describe exemptions to MDR requests, the cost associated with an MDR, the DOE process for MDR reviews and appeals, and DOE's OpenNet online resource.

The sections of Subpart F are as follows:

- §1045.185 – This section was added to clarify that this subpart concerns DOE-specific processes for MDRs under E.O. 13526, which includes NSI, and review of declassification requests for matter marked as or potentially containing RD, FRD, or TFNI, which are not governed by E.O. 13526, to ensure these are considered and appropriately reviewed.
- §1045.190: This content was previously in §1045.52. The mailing address for the Director, Office of Classification was updated.
- §1045.195: This content was previously in §1045.52. An exemption from MDR requests was added for RD matter (technical engineering, blueprints and design documents regarding nuclear weapons). Portion by portion review of these documents is complex and time consuming and results in release of minimal non-exempt information. Processing and review of these documents requires significant resources. Due to the significant sensitivity of the vast majority of information contained in these documents, DOE determined that they should not be subject to an MDR. The exemption from mandatory declassification review under the Central Intelligence Agency Information Act was removed because it does not apply to DOE records.

- §1045.200: This new section contains content addressing costs for MDR reviews. When 10 CFR part 1045 was initially issued, DOE received very few MDR requests. Due to a significant increase in MDR requests, DOE determined it was necessary to recover some of the cost. The fees established mirror DOE fees for FOIA requests.
- §1045.205: Content addressing MDR requests and appeals for matter containing RD, FRD, or TFNI was added. The changes codify existing practices.
- §1045.210: This content was previously in §1045.53. It addresses the denial of naval nuclear propulsion information in the requirement since this information is not initially denied by the Director, Office of Classification.
- §1045.215: This content was previously in §1045.53.
- §1045.220: This new section was added to address final MDR appeals for matter containing RD, FRD, or TFNI and ensure RD, FRD, and TFNI portions are removed from any matter containing NSI submitted to ISCAP for review. The requirement to coordinate Naval Nuclear Propulsion with the NNSA Deputy Administrator for Naval Nuclear Propulsion was added because that is the appeal authority for this information.
- §1045.225: This new section advises the public that matter previously requested under the FOIA/MDR is available on the DOE OpenNet database and provided link to OpenNet.

II. DOE's Response to Comments

In response to the Notice of Proposed Rulemaking, DOE received one comment relevant to the proposed rule. The comment advised that the timeframe for appeals under the Freedom of Information Act (FOIA) was extended from 60 to 90 days under the FOIA Improvement Act of 2016. Sections of subpart E were rewritten to clarify the differences between FOIA and MDR timeframes and processes. The section was also revised to clarify appellate denying officials for RD, FRD, and TFNI, for both the FOIA and MDR requests.

III. Regulatory Review and Procedural Requirements.

A. Review Under Executive Orders 12866 and 13563.

OMB has determined that this action does not constitute a "significant regulatory action" as defined in section 3(f) of E.O. 12866, "Regulatory Planning and Review" (58 FR 51735, October 4, 1993).

B. Review Under Executive Orders 13771 and 13777.

On January 30, 2017, the President issued Executive Order 13771, "Reducing Regulation and Controlling Regulatory Costs." That Order stated the policy of the executive branch is to be prudent and financially responsible in the expenditure of funds, from both public and private sources. The Order stated it is essential to manage the costs associated with the governmental

imposition of private expenditures required to comply with Federal regulations. This rule is an E.O. 13771 deregulatory action.

Additionally, on February 24, 2017, the President issued Executive Order 13777, “Enforcing the Regulatory Reform Agenda.” The Order required the head of each agency designate an agency official as its Regulatory Reform Officer (RRO). Each RRO oversees the implementation of regulatory reform initiatives and policies to ensure that agencies effectively carry out regulatory reforms, consistent with applicable law. Further, E.O. 13777 requires the establishment of a regulatory task force at each agency. The regulatory task force is required to make recommendations to the agency head regarding the repeal, replacement, or modification of existing regulations, consistent with applicable law. At a minimum, each regulatory reform task force must attempt to identify regulations that:

- (i) Eliminate jobs, or inhibit job creation;
- (ii) Are outdated, unnecessary, or ineffective;
- (iii) Impose costs that exceed benefits;
- (iv) Create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies;
- (v) Are inconsistent with the requirements of Information Quality Act, or the guidance issued pursuant to that Act, in particular those regulations that rely in whole or in part on data, information, or methods that are not publicly available or that are insufficiently transparent to meet the standard for reproducibility; or
- (vi) Derive from or implement Executive Orders or other Presidential directives that have been subsequently rescinded or substantially modified.

This rule reflects changes in the Atomic Energy Act, E.O. 13526, 32 CFR part 2001, DOE policies and DOE reorganizations that rendered portions of the previous regulation outdated, as well clarifies requirements and allows agencies more flexibility in implementing RD/FRD programs, meets the goals and objectives of the task force.

C. Review Under the Regulatory Flexibility Act.

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of a regulatory flexibility analysis for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by E.O. 13272, *Proper Consideration of Small Entities in Agency Rulemaking* (67 FR 53461, August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process. DOE has made its procedures and policies available on the Office of the General Counsel's website: (<http://energy.gov/gc/office-general-counsel>).

DOE reviewed this rule under the Regulatory Flexibility Act and certifies that the rule would not have a significant impact on a substantial number of small entities. This rule applies to Federal agencies and private entities who have access to RD. The number of private entities with access to RD is very small. These include access permittees (covered by 10 CFR part 1016) and private entities whose operations involve isotope separation technologies. The rule does not require significant new requirements for Federal agencies or private entities with access to RD. The changes are administrative changes (e.g., renumbering, and updating office names to reflect

reorganizations), and updates to incorporate responsibilities and procedures due to changes in laws, regulations and E.O.s and clarify requirements.

The rule initiates fees for MDRs. When 10 CFR part 1045 was initially issued, DOE received very few MDR requests. Due to a significant increase in MDR requests, DOE determined it was necessary to recover some of the cost. Because matter requested under an MDR could be requested, alternatively, under the FOIA, DOE determined that it was appropriate to treat MDR requests similarly to FOIA requests. DOE therefore proposed that the fees established for MDRs should mirror DOE fees for FOIA requests rather than creating a different fee structure.

For the above reasons, DOE certifies that the rule does not have a significant economic impact on a substantial number of small entities.

D. Review Under the Paperwork Reduction Act.

This rule does not contain a collection of information subject to the Office of Management and Budget (OMB) approval under the Paperwork Reduction Act.

E. Review Under the National Environmental Policy Act.

DOE has determined that this action meets the requirements for a Categorical Exclusion A-5 of Appendix A to Subpart D, 10 CFR part 1021, which applies to a rulemaking that addresses or amends an existing rule or regulation that does not change the environmental effect of the rule or regulation being amended.

This rule is necessary because changes in DOE and national policies have rendered portions of the existing rule outdated. In addition, changes were needed to clarify requirements and allow agencies more flexibility in implementing programs for RD and FRD.

The changes are administrative in nature reflecting changes to responsibilities and procedures, and the rule does not change the environmental effect of the rule. Accordingly, neither an environmental assessment nor an environmental impact analysis is required.

F. Review Under E.O. 13132, “Federalism.”

E.O. 13132 (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 develop a process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have “federalism implications.” Policies that have federalism implications are defined in the E.O. to include regulations that have “substantial direct effects 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.” On March 7, 2011, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations (65 FR 13735, March 14, 2000).

DOE has examined this rule and has determined that it 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 E.O. 13132.

G. Review Under E.O. 12988, “Civil Justice Reform.”

Section 3 of E.O. 12988 (61 FR 4729, February 7, 1996), instructs each agency to adhere to certain requirements in promulgating new regulations. These requirements, set forth in section 3(a) and (b), include eliminating drafting errors and needless ambiguity, drafting the regulations to minimize litigation, providing clear and certain legal standards for affected legal conduct, and promoting simplification and burden reduction. Agencies are also instructed to make every reasonable effort to ensure that the regulation describes any administrative proceeding to be available prior to judicial review and any provisions for the exhaustion of administrative remedies. DOE has determined that this regulatory action meets the requirements of section 3(a) and (b) of E.O. 12988.

H. Review Under the Unfunded Mandates Reform Act of 1995.

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104-4), requires each Federal agency to assess the effects of Federal regulatory action on state, local and tribal governments and the private sector. For proposed regulatory actions likely to result in a rule that may cause expenditures by State, local, and Tribal governments, in the aggregate, or by the private sector of \$100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish estimates of the resulting costs, benefits, and other effects on the national economy. UMRA also requires Federal agencies to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a proposed “significant intergovernmental mandate.” In addition, UMRA requires an agency plan for giving notice and opportunity for timely input to small governments that may be affected before establishing a requirement that might significantly or uniquely affect them. On March 18, 1997, DOE published a statement of policy on its process for

intergovernmental consultation under the UMRA (62 FR 12820, March 18, 1997). This policy is available at DOE General Counsel's website (<http://energy.gov/gc/office-general-counsel>). This part contains neither an intergovernmental mandate, nor a mandate that may result in the expenditure of \$100 million or more in any year, so these requirements do not apply.

I. Review Under E.O. 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use."

E.O. 13211 (66 FR 28355, May 22, 2001) requires Federal agencies to prepare and submit to the Office of Information and Regulatory Affairs (OIRA), OMB, a Statement of Energy Effects for any proposed significant energy action. A "significant energy action" is defined as any action by an agency that promulgates or is expected to lead to the promulgation of a final rule, and that: (1) is a significant regulatory action under E.O. 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternates to the action and their expected benefits on energy supply, distribution, and use. This rule is not a significant energy action, nor has it been designated as such by the Administrator of OIRA. Accordingly, DOE has not prepared a Statement of Energy Effects.

J. 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 this rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

K. Review Under the Treasury and General Government Appropriations Act of 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 proposed rule or policy that may affect family well-being. This 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.

L. Congressional Notification.

As required by 5 U.S.C. 801, DOE will report to Congress on the promulgation of this rule prior to its effective date. The report will state that it has been determined that the rule is a "major rule" as defined by 5 U.S.C. 804(2).

IV. Approval by the Office of the Secretary.

The Office of the Secretary of Energy has approved the publication of this final rule.

List of Subjects in 10 CFR Part 1045

Classified information, Declassification, Formerly Restricted Data, Restricted Data, Transclassified foreign nuclear information.

Issued in Washington, D.C. on November 28, 2018

Matthew B. Moury
Associate Under Secretary
for Environment, Health, Safety and Security

For the reasons stated in the preamble, DOE revises part 1045 of Title 10 of the Code of Federal Regulations to read as follows:

PART 1045 — NUCLEAR CLASSIFICATION AND DECLASSIFICATION

Subpart A – Introduction

Sec.

- 1045.5 What is the purpose of this part?
- 1045.10 To whom does this part apply?
- 1045.15 What is the process for submitting a question or a comment on any of the policies and procedures contained in this part?
- 1045.20 How does an agency request an exemption or equivalency to meet a provision in this part?
- 1045.25 What actions can be taken against a person who violates the requirements in this part?
- 1045.30 What definitions apply to this part?
- 1045.35 What acronyms are commonly used in this part?

Subpart B –Management of Restricted Data (RD), Formerly Restricted Data (FRD), and Transclassified Foreign Nuclear Information (TFNI) Classification Programs

- 1045.40 Is there an official in each agency with access to RD, FRD, or TFNI who manages the agency's RD, FRD, or TFNI program to ensure the requirements in this part are met?
- 1045.45 What are the responsibilities of DOE officials and personnel, and the officials and personnel of other agencies, under this part?
- 1045.50 [Reserved].
- 1045.55 When are RD, FRD, and TFNI considered for declassification?
- 1045.60 Does an unauthorized public release of RD, FRD, or TFNI result in its declassification?
- 1045.65 What are the responsibilities of a person who has access to RD, FRD, or TFNI if

they see information in the open literature that they think is RD, FRD, or TFNI?

Subpart C – Determining if Information is RD, FRD, or TFNI

- 1045.70 How is information initially determined to be RD?
- 1045.75 Are there prohibitions against information being classified, remaining classified, or prevented from being declassified as RD, FRD, or TFNI?
- 1045.80 What are the classification and declassification presumptions?
- 1045.85 How is information determined to be FRD or TFNI and can FRD or TFNI be returned to the RD category?
- 1045.90 Can information generated by private entities that is not owned by, produced by, or controlled by the U.S. Government be classified as RD?
- 1045.95 What are the criteria used to assign levels to RD, FRD, or TFNI?
- 1045.100 How are RD, FRD, and TFNI declassified?
- 1045.105 What is the method to request the declassification of RD, FRD or TFNI?
- 1045.110 How are challenges to the classification and declassification of RD, FRD, or TFNI submitted and processed?

Subpart D – Classifying and Declassifying Matter Containing RD, FRD, or TFNI

- 1045.115 Who is authorized to derivatively classify matter that contains RD, FRD, or TFNI?
- 1045.120 What training is required for persons who have access to or who derivatively classify matter containing RD, FRD, or TFNI?
- 1045.125 What is the process for reviewing and derivatively classifying matter that potentially contains RD, FRD, or TFNI?
- 1045.130 How does an authorized person derivatively classify matter containing RD, FRD, or TFNI?
- 1045.135 Can a person make an RD, FRD, or TFNI classification determination if applicable classification guidance is not available?
- 1045.140 How is matter containing RD, FRD, or TFNI, marked?

- 1045.145 Who must review output from a classified IT system that is marked as RD, FRD, or TFNI?
- 1045.150 Can anyone remove the RD, FRD, or TFNI portions and markings to produce an NSI or unclassified version of the matter?
- 1045.155 How is matter marked as containing RD, FRD, or TFNI declassified?
- 1045.160 When the RD, FRD, or TFNI is removed from matter, what action must be taken if the matter still contains NSI?
- 1045.165 Once matter marked as RD, FRD, or TFNI is declassified, how is it marked?

Subpart E – Government-wide Procedures for Handling Freedom of Information Act (FOIA) and Mandatory Declassification Review (MDR) Requests for Matter Marked as or Potentially Containing RD, FRD, or TFNI

- 1045.170 What is the purpose of this subpart?
- 1045.175 How must agencies process FOIA and MDR requests for matter that is marked as or potentially contains RD, FRD, or TFNI?
- 1045.180 What is the procedure if an agency receives an appeal to a FOIA or MDR concerning the denial of RD, FRD, or TFNI?

Subpart F – DOE-specific procedures for MDR Requests

- 1045.185 What is the purpose of this subpart?
- 1045.190 How does the public submit an MDR for DOE classified matter?
- 1045.195 Is any matter exempt from MDR requests?
- 1045.200 Is there a cost for an MDR review?
- 1045.205 How does DOE conduct an MDR review?
- 1045.210 How does a person submit an appeal if DOE withholds classified information in an MDR response?
- 1045.215 How does DOE process an MDR appeal for DOE matter containing NSI?
- 1045.220 How does DOE process an MDR appeal for matter containing RD, FRD, or TFNI?

1045.225 Are DOE responses to MDR requests available to the public?

Authority: 42 U.S.C. 2011; E.O. 13526, 75 FR 705, 3 CFR 2010 Comp., pp. 298-327.

Subpart A – Introduction

§1045.5 What is the purpose of this part?

(a) This part implements sections 141, 142, and 146 of the Atomic Energy Act, as amended (42 U.S.C. 2011 *et seq.*) (AEA) and describes the procedures to be used by the public in questioning or appealing DOE decisions regarding the classification of NSI under E.O. 13526, and 32 CFR part 2001, *Classified National Security Information*. This part is divided into six subparts:

(1) Subpart A – “Introduction” specifies to whom these rules apply, describes how to submit comments or suggestions concerning the policies and procedures in this part, describes how to request an exemption from or an equivalency to a provision in this part; outlines sanctions imposed for violating the policies and procedures in this part; defines key terms; and lists acronyms used in this part.

(2) Subpart B – “Program Management of Restricted Data (RD), Formerly Restricted Data (RD), and Transclassified Foreign Nuclear Information (TFNI) Classification Programs” specifies responsibilities of officials in DOE and other agencies in the role of identifying RD, transclassifying RD to FRD or to TFNI, and returning FRD or TFNI to RD; discusses the systematic declassification review of information/matter containing RD, FRD, or TFNI; and describes the “no comment” policy.

(3) Subpart C – “Determining if Information is RD, FRD, or TFNI” describes how information is initially classified as RD, transclassified as FRD or TFNI, or declassified; lists criteria for evaluating whether RD, FRD, or TFNI should be classified or declassified; describes the prohibitions against classifying information as RD, FRD, or TFNI; lists areas of information that are presumed to be RD or unclassified; specifies how privately generated information may be classified as RD; defines the classification levels; describes how to submit proposals for RD, FRD, and TFNI; describes how to challenge the classification or declassification of RD, FRD, or TFNI; and describes the issuance of classification guides to promulgate classification and declassification determinations.

(4) Subpart D – “Classifying and Declassifying Matter Containing RD, FRD, or TFNI” describes who has the authority to classify and declassify matter containing RD, FRD, or TFNI; the appointment and training of these individuals; discusses the use of classified addendums; describes classification by association or compilation; specifies who must review matter that potentially contains RD, FRD, or TFNI intended for public release; describes what to do if an RD Derivative Classifier or a person trained to classify matter containing TFNI cannot locate classification guidance to make a determination; describes the classification and declassification marking requirements; and states the prohibition against the automatic declassification of matter containing RD, FRD, or TFNI.

(5) Subpart E – “Government-wide Procedures for Handling Freedom of Information Act (FOIA) and Mandatory Declassification Review (MDR) Requests for Matter Marked as or Potentially Containing RD, FRD, or TFNI” describes how agencies process FOIA or MDR requests and appeals for matter marked as or potentially containing RD, FRD, or TFNI.

(6) Subpart F – “DOE Procedures for MDR Requests” describes how DOE FOIA and MDR requests and appeals for matter marked as or potentially containing NSI, RD, FRD, or TFNI are submitted and processed.

(b) [Reserved].

§1045.10 To whom does this part apply?

(a) Subparts A, B, C, and D apply to--

(1) Any person or agency with access to RD, FRD, or TFNI;

(2) Any person or agency who generates information that has the potential to be RD, FRD, or TFNI; and

(3) Any person or agency who generates matter that potentially contains RD, FRD, or TFNI.

(b) Subpart E applies to government agencies who receive Freedom of Information Act (FOIA) or Mandatory Declassification Review (MDR) requests for matter that is marked as or potentially contains RD, FRD, or TFNI.

(c) Subpart F applies to DOE and to any person submitting a Mandatory Declassification Review request for DOE matter.

§1045.15 What is the process for submitting a question or a comment on any of the policies and procedures contained in this part?

Any person who has a question or a comment on DOE’s classification and declassification policies and procedures under this part may submit the question or comment in writing to the

Director, Office of Classification, AU-60/Germantown Building, U.S. Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585. The correspondence should contain the question or comment, include applicable background information and/or citations, as appropriate, and must provide an address for the response. The Director will make every effort to respond within 60 days. Under no circumstance will anyone be subject to retribution for asking a question or making a comment regarding DOE's classification and declassification policies and procedures.

§1045.20 How does an agency request an exemption or equivalency to meet a provision in this part?

The agency must submit a request for an exemption or an equivalency to the procedural provisions under this part in writing to the Director, Office of Classification, AU-60/Germantown Building, U.S. Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585. The request must provide all relevant facts, to include any applicable citations, describing the procedure and why the exemption or equivalency is required. If the request is for an equivalency, it must include a proposed alternate procedure to meet the intent of the procedure for which the equivalency is being requested.

§1045.25 What actions can be taken against a person who violates the requirements in this part?

Any knowing, willful, or negligent action contrary to the requirements of this part that results in the misclassification of information is subject to appropriate sanctions. Such sanctions may range from administrative sanctions (e.g., reprimand, suspension, termination) to civil or criminal penalties, depending on the nature and severity of the action as determined by the

appropriate authority in accordance with applicable laws. Other violations of the policies and procedures in this part may be grounds for administrative sanctions as determined by an appropriate authority.

§1045.30 What definitions apply to this part?

The following definitions apply to this part:

Agency means any “executive agency” as defined in 5 U.S.C. 105; any “Military Department” as defined in 5 U.S.C. 102; and any other entity within the executive branch that has access to RD, FRD, or TFNI information or matter.

Associate RD Management Official (ARDMO) means a person appointed in accordance with agency policy to assist the RD Management Official (RDMO) with managing the implementation of this part within that agency.

Associate Under Secretary for Environment, Health, Safety and Security means DOE’s Associate Under Secretary for Environment, Health, Safety and Security or any person to whom the Associate Under Secretary’s duties are delegated.

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

Automatic Declassification means the declassification of NSI based on a specific date, event, or timeframe, in accordance with E.O. 13526, or prior or successor orders.

Classification means the act or process by which information or matter is determined to require protection as RD, FRD, or TFNI, under the AEA or as NSI under E.O. 13526 or prior or

successor orders.

Classification category identifies whether information is classified by statute or E.O. The classification categories are: RD, FRD, TFNI (classified by the AEA), and NSI (classified by E.O.).

Classification guidance means any instruction or source approved by an appropriate authority that prescribes the classification of specific information (e.g., classification guide, classification bulletins, portion-marked source documents).

Classification guide means a written record of detailed instructions, approved by an appropriate authority, that explicitly identifies whether specific information is classified, usually concerning a system, plan, project, or program. If classified, the level and category of classification assigned to such information is specified. For NSI, the classification duration is also specified.

Classified information means:

- (1) Information determined to be RD, FRD, or TFNI under the AEA and this part, or
- (2) Information that has been determined pursuant to E.O. 13526 or any predecessor order to require protection against unauthorized disclosure and is marked to indicate its classification status when in documentary form.

Classification level means one of the three following designators for RD, FRD, and TFNI:

- (1) *Top Secret (TS)* is applied to RD, FRD, or TFNI that is vital to the national security and the unauthorized disclosure of which could reasonably be expected to cause exceptionally grave damage to the national security that the appropriate official is able to identify or describe.

(2) *Secret (S)* is applied to RD, FRD, or TFNI, the unauthorized disclosure of which could reasonably be expected to cause serious damage to the national security that the appropriate official is able to identify or describe.

(3) *Confidential (C)* is applied to RD, FRD, or TFNI the unauthorized disclosure of which could reasonably be expected to cause undue risk to the common defense and security that the appropriate official is able to identify or describe.

Classified matter means anything in physical or electronic form that contains or reveals classified information.

Contractor means any industrial, educational, commercial, or other entity, grantee, or licensee at all tiers, including a person that has executed an agreement with the Federal Government for the purpose of performing under a contract, license, or other agreement.

Declassification means a determination by an appropriate authority that:

(1) Information no longer warrants protection against unauthorized disclosure in the interest of the national security; or

(2) Matter no longer contains or reveals classified information.

DOE means the Department of Energy.

Director, Office of Classification, means DOE's Director, Office of Classification.

Downgrading means:

(1) A decision by DOE that information classified as RD or TFNI is classified at a lower level

than currently identified in a DOE or joint classification guide;

(2) A joint decision by DOE and the Department of Defense (DoD) that FRD is classified at a lower level than currently identified in a DOE or joint classification guide; or

(3) A decision by an RD Derivative Classifier (or in the case of TFNI, a person trained to derivatively classify TFNI) based on classification guides and bulletins that matter containing RD, FRD, or TFNI is classified at a lower level than currently marked.

(4) A decision, based on a DOE or joint classification guide, by an authorized person that matter containing RD, FRD, or TFNI is classified at a less sensitive category (e.g., RD to FRD, RD to NSI) than currently marked.

Formerly Restricted Data (FRD) means classified information removed from the RD category under the AEA (section 142(d)), after DOE and DoD jointly determine it is related primarily to the military utilization of nuclear weapons and that the information can be adequately protected in a manner similar to NSI.

Government means the executive branch of the Federal Government of the United States.

Government information means information that is owned by, produced by or for, or is under the control of the U.S. Government.

Information means facts, data, or knowledge, as opposed to the medium in which it is contained.

Initial determination means the process used by the Director, Office of Classification, to determine if new information is RD. New information that falls under the definition of RD is presumed classified as RD until the Director, Office of Classification makes the initial

determination as to its classification status.

Interagency Security Classification Appeals Panel (ISCAP) means a Panel established and administered pursuant to E.O. 13526 and prior or successor E.O.s to perform functions specified in the order with respect to NSI.

Matter means any combination of physical documents, electronic instances of information or data (including email) at rest or in transit, or information or data presentation or representation regardless of physical form or characteristics.

National security means the national defense or foreign relations of the United States.

National Security Information (NSI) means information that has been determined pursuant to E.O. 13526 or prior or successor E.O.s to require protection against unauthorized disclosure and is marked to indicate its classification status.

Nuclear weapon means atomic weapon.

Originating activity, for the purpose of RD, FRD, or TFNI, means any development of specific matter (e.g., report, guide) within an organization, working group, or between persons, including coordination of a product for classification review.

Person means:

(1) Any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, Government agency other than the Commission, any State or any political subdivision of, or any political entity within a State, any foreign government or nation or any political subdivision of any such government or nation, or other entity; and

(2) Any legal successor, representative, agent, or agency of the foregoing.

Portion marking means the application of certain classification markings to reasonably segregable sections of matter (e.g., paragraphs, phrases, sentences). This also includes any markings required by national policy to control portions of unclassified information.

Restricted Data (RD) means all data concerning the design, manufacture, or utilization of atomic weapons; the production of special nuclear material; or the use of special nuclear material in the production of energy, except for data declassified or removed from the RD category pursuant to section 142 of the AEA.

RD Derivative Classifier means a person specifically trained and, when required, designated to derivatively classify matter containing RD or FRD in areas in which they have programmatic expertise.

RD Management Official (RDMO) means a person appointed by an agency to be responsible for managing the implementation of this part within the agency.

Secretary means the Secretary of Energy.

Source document means existing classified, portion-marked matter that contains classified information that is incorporated, paraphrased, restated, or generated in new form into new matter.

Special nuclear materials means special nuclear material as defined in the AEA.

Transclassified Foreign Nuclear Information (TFNI) means:

(1) Information concerning the nuclear energy programs of other nations (including subnational

groups) that is removed from the RD category under the AEA (section 142(e)) after DOE and the Director of National Intelligence (DNI) jointly determine that the information is necessary to carry out intelligence-related activities under the National Security Act of 1947, as amended, and that the information can be adequately protected in a manner similar to NSI. TFNI includes information removed from the RD category by past agreements between DOE and the Director of Central Intelligence or past and future agreements with the DNI.

(2) TFNI does not include:

- (i) RD or FRD concerning United Kingdom (U.K.) or Canadian programs;
- (ii) Any U.S. RD or FRD, including that which the U.S. has transmitted to other nations;
- (iii) Any evaluation of foreign information based on the use of U.S. RD or FRD unless also specifically transclassified to TFNI or any evaluation that could reveal such data concerning the U.S., U.K., or Canadian programs;
- (iv) Classified atomic energy information received from a foreign government pursuant to an agreement imposing security measures equivalent for those in effect for RD; or
- (v) Classified information on the Tripartite Gas Centrifuge and its successor programs, including data on the gas centrifuge work of each of the participants.

TFNI guideline means a policy document that describes information which meets the TFNI criteria for various collection assets.

Upgrading means:

- (1) A decision by DOE that information classified as RD or TFNI is classified at a higher

level than currently identified in a DOE or joint classification guide;

(2) A joint decision by DOE and DoD that FRD is classified at a higher level than currently identified in a DOE or joint classification guide; or

(3) A decision by an RD Derivative Classifier, (or in the case of TFNI, a person trained to classify TFNI) based on classification guidance, that matter containing RD, FRD, or TFNI is classified at a higher level or category than currently marked. This includes correcting the classification level or category of matter that was never marked as well as matter erroneously marked as unclassified.

§1045.35 What acronyms are commonly used in this part?

The following acronyms are commonly used throughout this part:

AEA – The Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 *et seq.*)

ARDMO – Associate RD Management Official

C - Confidential

CD – Compact Disk

CFR – Code of Federal Regulations

CUI – Controlled Unclassified Information

DCI – Director of Central Intelligence

DNI – Director of National Intelligence

DoD – Department of Defense

DOE – Department of Energy

E.O. – Executive order

FOIA – Freedom of Information Act

FRD – Formerly Restricted Data

IC – Intelligence Community

ICD – Intelligence Community Directive

ICPG – Intelligence Community Policy Guidance

ISCAP – Interagency Security Classification Appeals Panel

MDR – Mandatory Declassification Review

NNSA - National Nuclear Security Administration

NRC – Nuclear Regulatory Commission

NSI – National Security Information

Pub. L – Public Law

RD – Restricted Data

RDMO – RD Management Official

S - Secret

TFNI – Transclassified Foreign Nuclear Information

U.K. – United Kingdom

Subpart B –Management of Restricted Data (RD), Formerly Restricted Data (FRD), and Transclassified Foreign Nuclear Information (TFNI) Classification Programs

§1045.40 Is there an official in each agency with access to RD, FRD, or TFNI who manages the agency’s RD, FRD, or TFNI program to ensure the requirements in this part are met?

Yes. The head of each agency with access to RD, FRD, or TFNI:

(a) Must appoint at least one Federal official to serve as an RDMO who ensures the proper implementation of this part within his or her agency and serves as the primary point of contact for coordination with the Director, Office of Classification, for classification and declassification issues involving RD, FRD, and TFNI. Within DoD, a minimum of at least one RDMO must be appointed in each military department.

(b) May appoint or authorize the RDMO to appoint one or more Associate RDMOs if there is more than one organization that has access to RD, FRD, or TFNI. In such cases, the RDMO is the lead official and the primary point of contact with the Director, Office of Classification.

(c) Must ensure contact information for each RDMO and ARDMO is sent to the Director, Office of Classification, within 30 days of the appointment.

§1045.45 What are the responsibilities of DOE officials and personnel, and the officials and personnel of other agencies, under this part?

(a) The Secretary or Deputy Secretary of Energy must determine in writing whether information privately generated by persons in the United States but not under a Government contract is classified as RD. This responsibility cannot be delegated.

(b) The Associate Under Secretary for Environment, Health, Safety and Security:

(1) Determines if RD and TFNI may be published without undue risk to the common defense and security and declassified;

(2) Jointly with DoD, determines which information in the RD category relating primarily to the military utilization of nuclear weapons may be transclassified to the FRD category;

(3) Jointly with DoD, determines which information in the FRD category may be removed from that category and returned to the RD category and notifies all appropriate agencies as necessary of the change;

(4) Jointly with DoD, declassifies FRD and RD relating primarily to the military utilization of nuclear weapons that may be published without undue risk to the common defense and security;

(5) Jointly with the DNI, determines which information in the RD category concerning nuclear energy programs of foreign governments may be transclassified to the TFNI category to carry out the provisions of the National Security Act of 1947, as amended;

(6) Jointly with the DNI, determines which information in the TFNI category may be removed from that category and returned to the RD category and notifies all appropriate agencies as necessary of the change;

(7) Considers declassification proposals received from the public or other agencies or their

contractors concerning RD, FRD, and TFNI, and coordinates responses with the appropriate agencies;

(8) Makes the final appeal determination concerning the denial of any RD, FRD, or TFNI contained in matter requested under statute or Executive Order; and

(9) Makes the final appeal determination for any formal classification challenges for RD, DOE FRD, and TFNI.

(c) The Director, Office of Classification:

(1) Issues the Government-wide requirements for the classification and declassification of RD, FRD, and TFNI in accordance with the AEA and this part;

(2) Grants exemptions and equivalencies to provisions of this part;

(3) Develops and interprets policies to implement RD, FRD, and TFNI classification programs in coordination with DoD for FRD, as appropriate;

(4) Determines whether nuclear-related information is RD;

(5) Determines if new information in a previously declassified subject area warrants classification as RD based on the criteria in §1045.70, except where the information has been widely disseminated in the open literature;

(6) Assigns a classification level to RD and TFNI, and, jointly with DoD, to FRD, that reflects the sensitivity of the information to the national security;

(7) Serves as the Denying Official for RD, DOE FRD, and TFNI portions of records requested

under statute or Executive Order;

(8) Establishes a system for processing, tracking, and recording formal classification challenges and declassification proposals made by persons with access to RD, FRD, and TFNI;

(9) Considers challenges to RD, FRD, and TFNI, coordinates challenges with other agencies, as appropriate, and makes the initial determination pertaining to the challenge of a classification determination concerning RD, DOE FRD, or TFNI;

(10) Delegates the authority to declassify matter containing RD, FRD, or TFNI to qualified individuals in other Government agencies;

(11) Develops and distributes classification guides to promulgate classification and declassification determinations for RD, FRD, and TFNI, and jointly develops classification guides and TFNI guidelines with DoD, the Nuclear Regulatory Commission (NRC), the National Aeronautics and Space Administration, and other agencies in the RD, FRD, or TFNI categories or subject areas for which DOE and the agencies share responsibility;

(12) Reviews classification guides that contain RD and jointly reviews classification guides that contain FRD topics with the appropriate DoD authority (as specified in DoD Instruction 5210.02 or successor instructions) that are developed by other agencies;

(13) Reviews TFNI guidelines and classification guides containing TFNI topics developed by other agencies;

(14) Assists agencies with the implementation of RD, FRD, and TFNI classification programs to comply with this part;

(15) In consultation with the agency RDMO, determines when to conduct on-site reviews of agency programs established under this part to evaluate the agency's implementation of the requirements;

(16) Coordinates on-site reviews of the Intelligence Community (IC) with the DNI;

(17) Reviews agency implementing policies;

(18) Develops training materials related to implementing this part and provides these materials to RDMOs and other appropriate persons;

(19) Reviews any RD-, FRD-, or TFNI-related training material submitted by other agencies to ensure consistency with current policies;

(20) Periodically hosts a meeting of RDMOs to disseminate information or address issues; and

(21) Responds to questions and considers comments received from any person, including the public, concerning RD, FRD, and TFNI classification and declassification policies and procedures.

(d) DoD jointly with DOE:

(1) Determines which information in the RD category relating primarily to the military utilization of nuclear weapons may be transclassified to the FRD category;

(2) Determines which information in the FRD category may be removed from that category and returned to the RD category;

(3) Assigns a classification level to FRD that reflects the sensitivity of the information to the

national security;

(4) Prepares classification guides for FRD; and

(5) Declassifies FRD and RD relating primarily to the military utilization of nuclear weapons that may be published without undue risk to the common defense and security.

(6) Considers challenges to FRD, and coordinates challenges with other agencies, as appropriate.

(e) The DNI jointly with DOE:

(1) Determines which information in the RD category concerning nuclear energy programs of foreign governments may be transclassified to the TFNI category to carry out the provisions of the National Security Act of 1947, as amended;

(2) Determines which information in the TFNI category may be removed from that category and returned to the RD category; and

(3) Coordinates IC Directives (ICD) and IC Policy Guidance (ICPG) concerning RD, FRD, and TFNI to ensure policies are consistent;

(f) NRC:

(1) Jointly with DOE, develops classification guides for programs over which both agencies have cognizance; and

(2) Ensures the review and proper classification of matter containing RD by RD Derivative Classifiers that is generated by NRC or by its licensed or regulated facilities and activities.

(g) Heads of Agencies with access to RD, FRD, or TFNI:

- (1) Ensure that matter containing RD, FRD, and TFNI is reviewed by a person with appropriate authority and properly classified.
- (2) Must appoint at least one RDMO to manage the implementation of this part within the agency;
- (3) Ensure implementing directives for this part are developed, submitted to DOE for review prior to issuance, to ensure consistency with this part, and promulgated;
- (4) Should periodically review holdings containing RD, FRD, or TFNI that are likely to have a high degree of public interest and a likelihood of declassification. If any matter containing RD, FRD, or TFNI is identified for declassification, ensure coordination for the declassification of matter marked as RD, FRD, or TFNI with DOE or DoD, as appropriate;
- (5) Develop and promulgate procedures for persons with access to RD or FRD to submit classification challenges and declassification proposals for guide topics that are RD or FRD or for matter containing RD or FRD. If the agency possesses TFNI, develops and promulgates procedures for persons with access to TFNI to submit classification challenges and declassification proposals for guide topics that are TFNI or matter containing TFNI;
- (6) Ensure joint classification guides for programs over which DOE and the agency have cognizance are developed;
- (7) Ensure that any classification guides the agency develops or revises that contain RD or FRD, topics are coordinated with the Director, Office of Classification prior to issuance, to ensure consistency with DOE and DoD guidance;

(8) Ensure that any TFNI guidelines or classification guides containing TFNI topics the agency develops or revises are reviewed by the Director, Office of Classification, prior to issuance for consistency with policies developed by DOE and current transclassification agreements;

(9) Ensure that agency classification guides containing RD, FRD, or TFNI topics are reviewed for consistency with current DOE classification guides at least once every 5 years and that appropriate revisions are made, if necessary;

(10) Ensure that NSI records of permanent historical value are reviewed as required under the “Special Historical Records Review Plan (Supplement)” established under Pub. L. 105-261 and 106-65 or subsequent statutes;

(11) Ensure that each RDMO and Federal RD Derivative Classifier whose duties involve the classification of a significant amount of matter containing RD or FRD have his or her personnel performance evaluated with respect to such classification activities; and

(12) Ensure that contracting officers are notified of any contracts that have access to or generate matter containing RD, FRD, or TFNI, and that the requirements of this part are incorporated into those contracts.

(13) Ensure DOE classification guides, classification bulletins and matter containing DOE classification guide topics that is not itself classified is safeguarded and its dissemination is limited to persons with a need to know.

(h) Agency RDMOs:

(1) Ensure that procedures for training and designating ARDMOs and RD Derivative Classifiers

within the agency are established;

(2) Ensure that persons with access to RD, FRD, and TFNI are trained in accordance with §1045.120;

(3) Ensure that RD Derivative Classifiers are designated and trained in accordance with §§1045.115 and 1045.120, respectively;

(4) Ensure that persons who derivatively classify matter containing TFNI are trained in accordance with §1045.120;

(5) Ensure that RD Derivative Classifiers and persons who derivatively classify TFNI have access to any classification guides needed;

(6) Ensure that a periodic review of a sample of the agency's RD, FRD, and TFNI derivative classification determinations is conducted that evaluates that each determination was made by appropriately trained and (when required) designated employees acting within his or her authority, that the determination is accurate, and that the markings are applied correctly;

(7) In consultation with the Director, Office of Classification determine when to conduct on-site reviews of their agency program established under this part to evaluate the agency's implementation of the requirements; and

(8) Cooperate with and provide information as necessary to the Director, Office of Classification, to fulfill their responsibilities under this part.

(i) RD Derivative Classifiers:

(1) Must receive training prescribed by §1045.120;

(2) Must use approved DOE or joint classification guides, in the subject areas in which they have programmatic expertise, or an applicable portion-marked source document as the basis for derivative decisions to classify or upgrade matter containing RD or FRD; and

(3) Must use DOE classification guides and bulletins, joint DOE-agency classification guides, or agency classification guides containing RD or FRD topics that have been coordinated with DOE as the basis to downgrade the level of matter containing RD or FRD. Source documents must not be used as a basis to downgrade matter containing RD or FRD;

(4) Must not downgrade the category of matter containing RD, FRD, or TFNI (e.g., RD to NSI, FRD to NSI), unless granted this authority by DOE for RD or TFNI or by DOE or DoD for FRD;

(5) Must not declassify matter containing RD, FRD, or TFNI unless delegated this authority by DOE for RD or TFNI, or by DOE or DoD for FRD; and

(6) Can remove the RD, FRD, and TFNI portions from a portion-marked source document in accordance with §1045.150.

(j) Persons who derivatively classify matter containing TFNI:

(1) Must receive training prescribed by §1045.120;

(2) Must use approved TFNI guidelines, DOE or joint classification guides in the subject areas in which they have programmatic expertise, or an applicable portion-marked source document as the basis for derivative decisions to classify or upgrade matter containing TFNI; and

(3) Must not declassify or downgrade the category of matter containing TFNI unless delegated this authority by DOE.

(k) Persons with access to RD, FRD, or TFNI:

(1) Must be trained in accordance with §1045.120;

(2) Must submit matter that potentially contains RD, FRD, or TFNI to a person with the appropriate authority for review in accordance with §1045.125;

(3) Must submit matter that potentially contains RD, FRD, or TFNI to a person with the appropriate authority for declassification or public release.

§1045.50 [Reserved].

§1045.55 When are RD, FRD, and TFNI considered for declassification?

RD, FRD, and TFNI information and matter are considered for declassification during several processes.

(a) DOE reviews all classification guides containing RD, FRD, or TFNI topics at least once every 5 years to determine if information identified as RD, FRD, or TFNI still meets the criteria for classification under §1045.70. If RD, FRD, and TFNI information contained in a classification guide does not meet the standards for classification, the information is declassified.

(b) TFNI is no longer TFNI when comparable U.S. RD is declassified.

(c) Agencies with holdings containing RD, FRD, or TFNI should periodically review holdings that are likely to have a high degree of public interest and a likelihood of declassification. If any matter containing RD, FRD, or TFNI is identified for declassification, agencies must coordinate the declassification of matter marked as RD, FRD, or TFNI with DOE or DoD, as appropriate.

(d) RD, FRD, or TFNI information or matter containing RD, FRD, or TFNI in particular areas of public interest may be considered for declassification if sufficient interest is demonstrated.

Proposals for the systematic review of given collections or subject areas must be addressed to the Director, Office of Classification, AU-60/Germantown Building; U.S. Department of Energy; 1000 Independence Avenue SW., Washington, DC 20585.

(e) During the FOIA and MDR request process, agencies must refer any responsive matter that is marked as or potentially contains RD, FRD, or TFNI to DOE or DoD, as provided under Subpart F. During this process, the information may be reviewed to determine it still meets the standards for classification.

(f) The public and persons with access to RD, FRD, or TFNI may submit a declassification proposal for RD, FRD, or TFNI under §1045.105.

§1045.60 Does an unauthorized public release of RD, FRD, or TFNI result in its declassification?

The unauthorized disclosure of RD, FRD, or TFNI does not automatically result in its declassification. However, if a disclosure is sufficiently authoritative or credible, the Associate Under Secretary for Environment, Health, Safety and Security will examine the possibility of declassifying the information.

§1045.65 What are the responsibilities of a person with access to RD, FRD, or TFNI, if they see information in the open literature that they think is RD, FRD, or TFNI?

(a) A person with access to RD, FRD, or TFNI, must not confirm or expand upon the classification status or technical accuracy of information in the open literature that is RD, FRD,

or TFNI or suspected to be RD, FRD, or TFNI. Commenting on such information can cause greater damage to national security by confirming its location, classified nature, or technical accuracy.

(b) Because the open literature may contain information that is still classified as RD, FRD, or TFNI, a person who has access to RD, FRD, or TFNI who incorporates information from the open literature that is potentially classified as RD, FRD, or TFNI into matter must ensure the matter is reviewed as required under §1045.125 to ensure the information incorporated is not classified.

Subpart C – Determining if Information is RD, FRD, or TFNI

§1045.70 How is information initially determined to be RD?

(a) For new information to be classified as RD it must fall under the definition of RD that states such information concerns: the design, manufacture, or utilization of nuclear weapons; the production of special nuclear material; or the use of special nuclear material in the production of energy, and the unauthorized release of the information must reasonably be expected to cause undue risk to the common defense and security.

(b) This initial determination is made by the Director, Office of Classification after:

- (1) Ensuring the information is not prohibited from being classified under §1045.75;
- (2) Considering whether the information falls within the classification or declassification presumptions in §1045.80; and
- (3) Evaluating the criteria in this paragraph.

- (i) Whether the information is so widely known or readily apparent to knowledgeable observers that its classification would cast doubt on the credibility of classification programs;
 - (ii) Whether publication of the information would assist in the development of countermeasures or otherwise jeopardize any U.S. weapon or weapon system;
 - (iii) Whether the information would hinder U.S. nonproliferation efforts by significantly assisting potential adversaries to develop or improve a nuclear weapon capability, produce nuclear weapons materials, or make other military use of nuclear energy;
 - (iv) Whether information would assist terrorists to develop a nuclear weapon, produce nuclear materials, or use special nuclear material in a terrorist attack;
 - (v) Whether publication of the information would have a detrimental effect on U.S. foreign relations;
 - (vi) Whether publication of the information would benefit the public welfare, taking into account the importance of the information to public discussion and education and potential contribution to economic growth; and
 - (vii) Whether publication of the information would benefit the operation of any Government program by reducing operating costs or improving public acceptance.
- (c) In consideration of the analysis of the criteria of this section, if there is significant doubt about the need to classify the information, then the Director cannot make an initial determination to classify the information.

§1045.75 Are there prohibitions against information being classified, remaining classified,

or prevented from being declassified as RD, FRD, or TFNI?

(a) Yes. Information must not be classified or remain classified as RD, FRD, or TFNI to accomplish the purposes described in paragraphs (b) through (g) of this section. Persons must also not prevent information from being declassified as RD, FRD, or TFNI for the purposes described in paragraphs (b) through (g) of this section.

(b) Conceal violations of law, inefficiency, or administrative error;

(c) Prevent embarrassment to a person, organization, or agency;

(d) Restrain competition;

(e) Prevent or delay the release of information that does not require protection for the national security or nonproliferation reasons;

(f) Unduly restrict dissemination by assigning an improper classification level; or

(g) Prevent or delay the release of information bearing solely on the physical environment or public or worker health and safety.

§1045.80 What are the classification and declassification presumptions?

(a) The Director, Office of Classification and the Associate Under Secretary of Environment, Health, Safety and Security consider the presumptions in paragraph (b)(1) of this section before applying the criteria in §1045.70. These presumptions concern information in certain but not all nuclear-related areas that may generally be presumed to be RD or are generally unclassified.

The term “generally” here means that as a rule, but not necessarily in every case, the information in the identified area is presumed classified or not classified as indicated. Inclusion of specific

existing information in one of the presumption categories does not mean that new information in a category is or is not classified, but only that arguments to differ from the presumed classification status of the information should use the appropriate presumption as a starting point.

(b) Information in the following areas is presumed to be RD:

(1) Detailed designs, specifications, and functional descriptions of nuclear explosives, whether in the active stockpile or retired;

(2) Material properties under conditions achieved in nuclear explosions that are principally useful only for design and analysis of nuclear weapons;

(3) Vulnerabilities of U.S. nuclear weapons to sabotage, countermeasures, or unauthorized use;

(4) Nuclear weapons logistics and operational performance information (e.g., specific weapon deployments, yields, capabilities) related to military utilization of those weapons required by DoD;

(5) Details of the critical steps or components in nuclear material production processes; and

(6) Features of military nuclear reactors, especially naval nuclear propulsion reactors, that are not common to or required for civilian power reactors.

(c) Information in the following areas is presumed to be unclassified:

(1) Basic science: mathematics, chemistry, theoretical and experimental physics, engineering, materials science, biology, and medicine;

(2) Magnetic confinement fusion technology;

- (3) Civilian power reactors, including nuclear fuel cycle information but excluding technologies for uranium enrichment;
- (4) Source materials (defined as uranium and thorium and ores containing them);
- (5) Fact of use of safety features (e.g., insensitive high explosives, fire resistant pits) to lower the risks and reduce the consequences of nuclear weapon accidents;
- (6) Generic nuclear weapons effects;
- (7) Physical and chemical properties of uranium and plutonium, most of their alloys and compounds, under standard temperature and pressure conditions;
- (8) Nuclear fuel reprocessing technology and reactor products not revealing classified production rates or inventories;
- (9) The fact, time, location, and yield range (e.g., “less than 20 kilotons” or “20-150 kilotons”) of U.S. nuclear tests;
- (10) General descriptions of nuclear material production processes and theory of operation;
- (11) DOE special nuclear material aggregate inventories and production rates not revealing the size of or details concerning the nuclear weapons stockpile;
- (12) Types of waste products resulting from all DOE weapon and material production operations;
- (13) Any information solely relating to the public and worker health and safety or to environmental quality; and
- (14) The simple association or simple presence of any material (i.e., element, compound, isotope,

alloy, etc.) at a specified DOE site.

§1045.85 How is information determined to be FRD or TFNI and can FRD or TFNI be returned to the RD category?

(a) To be eligible to become FRD or TFNI, information must first be classified as RD in accordance with the AEA and this part. FRD and TFNI are removed from and may be returned to the RD category under section 142 of the AEA. The process by which information is removed from the RD category and placed into the FRD or TFNI category or returned to the RD category is called transclassification and involves the following decisions:

(1) For information to be transclassified from RD to the FRD category, the Associate Under Secretary for Environment, Health, Safety and Security and the appropriate official within DoD (as specified in DoD Instruction 5210.02 or subsequent instructions) must jointly determine that the information relates primarily to the military utilization of nuclear weapons and can be adequately protected in a manner similar to NSI.

(2) For information to be transclassified from RD to the TFNI category, the Associate Under Secretary for Environment, Health, Safety and Security and the DNI must jointly determine that information concerning a foreign nuclear energy program that falls under the RD definition must be removed from the RD category in order to carry out the provisions of the National Security Act of 1947, as amended, and can be adequately protected in a manner similar to NSI.

(b) The process to return FRD and TFNI to the RD category is as follows:

(1) FRD may be returned to the RD category if the DOE and DoD jointly determine that the programmatic requirements that caused the information to be removed from the RD category no

longer apply, the information would be more appropriately protected as RD and returning the information to the RD category is in the interest of national security. DOE jointly with DoD must notify all appropriate agencies of the change.

(2) TFNI may be returned to the RD category if the DOE and the DNI jointly determine that the programmatic requirements that caused the information to be removed from the RD category no longer apply, the information would be more appropriately protected as RD and returning the information to the RD category is in the interest of national security. DOE jointly with the DNI must notify all appropriate agencies of the change.

§1045.90 Can information generated by private entities that is not owned by, produced by, or controlled by the U.S. Government be classified as RD?

Yes. Under the AEA, DOE may classify information that is privately generated (e.g., not under a Government contract) as RD. This may only be done in writing by the Secretary or Deputy Secretary. This responsibility cannot be delegated. Once such a determination is made, DOE must notify the public through the Federal Register. This notice is not required to reveal any details about the determination and must protect the national security as well as the interests of the private party.

§1045.95 What are the criteria used to assign levels to RD, FRD, or TFNI?

(a) When the Director, Office of Classification, makes the initial determination that information is RD, he or she determines the appropriate level of the information based on the damage that would occur if there was an unauthorized disclosure of the information. The Director, Office of Classification, also determines the level for TFNI, and, jointly with the appropriate DoD official

(as specified in DoD Instruction 5210.02 or successor instructions) determines the level for FRD information.

(b) The three classification levels of RD, FRD, and TFNI are:

(1) *Top Secret*. Top Secret is applied to information that is vital to the national security the unauthorized disclosure of which could reasonably be expected to cause exceptionally grave damage to the national security that the appropriate official is able to identify or describe.

(2) *Secret*. Secret is applied to information, the unauthorized disclosure of which could reasonably be expected to cause serious damage to the national security that the appropriate official is able to identify or describe.

(3) *Confidential*. Confidential is applied to information, the unauthorized disclosure of which could reasonably be expected to cause undue risk to the common defense and security that the appropriate official is able to identify or describe.

§1045.100 How are RD, FRD, and TFNI declassified?

(a) This section addresses the declassification of information, not derivatively classified matter. See Subpart D for requirements for the declassification of matter containing RD, FRD, or TFNI.

(b) RD and TFNI are declassified by the Associate Under Secretary for Environment, Health, Safety and Security by evaluating the criteria in §1045.70. FRD requires the evaluation of the same criteria and a joint decision by the Associate Under Secretary for Environment, Health, Safety and Security and the appropriate DoD official (as specified in DoD Instruction 5210.02 or subsequent instructions).

§1045.105 What is the method to request the declassification of RD, FRD or TFNI?

(a) If a person believes RD, FRD, or TFNI should not be classified, he or she may submit a declassification proposal. Proposals must be submitted in writing and must include a description of the information concerned and may include a reason for the request. If submitted by a person with access to RD, FRD, or TFNI, the request must be submitted through secure means. The proposal is processed as follows:

(b) The Associate Under Secretary for Environment, Health, Safety and Security considers declassification proposals from the public and Government agencies and their contractors for the declassification of RD, FRD, and TFNI on an ongoing basis. For FRD, the Director, Office of Classification, will coordinate the declassification proposal with the appropriate DoD official (as specified in DoD Instruction 5210.02 or subsequent instructions).

(c) Declassification proposals may be sent to the Associate Under Secretary for Environment, Health, Safety and Security, AU-1/Forrestal Building, U.S. Department of Energy, 1000 Independence Avenue, SW, Washington, DC 20585. For FRD, the proposal may be sent to the Director, Office of Classification, or the appropriate DoD official (as specified in DoD Instruction 5210.02 or subsequent instructions). DOE and DoD must coordinate with one another concerning declassification proposals for FRD.

§1045.110 How are challenges to the classification and declassification of RD, FRD, or TFNI submitted and processed?

(a) Any person with access to RD, FRD, or TFNI who believes that RD, FRD, or TFNI is improperly classified is encouraged and expected to challenge the classification. The challenge

may be to information RD, FRD, or TFNI (e.g., a guide topic) or the classification status of matter containing RD, FRD, or TFNI.

(b) Challenges are submitted in accordance with agency procedures.

(c) Each agency must establish procedures for a person to challenge the classification status of RD, FRD, or TFNI if they believe that the classification status is improper. These procedures must:

(1) Advise the person of their right to submit a challenge directly to the Director, Office of Classification, AU-60/Germantown Building; U.S. Department of Energy; 1000 Independence Avenue SW, Washington, DC 20585, at any time.

(2) Ensure that under no circumstances is an employee subject to retribution for challenging the classification status of RD, FRD, or TFNI;

(3) Require the agency that initially receives the challenge to provide an initial response within 60 days to the person submitting the challenge.

(4) Require the agency to advise the person of their appeal rights. If the employee is not satisfied with the agency response or the agency has not responded to the challenge within 180 days, the challenge involving RD, FRD, or TFNI may be appealed to the Director, Office of Classification.

(i) In the case of FRD and RD related primarily to the military utilization of nuclear weapons, the Director, Office of Classification, coordinates with the appropriate DoD official (as specified in DoD Instruction 5210.02 or subsequent instructions).

(ii) In the case of TFNI, the Director, Office of Classification, coordinates with DNI.

(5) If the response to the initial appeal and its justification for classification does not satisfy the person making the challenge, a further appeal may be made to the Associate Under Secretary for Environment, Health, Safety and Security, AU-1/Forrestal Building, U.S. Department of Energy, 1000 Independence Avenue, SW, Washington, DC 20585.

(d) Agency responses to RD or TFNI challenges are limited to interpreting the application of guidance to derivatively classify matter. Except for DoD, agency responses to FRD are limited to interpreting the application of guidance to derivatively classify matter. An agency may coordinate challenges regarding interpreting guidance for RD or TFNI with DOE, and may coordinate challenges regarding interpreting guidance for FRD with DOE or DoD.

(e) Agencies must forward challenges that require decisions other than interpreting the application of guidance (e.g., challenges to guide topics) to the Director, Office of Classification.

Subpart D – Classifying and Declassifying Matter Containing RD, FRD, or TFNI

§1045.115 Who is authorized to derivatively classify matter that contains RD, FRD, or TFNI?

(a) Specific authority and/or training is required to derivatively classify matter containing RD, FRD, or TFNI. These derivative classification decisions must be based on a classification guide, a classification bulletin, or a portion-marked source document and must only be made in the RD Derivative Classifier's subject areas of expertise. In cases where guidance does not

exist, for RD the Director, Office of Classification must make an initial determination that information is RD or that the matter contains RD, and for FRD DOE and DoD must jointly determine that the information is FRD or the matter contains FRD. No other agency or agency personnel has the authority to make an initial determination regarding RD or FRD. See §1045.135 for the process for requesting a determination in cases where guidance does not exist.

(b) Each person who derivatively classifies matter containing RD or FRD must be an RD Derivative Classifier.

(c) Except for DoD military and DoD Federal civilian employees, each RD Derivative Classifier must be designated by name or position in writing in accordance with agency procedures.

(d) An agency contractor employee may be an RD Derivative Classifier. All contractor employees, including DoD contractors, must be designated by name or position as such in writing in accordance with agency procedures.

(e) Once a person is an RD Derivative Classifier for an agency, he or she may classify matter containing RD or FRD in those subject areas in which they have programmatic expertise for any agency, provided the other agency or agencies accept the existing authority.

(f) No specific designation as an RD Derivative Classifier is required to classify matter containing TFNI. Any person who has received training required by §1045.120 may classify matter containing TFNI.

§1045.120 What training is required for persons who have access to or who derivatively classify matter containing RD, FRD, or TFNI?

(a) Prior to being authorized access to RD and FRD, a person must receive training that explains:

(1) What information is potentially RD and FRD;

(2) Matter that potentially contains RD or FRD must be reviewed by an RD Derivative Classifier to determine whether it contains RD or FRD;

(3) DOE must review matter that potentially contains RD or TFNI for public release and DOE or DoD must review matter that potentially contains FRD for public release;

(4) RD Derivative Classification authority is required to classify or upgrade matter containing RD or FRD, or to downgrade the level of matter containing RD or FRD;

(5) Only a person trained in accordance with this section, may classify matter containing TFNI;

(6) Matter containing RD, FRD, and TFNI is not automatically declassified and only DOE authorized persons may downgrade the category or declassify matter marked as containing RD; only DOE or DoD authorized persons may downgrade the category or declassify matter marked as containing FRD;

(7) How to submit a challenge if they believe RD, FRD, or TFNI information (e.g., a guide topic) or matter containing RD, FRD, or TFNI is not properly classified; and

(8) Access requirements for matter marked as containing RD or FRD.

(b) Each person with access to RD and FRD must also receive periodic refresher briefings covering these same topics.

(c) In addition to the training in paragraph (a) of this section, prior to derivatively classifying

matter containing RD, or FRD and every 2 years thereafter, each RD Derivative Classifier must also receive training that explains:

(1) The use of classification guides, classification bulletins, and portion-marked source documents to classify matter containing RD and FRD;

(2) What to do if applicable classification guidance is not available;

(3) Limitations on an RD Derivative Classifier's authority to remove RD or FRD portions from matter; and

(4) Marking requirements for matter containing RD and FRD.

(d) Prior to having access to TFNI, and periodically thereafter, each person must receive the following training (which may be combined with the training required for access to RD or FRD):

(1) What information is potentially TFNI;

(2) Only a person with appropriate training may determine if matter contains TFNI;

(3) Marking requirements for matter containing TFNI;

(4) Matter containing TFNI is not automatically declassified and only DOE authorized persons may downgrade the category or declassify matter marked as containing TFNI; and

(5) How to submit a challenge if they believe TFNI information (e.g., a guide topic) or matter containing TFNI is not properly classified.

(e) In addition to the training in §1045.120(d), prior to derivatively classifying matter containing TFNI and every 2 years thereafter, each person who derivatively classifies matter containing

TFNI must also receive training that explains:

- (1) The markings applied to matter containing TFNI;
- (2) Limitations on their authority to remove TFNI portions from matter;
- (3) Only DOE authorized persons may determine that classified matter no longer contains TFNI;
- (4) Only DOE authorized persons may declassify matter marked as containing TFNI; and
- (5) DOE must review matter that potentially contains TFNI for public release.

§1045.125 What is the process for reviewing and derivatively classifying matter that potentially contains RD, FRD, or TFNI?

(a) *Protecting and marking matter that potentially contains RD, FRD, or TFNI prior to review.*

Prior to the review of matter to determine if it contains RD, FRD, or TFNI, the matter must be protected at the overall potential highest level and category and marked as a working paper in accordance with §1045.140.

(b) *Matter that potentially contains RD, FRD, or TFNI that is intended for public release.* Any

person who generates or possesses matter that potentially contains RD, FRD, or TFNI that is intended for public release must ensure that it is reviewed by the Director, Office of Classification, or a DOE official granted the authority by delegation, regulation, or DOE directive, prior to release. FRD may also be reviewed by the appropriate DoD official as specified in DoD Instruction 5210.02 or subsequent instructions.

(c) *Matter that potentially contains RD or FRD information that is not intended for public release.* Matter that potentially contains RD or FRD that is not intended for public release must

be reviewed by an RD Derivative Classifier.

(d) *Matter that potentially contains TFNI that is not intended for public release.* Matter that potentially contains TFNI that is not intended for public release must be reviewed by a person who has been trained in accordance with §1045.120(e).

(e) *Matter that incorporates information from the open literature that potentially contains RD, FRD, or TFNI.* Because the open literature may contain information that is still classified as RD, FRD, or TFNI, matter that incorporates information from the open literature that is potentially RD, FRD, or TFNI must be reviewed as required under this section.

(f) *Matter being reviewed under E.O. 13526 or successor orders.* If, when reviewing matter under the automatic or systematic review provisions of E.O. 13526 or successor orders, the person finds matter potentially contains RD, FRD, or TFNI that it is not correctly marked:

(1) An RD Classifier may review the matter to determine if it contains RD or FRD. If the matter is determined to contain RD or FRD, the matter must be appropriately marked and is exempt from automatic declassification.

(2) A person trained to classify TFNI may review the matter to determine if it contains TFNI. If the matter is determined to contain TFNI, the matter must be appropriately marked and is exempt from automatic declassification.

(3) If an authorized person is unable to make a determination for RD, FRD, or TFNI, the matter must be referred to DOE. Matter containing FRD may also be referred to DoD. The matter may not be automatically declassified until DOE or DoD makes a determination as to its classification status.

§1045.130 How does an authorized person derivatively classify matter containing RD, FRD, or TFNI?

(a) *Derivative classification of RD or FRD.* For RD or FRD, an RD Derivative Classifier makes the derivative classification determination using:

(1) A DOE classification guide or bulletin, a joint DOE-agency classification guide, an agency guide with RD/FRD topics that is within his or her programmatic area of expertise; or

(2) An applicable portion-marked source document.

(b) *Derivative classification of TFNI.* For TFNI, a person who is trained to derivatively classify matter containing TFNI makes the determination using:

(1) Approved TFNI guidelines;

(2) A DOE classification guide or bulletin, a joint DOE-agency classification guide, an agency guide with RD, FRD, or TFNI topics within his or her programmatic area of expertise; or

(3) An applicable portion-marked source document.

(c) *Association and compilation.* (1) *RD, FRD, or TFNI classification based on association.* If two or more different, unclassified facts when combined in a specific way result in a classified statement, or if two or more different classified facts or unclassified and classified facts when combined in a specific way result in a higher classification level or more restrictive category, then an RD Derivative Classifier may classify or upgrade the matter based on the association. If the matter is to be portion marked, then each portion of the associated information must be marked at the level and category of the association.

(2) *RD, FRD, or TFNI classification based on compilation.* A large number of often similar unclassified pieces of information or a large number of often similar RD, FRD, or TFNI pieces of information by selection, arrangement, or completeness in matter may add sufficient value to merit classification or to merit classification at a higher level. If there is a classification guide topic that applies to the compilation, an RD Derivative Classifier may classify the information by compilation. In the absence of a classification guide topic that applies, for RD or TFNI, the Director, Office of Classification, may make the determination to classify or upgrade the matter based on compilation. For FRD, the Director, Office of Classification, or any appropriate DoD official (as specified in DoD Instruction 5210.02 or subsequent instructions) may classify or upgrade the matter based on compilation. Matter that is classified as RD, FRD, or TFNI based on compilation is never portion marked.

(d) *Use of a classified addendum.* When it is important to maximize the amount of information available to the public or to simplify matter handling procedures, the RD, FRD, or TFNI should be segregated into a classified addendum.

§1045.135 Can a person make an RD, FRD, or TFNI classification determination if applicable classification guidance is not available?

(a) No. If an RD Derivative Classifier or a person trained to classify matter containing TFNI is unable to locate a classification guide or classification bulletin that applies to the nuclear-related information within his or her programmatic expertise and does not have an applicable portion-marked source document to use for derivative classification, then he or she must contact the RDMO or an ARDMO for assistance. The RDMO/ARDMO may be aware of other classification guidance that could apply to the information.

(b) If no guidance is identified, the RDMO must forward the matter to the Director, Office of Classification, for a determination. Within 30 days, the Director, Office of Classification must:

(1) Determine whether the information is already classified as RD, FRD, or TFNI under current classification guidance and, if so, provide such guidance to the RDMO who forwarded the matter.

(2) If the information is not already classified as RD, FRD, or TFNI, the procedures for initially classifying information as RD, FRD, or TFNI under §1045.70 must be followed. The Director, Office of Classification, must notify the RDMO of the results of the initial classification determination within 90 days of receiving the matter. Initial determinations must be incorporated into classified guides, as appropriate.

(c) Pending a determination, the matter under review must be protected at a minimum as Secret RD, Secret FRD, or Secret TFNI, as appropriate.

§1045.140 How is matter containing RD, FRD, or TFNI marked?

(a) *Matter determined to contain RD, FRD, or TFNI.* Matter determined to contain RD, FRD, or TFNI must be clearly marked to convey to the holder of that matter that it contains such information.

(b) *Marking matter containing RD, FRD, or TFNI in the IC.* Matter generated by/for the IC containing RD, FRD, or TFNI must be marked in accordance with the requirements in this part as described in ICD 710 or successor directives, and the corresponding implementation directives and policy guidance issued or approved by the DNI concerning marking matter containing RD, FRD, and TFNI.

(c) *Working papers containing RD, FRD, or TFNI.* Prior to the determination that matter contains RD, FRD, or TFNI, it must be marked and protected as a working paper. Matter that has not been reviewed that potentially contains RD, FRD, or TFNI, or is expected to be revised prior to the preparation of a finished product that contains RD, FRD, or TFNI, must be dated when created or last changed, marked with the highest potential level and category of information (and caveats, when applicable) on the bottom and top of each page, and must be protected at the highest potential level and category of the information contained in the matter. The matter must also be marked “Draft” or “Working Paper” on the front cover. The RD/FRD admonishment is not required. RD Derivative Classifier authority is not required to mark working papers containing RD or FRD. However, working papers containing RD or FRD must be reviewed by an RD Derivative Classifier, and working papers containing TFNI must be reviewed by a person trained to mark matter containing TFNI, and the matter must be marked as a final document when it is:

- (1) Released outside the originating activity;
- (2) Retained more than 180 days from the date of origin or the date of the last change; or
- (3) Filed permanently.

(d) *RD and FRD markings.* An RD Derivative Classifier applies or authorizes the application of the following markings on matter determined to contain RD or FRD:

- (1) *Front page.* The front page of matter containing RD or FRD must have the page/banner markings at the top and bottom, the RD or FRD admonishment, subject/title marking, and the classification authority block.

(i) *Front page/banner markings.* The top and bottom of the front page must clearly indicate the overall classification level of the matter. The classification category may also be included. No other markings are required in the page/banner marking.

(ii) *Admonishments.* (A) If the matter contains RD or RD and FRD, use the following admonishment:

RESTRICTED DATA

This document contains RESTRICTED DATA as defined in the Atomic Energy Act of 1954, as amended. Unauthorized disclosure subject to administrative and criminal sanctions.

(B) If the document contains FRD and no RD, use the following admonishment:

FORMERLY RESTRICTED DATA

Unauthorized disclosure subject to administrative and criminal sanctions. Handle as RESTRICTED DATA in foreign dissemination. Section 144b, Atomic Energy Act of 1954, as amended.

(iii) *Subject/title marking.* The classification level and category of the text of the subject or title (e.g., U, SRD, CFRD, S//RD, C//FRD) must be marked immediately preceding the text of the subject or title.

(iv) *Classification authority block.* The classification authority block for matter containing RD or FRD must identify the RD Derivative Classifier who classified the matter and the classification guidance used to classify the matter.

(A) *Identity of the RD Derivative Classifier.* The RD Derivative Classifier must be identified by

name and position or title, and, if not otherwise evident, the agency and office of origin must be identified. An RD Derivative Classifier may also be identified by a unique identifier. For example:

Classified By: Jane Doe, Nuclear Analyst, DOE, CTI-61

(B) *Identity of classification guidance.* (1) If a classification guide is used to classify the matter, the “Derived From” line must include the short title of the guide, the issue date of the guide, the issuing agency and, when available, office of origin. For example:

Derived From: CG-ABC-1, 10/16/2014, DOE OC

(2) If a source document is used to classify the matter, it must be identified, including the office of origin and the date of the source document. If more than one classification guide or source document is used, the words “Multiple Sources” may be included. In the case of multiple sources, a source list identifying each guide or source document must be included with all copies of the matter.

(C) *Declassification instructions.* Matter containing RD or FRD are never automatically declassified and must either omit the “Declassify On” line, or indicate that the matter is exempt from automatic declassification (Not Applicable or N/A for RD/FRD, as appropriate).

(2) *Interior page/banner marking.* Each interior page of matter containing RD or FRD must be clearly marked at the top and bottom with the overall classification level and category of the matter or the overall classification level and category of the page, whichever is preferred. The abbreviations “RD” and “FRD” may be used in conjunction with the matter classification (e.g., SECRET//RD, CONFIDENTIAL//FRD).

(3) *Back cover or back page marking.* The outside of the back cover or back page must be marked with the overall level of information in the matter.

(4) *Portion marking.* Other than the required subject/title marking, portion marking is permitted, but not required, for matter containing RD or FRD. Each agency that generates matter containing RD or FRD determines the policy for portion marking matter generated within the agency. If matter containing RD or FRD is portion marked, each portion containing RD or FRD must be marked with the level and category of the information in the portion (e.g., SRD, CFRD, S//RD, C//FRD).

(e) *TFNI markings.* If matter contains RD or FRD commingled with TFNI, the RD or FRD markings take precedence. If matter contains TFNI and no RD or FRD, a person who is trained to classify matter containing TFNI applies or authorizes the application markings on matter determined to contain TFNI in accordance with 32 CFR Part 2001.22, or successor regulations, and with this part.

(1) *Front page.* If the matter contains TFNI and no RD or FRD, no admonishment is required on the front page, but the top and bottom of the front page must be clearly marked with the overall classification level and the TFNI label (e.g., SECRET//TFNI).

(2) *Subject/title marking.* The classification level and category of the subject or title must be marked immediately preceding the text of the subject or title.

(3) *Portion marking.* Matter containing TFNI and no RD or FRD must be portion marked. Each portion containing TFNI must be marked immediately preceding the portion to which it applies with the level and category of the information in the portion (e.g., S//TFNI).

(4) *Classification authority block.* The classifier and guidance used to classify matter containing TFNI must be identified as described in §1045.40(d)(1)(iv)(A) and (B). In addition, the “Declassify On” line must be annotated with the statement: “Not Applicable [or N/A] to TFNI portions.”

(5) *Interior pages.* If the matter contains TFNI and no RD or FRD, the top and bottom of each interior page must be clearly marked with the overall classification level and the TFNI label (e.g., SECRET//TFNI) or the overall classification level for each page with the TFNI label included on only those pages that contain TFNI, whichever is preferred.

(6) *Back cover or back page marking.* If the matter contains TFNI and no RD or FRD, the top and bottom of the outside of the back cover or back page must be clearly marked with the overall classification level of information in the matter.

(f) *Commingled matter - NSI.* Matter that contains a mixture of RD, FRD, or TFNI and NSI, and is portion marked, must also comply with the following:

(1) *Declassification instructions.* If the matter is not portion marked, then no declassification instructions are included. If the matter is portion marked, declassification instructions for each portion must be included in a source list. See this paragraph (f)(2) and E.O. 13526 or successor orders for instructions on annotating the source list.

(2) *Source list.* The source list must include declassification instructions for all NSI sources used to classify the NSI portions. The declassification instructions for sources that are used to classify the RD, FRD, or TFNI portions must state “Not applicable [or N/A] to RD/FRD/TFNI (as appropriate).” The source list must not appear on the front page of the matter, unless the

matter is a single page. If the matter is a single page, the source list may appear at the bottom of the page, and must be clearly separate from the classification authority block.

(g) *Commingled matter – CUI.* (1) If matter containing RD and/or FRD and CUI is not portion marked, CUI markings are not required.

(2) *Applicable CUI Decontrol instructions.* (i) If the matter contains RD or FRD and is not portion marked, then CUI decontrol instructions must not be included.

(ii) If the matter is portion marked and decontrol instructions are applied, the decontrol instructions for the CUI portions must not be on the front page. Where they appear, they must be clearly labeled as decontrol instructions for CUI.

(iii) If the matter contains TFNI, and decontrol instructions are applied, the decontrol instructions for the CUI portions must not be on the front page. Where they appear they must be clearly labeled as decontrol instructions for CUI.

(h) *Marking special format matter.* Standard RD, FRD, or TFNI markings must be applied to matter in special formats (e.g., photographs, flash memory drives, compact discs, audio or video tapes) to the extent practicable. Regardless of the precise markings in such cases, any special format matter that contains RD, FRD, or TFNI must be marked so that both a person in physical possession of the matter and a person with access to the information in or on the matter are aware that it contains RD, FRD, or TFNI.

§1045.145 Who must review output from a classified IT system that is marked as RD, FRD, or TFNI?

If the output is a final product that has been reviewed by a person with appropriate authority, and is properly marked, or is a working paper that is properly marked, no additional review is required. Otherwise, the output must be reviewed in accordance with §1045.30.

§1045.150 Can anyone remove the RD, FRD, or TFNI portions and markings to produce an NSI or unclassified version of the matter?

(a) *Removal of RD, FRD, or TFNI portions from matter containing RD, FRD, or TFNI.* Specific authority is required to remove RD, FRD, or TFNI portions from matter. The authority required depends on whether the matter is intended for public release, the category of information in the matter, and whether the matter is portion marked.

(b) *If the resulting or new matter is intended for public release.* An RD Derivative Classifier or a person trained to classify matter containing TFNI does not have the authority to remove the RD, FRD, or TFNI portions or markings for matter intended for public release. The matter must be submitted in accordance with §1045.125 to the appropriate agency who will review the matter and remove the RD, FRD, or TFNI portions and markings.

(c) *If the resulting matter is not intended for public release.* (1) An RD Derivative Classifier may remove the portions marked as containing RD or FRD and remove the RD or FRD markings.

(2) A person trained in accordance with §1045.120(e) may remove the portions containing TFNI and the TFNI markings.

(3) In all cases under §1045.150(b) this may be done only if the matter is originated by the authorized person's agency and the matter is portion marked, and the resulting matter is

reviewed to ensure it does not contain RD, FRD, or TFNI by a person authorized to review the matter.

§1045.155 How is matter marked as containing RD, FRD, or TFNI declassified?

(a) *Declassification of matter containing RD, FRD, or TFNI.* RD, FRD, and TFNI are never automatically declassified. No date or event for automatic declassification ever applies to RD, FRD, or TFNI, even when commingled with NSI. It takes positive action by an authorized person to declassify matter potentially containing or marked as containing RD, FRD, or TFNI.

(b) *Authority to declassify matter containing RD, FRD, or TFNI.* Only authorized persons within DOE may declassify matter marked as RD or TFNI and only authorized persons within DOE or DoD may declassify matter marked as FRD. Only these same persons may identify the portions of classified matter that contain RD, FRD, or TFNI that must be redacted prior to public release.

(c) *Declassification of matter containing RD or TFNI.* Except as allowed under paragraph (b) of this section, only designated persons in DOE may declassify matter marked as containing RD or TFNI or identify the RD or TFNI portions of matter that must be removed from the matter prior to public release. Such determinations must be based on classification guides.

(d) *Declassification of matter containing FRD.* Except as allowed under paragraph (b) of this section, only designated persons in DOE or appropriate persons in DoD (as specified in DoD Instruction 5210.02 or subsequent instructions) may declassify matter marked as containing FRD or determine the FRD portions of matter that must be removed prior to public release. Such determinations must be based on classification guides.

(e) *Delegation of declassification authority.* The Director, Office of Classification, may delegate declassification authority for matter containing RD and TFNI to other agencies Federal and contractor personnel. The Director, Office of Classification, or an appropriate person in DoD (as specified in DoD Instruction 5210.02 or subsequent instructions) may delegate declassification authority for matter containing FRD to qualified Federal or contractor personnel in other agencies.

§1045.160 When the RD, FRD, or TFNI is removed from matter, what action must be taken if the matter still contains NSI?

When an appropriate authority removes the RD, FRD, or TFNI from matter and it still contains NSI, the matter must be marked following E.O. 13526 and 32 CFR part 2001 or successor orders and regulations, including portion marking if the matter was not previously portion marked, and the classification authority block of the matter must be changed to contain declassification instructions for the NSI. This does not apply to matter produced as part of the coordination process for declassification or public release reviews.

§1045.165 Once matter marked as RD, FRD, or TFNI is declassified, how is it marked?

(a) Matter that is determined to no longer contain RD, FRD, or TFNI and also does not or no longer contains NSI must be clearly marked to convey to the holder of that matter that the matter is declassified;

(b) The front page must identify the person authorizing the declassification by name and position or title, if not otherwise evident, agency, and office of origin; or with a unique identifier; the classification guide that served as the basis for the declassification by short title, date, agency

and, when available, the office of origin; and the declassification date. For example:

(1) Declassified by: Jane Doe, Nuclear Analyst, DOE, CTI-61

(2) Derived from: CG-ABC-1, 10/16/2014, DOE OC

(3) Declassified on: 20201009

(c) The person authorizing the declassification must line through but not obliterate the classification markings and apply or authorize the application of the appropriate markings.

Subpart E – Government-wide Procedures for Handling Freedom of Information Act (FOIA) and Mandatory Declassification Review (MDR) Requests for Matter Marked as or Potentially Containing RD, FRD, or TFNI

§1045.170 What is the purpose of this subpart?

This subpart contains requirements that apply when Federal agencies other than DOE receive FOIA or MDR requests for matter that is marked as or potentially contains RD, FRD, or TFNI. RD, FRD, and TFNI are classified under the Atomic Energy Act and are not subject to the provisions governing MDR requests under E.O. 13526 or successor orders. To ensure RD, FRD, and TFNI are considered and appropriately reviewed when requested under a FOIA or MDR request, this section describes the process Federal agencies must follow for FOIA and MDR requests for matter that is marked as or potentially contains RD, FRD, or TFNI.

§1045.175 How must agencies process FOIA and MDR requests for matter that is marked as or potentially contains RD, FRD, or TFNI?

(a) When an agency receives a FOIA or MDR request for which any responsive matter is marked as or potentially contains RD, FRD, or TFNI, the agency must forward the matter to the

appropriate agency as follows:

(1) Forward any matter marked as or potentially containing RD or TFNI to the Director, Office of Classification or a DOE official granted authority by delegation, regulation, or DOE directive.

(2) Forward any matter originated by DOE and marked as or potentially containing FRD to either the Director, Office of Classification or a DOE official granted authority by delegation, regulation, or DOE directive. Forward any matter originated by DoD and marked as or potentially containing FRD to the appropriate DoD program (as specified in DoD Manual 5400.07, DoD Freedom of Information Act (FOIA) Program, subsequent manuals, or other applicable manuals). Matter not originated by DOE or DoD may be submitted to either agency as provided in this paragraph.

(b) DOE and DoD must coordinate the review of matter marked as or potentially containing RD and FRD, when appropriate. DOE and the DNI must coordinate the review of matter marked as or potentially containing TFNI, when appropriate.

(c) DOE, DoD, or the DNI may refuse to confirm or deny the existence or nonexistence of the requested matter whenever the fact of its existence or nonexistence is itself classified as RD, FRD, or TFNI.

(d) If the information contained in the requested matter has been reviewed for declassification within the past 2 years, another review need not be conducted, but instead the agency may inform the requester of this fact and of the results of the prior review decision.

(e) When paragraph (c) or (d) of this section do not apply, and the information requested under an MDR is not exempt under § 1045.195, the appropriate DOE or DoD authority must conduct a

line-by-line review of matter forwarded under paragraph (a) of this section; identify the information that is classified under current classification guidance as RD, FRD, or TFNI; and respond to the agency that forwarded the matter. The response to the agency who forwarded the request must identify the RD, FRD, or TFNI that is exempt from public release; provide the FOIA exemption or appropriate MDR notation for the RD, FRD, or TFNI withheld; identify the Denying Official for the RD, FRD, or TFNI withheld; and explain the applicable appeal procedures for a FOIA request identified in 10 CFR 1004.8 or for an MDR request identified in §1045.180.

(1) The Denying Officials are as follows:

(i) The Denying Official for matter containing RD or TFNI is the Director, Office of Classification.

(ii) The Denying Official for matter containing FRD is the Director, Office of Classification, or the appropriate DoD Component's Initial Denying Authority (as specified in applicable DoD manuals).

(iii) The Denying Official for Naval Nuclear Propulsion Information is the National Nuclear Security Administration (NNSA) Deputy Director, Deputy Administrator for Naval Reactors.

(f) Upon receipt of the response from DOE or DOD, the agency processing the initial request must inform the requester of the results of the review; provide the name of the Denying Official identified for any RD, FRD, or TFNI withheld; and advise the requester of his or her appeal rights concerning the RD, FRD, or TFNI.

§1045.180 What is the procedure if an agency receives an appeal to a FOIA or MDR concerning the denial of RD, FRD, or TFNI?

(a) If an agency receives a FOIA appeal for RD, FRD, or TFNI denied by DOE within 90 days of receipt of the denial and as required under 10 CFR 1004.8, the appeal must be submitted to the DOE Director, Office of Hearings and Appeals. If an agency receives a FOIA appeal for FRD denied by DoD, it must be submitted to DoD in accordance with applicable DoD FOIA regulations or instructions.

(b) Appeals of an MDR response when DOE denied RD, FRD, or TFNI may be submitted to the agency that replied to the initial MDR request or directly to DOE.

(1) When an MDR appeal concerning DOE-withheld RD, FRD, or TFNI is sent to the agency that replied to the initial MDR request, the appeal must be received by the agency who replied to the initial request within 60 days of receipt of the denial and contain the information required under §1045.210(b). The agency must forward the appeal to the Associate Under Secretary of Environment, Health, Safety and Security at the following address: Associate Under Secretary for Environment, Health, Safety and Security, AU-1/Forrestal Building, U.S. Department of Energy, 1000 Independence Avenue, SW, Washington, DC 20585.

(2) When sent directly to DOE, an MDR appeal must be received by the Associate Under Secretary for Environment, Health, Safety and Security within 60 days of the denial and contain the information required under §1045.210(b).

(3) MDR appeals received by DOE are processed consistent with §1045.220.

(c) If an agency receives an MDR appeal for FRD withheld by DoD, the agency must submit the

appeal to the appropriate DoD Component as identified in applicable DoD manuals.

(d) MDR Final Appeal: The classification and declassification of RD, FRD, and TFNI is governed by the AEA and this part and is not subject to E.O. 13526 or successor orders.

Therefore, MDR appeal decisions by the Associate Under Secretary for Environment, Health, Safety and Security, for RD, FRD, and TFNI and MDR appeal decisions by the appropriate DoD Component appellate authority for FRD are final agency decisions and are not subject to review by ISCAP. However, if matter containing RD, FRD, or TFNI also contains NSI, the NSI portions may be appealed to the ISCAP. Prior to submission to ISCAP, the RD, FRD, or TFNI portions must be deleted.

(e) The FOIA and MDR appeal authorities for RD, FRD, or TFNI are as follows:

(1) The appeal authority for RD and TFNI is the Associate Under Secretary for Environment, Health, Safety and Security.

(2) The appeal authority for FRD is the Associate Under Secretary for Environment, Health, Safety and Security or the appropriate DoD Component appellate authority.

(3) The appeal authority for Naval Nuclear Propulsion Information is the NNSA Deputy Administrator for Naval Reactors.

(f) Declassification proposals resulting from appeal reviews: The appeal review of RD, FRD, and TFNI withheld from a requester is based on current classification guidance. However, as part of the appeal review, the withheld information must be reviewed to determine if it may be a candidate for possible declassification. If declassification of the information appears to be appropriate, then a declassification proposal must be initiated, and the requester must be advised

that additional information will be available if the declassification proposal is approved.

Subpart F – DOE-specific procedures for MDR Requests

§1045.185 What is the purpose of this subpart?

This subpart describes the process for MDR requests submitted for DOE matter classified under E.O. 13526 or successor orders, and the Atomic Energy Act.

§1045.190 How does the public submit an MDR for DOE classified matter?

(a) DOE matter marked as containing NSI, RD, FRD, or TFNI is subject to review for declassification by DOE if the request for a declassification review describes the matter containing the information with sufficient specificity to enable DOE to locate it with a reasonable amount of effort.

(b) The request must be sent to the Director, Office of Classification, AU-60/Germantown Building; U.S. Department of Energy; 1000 Independence Avenue SW., Washington, DC 20585.

§1045.195 Is any matter exempt from MDR requests?

(a) MDR requests are not accepted for:

(1) Matter containing RD technical engineering, blueprints, and design regarding nuclear weapons, if they contain no NSI.

(2) Matter required to be submitted for prepublication review or other administrative process pursuant to an approved nondisclosure agreement;

(3) Matter that is the subject of pending litigation; or

(4) Any matter contained within an operational file exempted from search and review, publication, and disclosure under the FOIA in accordance with law.

(b) Current Presidential records as described in section 3.5(b) of E.O. 13526 or successor orders that are in the custody of DOE are exempt from release in response to an MDR request.

§1045.200 Is there a cost for an MDR review?

Yes. The fees, including waivers, reductions, and categorizations, are the same for an MDR as for providing records under the FOIA as defined in 10 CFR 1004.9.

§1045.205 How does DOE conduct an MDR review?

(a) If DOE has reviewed the information contained in the requested matter for declassification within the past 2 years, DOE need not conduct another review. DOE may instead inform the requester of this fact and of the prior review decision, as well as advise the requester of his or her appeal rights as provided in §1045.210.

(b) DOE performs an MDR as follows:

(1) Conducts a line-by-line review of the matter;

(2) Coordinates the review with appropriate programs and agencies, as necessary;

(3) Identifies and withholds any information that meets the standards for classification;

(4) Declassifies any NSI that no longer meets the standards for classification under E.O. 13526 or successor orders and any RD, FRD, or TFNI that no longer meets the standards for

classification under this part;

(5) If the matter also contains unclassified information that is potentially exempt from release under the FOIA, the matter is further processed to ensure unclassified information that is exempt from public release is identified and that the appropriate officials responsible for denying any unclassified portion of the matter are provided and listed with the notice of denial.

(6) Upon completion of the review, releases the matter to the requester unless withholding is authorized by law. If NSI, RD, FRD, or TFNI, is withheld, the response must advise the requester of his or her appeal rights under §1045.210.

§1045.210 How does a person submit an appeal if DOE withholds classified information in an MDR response?

(a) When the Director, Office of Classification, denies NSI, RD, FRD, or TFNI, or the NNSA Deputy Director, Deputy Administrator for Naval Reactors, denies Naval Nuclear Propulsion information, in matter requested under an MDR, the requester may appeal the determination to the Associate Under Secretary for Environment, Health, Safety and Security. The appeal must be received within 60 days of the receipt of the denial.

(b) The appeal must be in writing and submitted to the Associate Under Secretary for Environment, Health, Safety and Security, AU-1/Forrestal Building, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585. The appeal:

(1) Must contain a concise statement of grounds upon which it is brought, and a description of the relief sought.

(2) Must include a copy of the letter containing the determination being appealed.

(3) Should include a discussion of all relevant authorities that include but are not limited to DOE (and predecessor agencies) rulings, regulations, interpretations, and decisions on appeals, as well as any judicial determinations being relied upon to support the appeal.

§1045.215 How does DOE process an MDR appeal for DOE matter containing NSI?

An appeal for NSI requested under the provisions of E.O. 13526 or successor orders is processed as follows:

(a) The Associate Under Secretary for Environment, Health, Safety and Security must act upon the appeal within 60 working days of its receipt. If no determination on the appeal has been issued at the end of this 60-day period, the requester may consider his or her administrative remedies to be exhausted and may seek a review by the ISCAP. When no determination can be issued within the applicable time limit, the appeal must nevertheless continue to be processed.

On expiration of the time limit, DOE must inform the requester of the reason for the delay, of the date on which a determination may be expected to be issued, and of the requester's right to seek further review by the ISCAP. Nothing in this subpart precludes the appeal authority and the requester from agreeing to an extension of time for the decision on an appeal. The Associate Under Secretary for Environment, Health, Safety and Security must confirm any such agreement in writing and clearly specify the total time agreed upon for the appeal decision.

(b) The Associate Under Secretary for Environment, Health, Safety and Security's action on an appeal must be in writing and set forth the reason for the decision. DOE may refuse to confirm or deny the existence or nonexistence of requested information whenever the fact of its existence

or nonexistence is itself classified under E.O. 13526 or successor orders.

(c) The requester has the right to appeal a final DOE decision, or a failure to provide a determination on an appeal within the allotted time, to the ISCAP for those appeals dealing with NSI. In cases where NSI documents also contain RD, FRD, or TFNI, the portions of the document containing RD, FRD, or TFNI must be deleted prior to forwarding the NSI and unclassified portions to the ISCAP for review.

§1045.220 How does DOE process an MDR appeal for matter containing RD, FRD, or TFNI?

(a) Final appeals for DOE matter containing RD, FRD, or TFNI are submitted to the Associate Under Secretary for Environment, Health, Safety and Security. The Associate Under Secretary for Environment, Health, Safety and Security will coordinate appeals concerning Naval Nuclear Propulsion Information with the NNSA Deputy Administrator for Naval Reactors.

(b) The classification and declassification of RD, FRD, and TFNI is governed by the AEA and this part and is not subject to E.O. 13526 or successor orders. Therefore, appeal decisions concerning RD, FRD, or TFNI by the Associate Under Secretary for Environment, Health, Safety and Security, or the NNSA Deputy Administrator for Naval Reactors are not subject to review by ISCAP.

§1045.225 Are DOE responses to MDR requests available to the public?

Yes. Once the classified and unclassified information exempt from public release is redacted, DOE responses to MDR requests, as well as FOIA requests for matter containing classified information, are posted on DOE's OpenNet System at: <https://www.osti.gov/opennet/>.

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