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DEPARTMENT OF ENERGY

10 CFR Part 712

RIN 1992–AA44

Human Reliability Program

AGENCY: Department of Energy (DOE).

ACTION: Final rule.

SUMMARY: DOE is amending its regulation concerning the Human Reliability Program (HRP). This regulation provides the policies and procedures to ensure that individuals who occupy positions affording unescorted access to certain nuclear materials, nuclear explosive devices, facilities and programs meet the highest standards of reliability and physical and mental suitability. The revisions include some clarification of the procedures and burden of proof applicable in certification review hearings, the addition and modification of certain definitions, and a clear statement that a security concern can be reviewed pursuant to the HRP regulation in addition to the DOE regulations for determining eligibility for access to classified matter or special nuclear material. These revisions are intended to provide better guidance to HRP-certified individuals and to ensure consistency in HRP decision making.

DATES: This rule is effective July 25, 2018.

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I. Background

Pursuant to the Atomic Energy Act of 1954, as amended (the AEA), the DOE owns and leases defense nuclear and other facilities in various locations in the United States. These facilities are operated by contractors with DOE oversight or are operated by DOE. These facilities are involved in (among other activities) researching, testing, producing, disassembling, or transporting nuclear materials. Compromise of these DOE facilities could severely damage national security. To guard against such compromise, DOE established the Human Reliability Program (HRP). The HRP is designed to ensure that individuals who occupy positions affording unescorted access to certain nuclear materials, facilities and programs meet the highest standards of reliability as well as physical and mental suitability, through a system of continuous evaluation of those individuals. The purpose of this continuous evaluation is to identify in a timely manner individuals whose judgment may be impaired by physical or mental/personality disorders; the use of illegal drugs or the abuse of legal drugs or other substances; the abuse of alcohol; or any other condition or circumstance that may represent a reliability, safety or security concern. If any of these conditions or circumstances is identified, the HRP provides for an administrative process, including the opportunity for a certification review hearing that results in either the revocation or reinstatement of the individual's HRP certification.

The part 712 regulation has not been comprehensively updated since it was promulgated in 2004. Two technical amendments to the regulation were made in 2011 and 2013. In 2011, the part 712 regulation was amended to designate the appropriate Undersecretary as the person with the authority to issue a final written decision to recertify or revoke the certification of an individual in the HRP. 76 FR 12271 (Mar. 7, 2011). In 2013, the part 712 regulation was amended to eliminate references to obsolete provisions and to reflect organizational changes within the DOE. 78 FR 56132 (Sep. 12, 2013).

In the years since the HRP regulation was first promulgated, it has become apparent that certain additional updates are necessary in the sections pertaining to security concerns and the process related to certification review hearings. On June 22, 2017, DOE issued a notice of proposed rulemaking (NOPR) to propose the updating of part 712 (82 FR 28412). The NOPR proposed amending the existing rule to: (1) Identify the evidentiary burden applicable to an individual requesting a certification review hearing; (2) clarify that a security concern is reviewable under HRP separate from a review pursuant to 10 CFR part 710; (3) eliminate obsolete references; (4) clarify the processes and procedures to be followed during the removal, revocation, hearing, and appeal stages; and (5) update and add definitions for certain terms used in the regulation that apply to HRP certification.

As described, DOE makes only a few changes to the existing rule that are different than those proposed in the NOPR. Details of those changes to the existing rule are summarized in Sections II and III in this rule. DOE's responses to public comments received on the NOPR are also discussed in Section II in this rule.

II. Summary of Comments and Responses

DOE published a NOPR on June 22, 2017 (82 FR 28412), inviting public comments on the proposed regulatory changes in the NOPR. In response to the publication of the NOPR, DOE received comments from three individuals and

one entity. Two of the individual commenters were generally complimentary about the NOPR but did not provide any specific comments on the NOPR. One individual commenter submitted multiple comments, but the comments do not concern the provisions in part 712 that were proposed for amendment in the NOPR and therefore are not addressed in this section. Another commenter representing the Savannah River Nuclear Solutions (SRNS) submitted 20 comments, of which 13 were determined to be outside the scope of this rulemaking because they do not concern the provisions in part 712 that were proposed for amendment in the NOPR. Those 13 comments are not addressed in this section. The remaining seven SRNS comments that are responsive to the changes proposed in the NOPR are addressed as follows:

1. The commenter expressed concern that the standard for temporary removals by the HRP management official in § 712.19(a)(1) was too subjective and recommended defining specific criteria for the temporary removal.

Response: To further clarify that the criteria identified in § 712.13(c) apply to the HRP management official's decision to temporarily remove an individual, DOE is amending §§ 712.13(d)(1) and 712.19(a)(1) to clarify that all removals must be based on a safety or security concern that is tied to one or more of the types of behaviors or conditions identified in § 712.13(c).

2. The commenter requested clarification as to the types of safety concerns that would warrant a temporary removal.

Response: DOE changed its definition of safety concern from ''any condition, practice, or violation that causes a substantial probability of physical harm, property loss, and/or environmental damage'' to one that causes a ''reasonable probability.'' By changing the threshold from ''substantial'' to ''reasonable'' probability DOE intended to clarify that a common sense approach be taken to determine whether an individual can physically perform his/her duties with due consideration to the factors involved in an incident that may raise safety concerns. The commenter's statement that not every violation of a safety rule or procedure should result in a temporary removal is correct. Only those violations that would raise a concern as to the individual's ability to perform his/her duties would raise the type of safety concern that may lead to a temporary removal.

3. The commenter requested clarification as to whether incumbents and/or applicants can request a certification review hearing.

Response: The regulation provides at § 712.20(a) that an individual who receives notification of the Manager's decision to revoke his or her HRP certification may choose one of two options. The two options are either a request to the Manager for reconsideration or a request to the Manager for a certification review hearing. Only those individuals who have been certified in the HRP and have had their HRP certification revoked can choose one of these two options. Applicants are those individuals who do not have HRP certification; therefore, applicants do not have a certification that can be revoked. Thus, applicants are not entitled to either of the two options.

4. The commenter requested that the rule clarify whether interim clearances would meet the requirement in § 712.11 to have a ''Q'' access authorization.

Response: The rule does not currently permit interim clearances; however, DOE has determined that there should be a process in place for approving exemptions from the requirements in § 712.11 under appropriate circumstances, including the requirement to have a ''Q'' access authorization. Therefore, DOE is amending part 712 to include a process for approving exemptions to requirements in § 712.11. This provision makes clear that exemptions may be granted only when the exemption will not endanger life or property or the common defense and security, and is otherwise consistent with the national interest.

5. The commenter requested clarification as to whether a counterintelligence evaluation is required for everyone nominated for HRP.

Response: A counterintelligence evaluation of HRP certified individuals is performed consistent with the requirements of 10 CFR part 709, which provides that a counterintelligence evaluation, which may include a polygraph examination, is required at least once every five years for individuals in the HRP who are designated based on a risk assessment pursuant to § 709.3(b)(6). DOE is adding language to § 712.11(a)(8) to clarify that the counterintelligence evaluation only applies to designated positions identified pursuant to 10 CFR part 709.

6. The commenter requested clarification on the five-day notification requirement in § 712.19 for temporary removals, including whether email notification would meet the requirement for notification in writing.

Response: The requirement for written notification within five business days was intended to give DOE sufficient time to notify the individual in the event there were extenuating circumstances (*e.g.,* individual is out of work sick or on vacation), but otherwise notice should be made immediately after temporary removal. Also, email notification would meet the requirements for written notification as long as the message makes clear that it serves as written notification required by § 712.19.

7. The commenter requested clarification on how the HRP supervisors and HRP contractor management officials can prepare a case chronology without having access to the personnel security files of HRP certified individuals.

Response: The case chronology is prepared by the HRP management official, not the supervisor. Also, the case chronology is based on information in the HRP file, to which the HRP management official has access. So, lack of access to the personnel security file would not have an impact on an HRP management official's ability to prepare a case chronology. If the HRP management official, or other individual with responsibilities in the HRP program, such as the supervisor, SOMD/Physician/Psychologist needed access to the personnel security file, then access would be permitted in accordance with the Privacy Act of 1974.

III. Description of Proposed Changes

With the exception of the changes described below, the modifications to 10 CFR part 712 adopted in this final rule are described in the Description of Proposed Changes in Section II of DOE's NOPR published in June 22, 2017 (82 FR 28412).

1. In § 712.3, ''Definitions,'' the definition of ''Reinstatement'' is modified for consistency with the definition of ''Restoration.'' Both terms are used to describe the circumstances under which an individual is returned to HRP duties. The new definition of ''Reinstatement'' would clarify that the individual's return to HRP duties is contingent on the HRP management official ensuring that the individual has completed all necessary components of the annual recertification process identified in § 712.11, and any other specific requirements that must be completed in order to return to full HRP duties. The definition of ''Restoration'' already includes this clarification.

2. In § 712.4, ''Exemptions,'' a new section is added to incorporate a process for requesting exemptions from requirements in § 712.11 and DOE

approval of such requests. This change authorizes the cognizant Under Secretary to approve an exemption only if the exemption will not endanger life or property or the common defense and security, and is otherwise consistent with the national interest.

3. In § 712.11, ''General requirements for HRP certification,'' § 712.11(a)(8) is modified to clarify that the requirement for successful completion of a counterintelligence evaluation is only required for HRP positions that are designated pursuant to DOE's regulations in 10 CFR part 709, ''Counterintelligence Evaluation Program,'' § 709.3(b)(6).

4. In § 712.12, ''HRP Implementation,'' § 712.12(e)(1) is modified to replace the title, ''Director, Office of Corporate Security Strategy, Analysis and Special Operations'' with ''Director, Office of Corporate Security Strategy.'' In addition, paragraph (c) is modified to replace the title, ''The Deputy Administrator for Defense Programs, NNSA'' with ''The Under Secretary for Nuclear Security, or his/her designee,''.

5. In § 712.13, ''Supervisory review,'' § 712.13(d)(1) is modified to clarify that the supervisor's immediate removal of an HRP-certified individual for safety and/or security concerns must be based on one of the behaviors identified in paragraph (c) of this section.

6. In § 712.15, ''Management evaluation,'' § 712.15(b) is modified to update the reference to DOE's drug testing program for federal employees. The DOE Order only applies to federal employees and no significant changes were made to DOE's drug testing program.

7. In § 712.16, ''Security review,'' the last sentence of § 712.16(b) is modified to replace the term ''immediately'' with ''temporarily'' to clarify that an individual whose access authorization has been suspended must be temporarily removed by the HRP management official. The current language provides that the individual must be ''immediately'' removed, which may be confused with ''immediate removals'' under § 712.13, which are the responsibility of the supervisor. When an individual's access authorization has been suspended, the HRP management official is notified of the suspension; therefore, it is appropriate that the HRP management official has the responsibility to temporarily remove the individual. After the HRP management official has temporarily removed an individual, it is the HRP certifying official's responsibility to continue the temporary removal pending completion of the DOE personnel security process in accordance with § 712.19(f)(2). Processing of the individual's HRP certification will be stayed pending completion of the DOE personnel security process. If the personnel security process results in the revocation of the individual's access authorization, the individual's HRP certification must be administratively terminated, on the ground that the individual no longer meets the requirement in § 712.11 to hold a ''Q'' access authorization. Administrative termination is not a temporary removal or revocation. Therefore, an administrative termination does not entitle the individual to reconsideration or a certification review hearing under § 712.20. Other circumstances where administrative termination of HRP certification would be appropriate include where an individual no longer has need for HRP certification due to administrative actions such as retirement or moving to a non-HRP position, or where the individual's position is no longer designated as an HRP position under § 712.10.

8. In § 712.19, ''Actions related to removal, revocation and/or reinstatement,'' § 712.19(a)(1) is modified to clarify that temporary removal of an individual by the HRP management official for a safety and/or security concern must be based on one of the behaviors identified in § 712.13(c). In addition, the timing of the HRP management official's preparation of the evaluative report is modified. In the NOPR, DOE proposed that the HRP certifying official, upon recommending revocation to the Manager, would direct the HRP management official to prepare the evaluative report. The rule now requires the Manager, upon a determination that revocation is appropriate, to require the HRP management official to prepare the evaluative report. The evaluative report is the document that sets forth the bases supporting the revocation of an individual's certification; therefore, it should be prepared at the time the Manager determines that revocation is appropriate. Modifications are made to § 712.19(f)(3) and (h) to reflect this change. Consistent with these modifications, modifications are also made to § 712.19(i)(2) to clarify that an evaluative report be prepared, and not revised, when the Manager makes a determination to revoke after the individual was directed to take specified actions under § 712.19(f)(2) or (g)(3).

9. In § 712.20, ''Request for reconsideration or certification review hearing,'' paragraph (a) is modified to clarify that the procedures in this section only apply to revocations made under § 712.19 and not to other types of revocations, such as revocations for failure to cooperate under § 712.25.

10. In § 712.23, ''Office of Hearings and Appeals,'' DOE clarifies in paragraph (c) that the individual's or the Manager's written request for further review of the Administrative Judge's decision must be filed with the cognizant Under Secretary within 20 working days of the receipt of the OHA decision by the individual or the Manager, respectively.

11. In § 712.25, ''Cooperation by the individual,'' DOE modifies paragraph (c) to indicate that if the Manager determines upon reconsideration that revocation was inappropriate, the Manager shall ''reverse revocation.'' Reversing revocation would place the individual in the same HRP status that he or she occupied prior to the revocation. In the NOPR, DOE had proposed that the Manager would direct the individual to be ''reinstated.'' However, use of the term ''reinstated'' may be confused with ''reinstatement,'' which is a defined term and only applies to temporary removals.

IV. Regulatory Review

A. Review Under Executive Order 12866 and 13563

The regulatory action today has been determined not to be a ''significant regulatory action'' under Executive Order 12866, ''Regulatory Planning and Review,'' 58 FR 51735 (October 4, 1993). Accordingly, this rule is not subject to review under the Executive Order by the Office of Information and Regulatory Affairs within the Office of Management and Budget.

DOE has also reviewed the regulation pursuant to Executive Order 13563, issued on January 18, 2011 (76 FR 3281 (Jan. 21, 2011)). Executive Order 13563 is supplemental to and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, agencies are required by Executive Order 13563 to: (1) Propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including

potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and (5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.

DOE emphasizes as well that Executive Order 13563 requires agencies to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible. In its guidance, the Office of Information and Regulatory Affairs has emphasized that such techniques may include identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes. DOE believes that this NOPR is consistent with these principles, including the requirement that, to the extent permitted by law, agencies adopt a regulation only upon a reasoned determination that its benefits justify its costs and, in choosing among alternative regulatory approaches, those approaches maximize net benefits.

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 final rule is expected to be 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.

DOE concludes that this final rule is consistent with the directives set forth in these executive orders. The revisions would streamline DOE's existing procedures, applicable to DOE contractors and Federal employees, for ensuring that persons with unescorted access to certain nuclear materials, nuclear explosive devices, facilities and programs meet the highest standards of reliability and physical and mental suitability. These revisions are intended to provide better guidance to HRP-certified individuals and to ensure consistency in HRP decision making. Specifically, this rule will incorporate a new process for requesting exemptions from requirements in § 712.11 and approval by the cognizant Under Secretary of such requests. For example, this provision would allow, in appropriate circumstances, interim clearances. In addition, in response to comment on the proposed rule (82 FR 28412, June 22, 2017), DOE clarifies that all removals must be based on a safety or security concern that is itself based on one or more of the types of behaviors or conditions identified in § 712.13(c). This clarification ensures that removals are not made for reasons not previously known to the individual. DOE also clarifies that in determining whether an individual can physically perform his/her duties, DOE will consider all the factors involved in an incident that may raise safety concerns, such that not every safety violation would result in a temporary removal from HRP. This provision ensures that the applicable threshold would not require removal where removal is not warranted.

C. Review Under the National Environmental Policy Act

DOE has concluded that promulgation of this rule falls into a class of actions which would not individually or cumulatively have significant impact on the human environment, as determined by DOE's regulations (10 CFR part 1021, subpart D) implementing the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 *et seq.*). Specifically, this rule is categorically excluded from NEPA review because the amendments to the existing rule are strictly procedural (categorical exclusion A6). Therefore, this rule does not require an environmental impact statement or environmental assessment pursuant to NEPA.

D. Review Under the Regulatory Flexibility Act

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

This rule would amend procedures that apply to the certification of individuals in the HRP. The rule applies to individuals, and would not apply to ''small entities,'' as that term is defined in the Regulatory Flexibility Act. As a result, if adopted, the rule would not have a significant economic impact on a substantial number of small entities.

Accordingly, DOE certifies that the rule would not have a significant economic impact on a substantial number of small entities, and, therefore, no regulatory flexibility analysis is required. DOE's certification and supporting statement of factual basis was provided to the Chief Counsel for Advocacy of the Small Business Administration pursuant to 5 U.S.C. 605(b).

E. Review Under the Paperwork Reduction Act

The information collection necessary to administer DOE's HRP program is subject to OMB approval under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* The collection was approved by OMB under OMB approval number 1910–5122. Public reporting burden for the certification is estimated to average 0.08 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

F. Review Under the Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) generally requires a Federal agency to perform a detailed assessment of costs and benefits of any rule imposing a Federal Mandate with costs to State, local or tribal governments, or to the private sector, of $100 million or more. This rulemaking does not impose a Federal mandate on State, local or tribal governments or on the private sector.

G. Review Under the Treasury and Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277), requires Federal agencies to issue a Family Policymaking Assessment for any rule or policy that may affect family well-being. The rule, if adopted, will have no impact on family well-being. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

H. Review Under Executive Order 13132

Executive Order 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 examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and carefully assess the necessity for such actions. DOE has examined this rule and has determined that it does not preempt State law and would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. No further action is required by Executive Order 13132.

I. Review Under Executive Order 12988

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

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

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 implementing 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 Executive Order 13211

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to the Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget, a Statement of Energy Effects for any significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgates or is expected to lead to promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution and use. This rule is not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

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).

V. Approval by the Office of the Secretary

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

List of Subjects in 10 CFR Part 712

Administrative practice and procedure, Alcohol abuse, Classified information, Drug abuse, Government contracts, Government employees, Health, Occupational safety and health, Radiation protection and Security measures.

Issued in Washington, DC, on April 16, 2018.

Rick Perry,

Secretary of Energy.

For the reasons stated in the preamble, DOE is amending part 712 of title 10 of the Code of Federal Regulations as set forth below:

PART 712—HUMAN RELIABILITY PROGRAM

■ 1. The authority citation for part 712 continues to read as follows:

Authority: : 42 U.S.C. 2165; 42 U.S.C. 2201; 42 U.S.C. 5814–5815; 42 U.S.C. 7101 *et seq.;* 50 U.S.C. 2401 *et seq.;* E.O. 10450, 3 CFR 1949–1953 Comp., p. 936, as amended; E.O. 10865, 3 CFR 1959–1963 Comp., p. 398, as amended; 3 CFR Chap. IV.

■ 2. Revise subpart A to read as follows:

Subpart A—Establishment of and Procedures for the Human Reliability Program

General Provisions

Sec. 712.1 Purpose.

712.2 Applicability.
712.3 Definitions.
712.4 Exemptions.

Procedures

712.10 Designation of HRP positions.
712.11 General requirements for HRP certification.
712.12 HRP implementation.
712.13 Supervisory review.
712.14 Medical assessment.
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712.16 Security review.
712.17 Instructional requirements.
712.18 Transferring HRP certification.
712.19 Actions related to removal, revocation and/or reinstatement.
712.20 Request for reconsideration or certification review hearing.
712.21 Appointment of DOE counsel.
712.22 Office of Hearings and Appeals.
712.23 Administrative Judge's decision.
712.24 Final decision by DOE Under Secretary.
712.25 Cooperation by the individual.

Subpart A—Establishment of and Procedures for the Human Reliability Program

General Provisions

§ 712.1 Purpose.

This part establishes the policies and procedures for a Human Reliability Program (HRP) in the Department of Energy (DOE), including the National Nuclear Security Administration (NNSA). The HRP is a security and safety reliability program designed to ensure that individuals who occupy positions affording access to certain materials, nuclear explosive devices, facilities, and programs meet the highest standards of reliability and physical and mental suitability. This objective is accomplished under this part through a system of continuous evaluation that identifies individuals whose judgment and reliability may be impaired by physical or mental/personality disorders, alcohol abuse, use of illegal drugs or the abuse of legal drugs or other substances, or any other condition or circumstance that may be of a security or safety concern.

§ 712.2 Applicability.

The HRP applies to all applicants for, or current employees of DOE or NNSA or a DOE or NNSA contractor or subcontractor in a position defined or designated under § 712.10 of this subpart as an HRP position.

§ 712.3 Definitions.

The following definitions are used in this part:

Access means:

(1) A situation that may provide an individual proximity to or control over Category I special nuclear material (SNM); or

(2) The proximity to a nuclear explosive and/or Category I SNM that allows the opportunity to divert, steal, tamper with, and/or damage the nuclear explosive or material in spite of any controls that have been established to prevent such unauthorized actions.

Alcohol means the intoxicating agent in beverage alcohol, ethyl alcohol, or other low molecular weight alcohol.

Alcohol abuse means consumption of any beverage, mixture, or preparation, including any medication containing alcohol that results in impaired social or occupational functioning.

Alcohol concentration means the alcohol in a volume of breath expressed in terms of grams of alcohol per 210 liters of breath as indicated by a breath test.

Alcohol use disorder means a maladaptive pattern in which a person's intake of alcohol is great enough to damage or adversely affect physical or mental health or personal, social, or occupational function; or when alcohol has become a prerequisite to normal function.

Associate Under Secretary for Environment, Health, Safety and Security means the DOE individual with responsibility for policy and quality assurance for DOE occupational medical programs.

Case chronology means a written recitation of all actions that support a recommendation to revoke an individual's HRP certification under § 712.19.

Certification means the formal action the HRP certifying official takes that permits an individual to perform HRP duties after it is determined that the individual meets the requirements for certification under this part.

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

Designated Physician means a licensed doctor of medicine or osteopathy who has been nominated by the Site Occupational Medical Director (SOMD) and approved by the Manager or designee, with the concurrence of the Associate Under Secretary for Environment, Health, Safety and Security or his or her designee to provide professional expertise in occupational medicine for the HRP.

Designated Psychologist means a licensed Ph.D., or Psy.D., in clinical psychology who has been nominated by the SOMD and approved by the Manager or designee, with the concurrence of the Associate Under Secretary for Environment, Health, Safety and Security or his or her designee to provide professional expertise in the area of psychological assessment for the HRP.

Diagnostic and Statistical Manual of Mental Disorders means the current version of the American Psychiatric Association's manual containing definitions of psychiatric terms and diagnostic criteria of mental disorders.

Drug abuse means use of an illegal drug or misuse of legal drugs.

Evaluative report means the document that sets forth the bases supporting the revocation of an individual's certification.

Evidential-grade breath alcohol device means a device that conforms to the model standards for an evidential breath-testing device as listed on the Conforming Products List of Evidential Breath Measurement Devices published by the National Highway Traffic Safety Administration (NHTSA).

Flashback means an involuntary, spontaneous recurrence of some aspect of a hallucinatory experience or perceptual distortion that occurs long after taking the hallucinogen that produced the original effect; also referred to as hallucinogen persisting perception disorder.

Hallucinogen means a drug or substance that produces hallucinations, distortions in perception of sights and sounds, and disturbances in emotion, judgment, and memory.

HRP candidate means an individual being considered for assignment to an HRP position.

HRP-certified individual means an individual who has successfully completed the HRP requirements.

HRP certifying official means the Manager or the Manager's designee who certifies, recertifies, temporarily removes, reviews the circumstances of

an individual's removal from an HRP position, and directs reinstatement.

HRP management official means an individual designated by the DOE or a DOE contractor, as appropriate, who has programmatic responsibility for HRP positions.

Illegal drug means a controlled substance, as specified in Schedules I through V of the Controlled Substances Act, 21 U.S.C. 811 and 812; the term does not apply to the use of a controlled substance in accordance with the terms of a valid prescription, or other uses authorized by Federal law.

Impaired or *impairment* means a decrease in functional capacity of a person that is caused by a physical, mental, emotional, substance abuse, or behavioral disorder.

Incident means an unplanned, undesired event that interrupts the completion of an activity and that may include property damage or injury.

Job task analysis means the formal process of defining the requirements of a position and identifying the knowledge, skills, and abilities necessary to effectively perform the duties of the position.

Manager means the senior Federal line manager at a departmental site or Federal office with HRP-designated positions.

Material access area means a type of Security Area that is authorized to contain a Category I quantity of special nuclear material and that has specifically defined physical barriers, is located within a Protected Area, and is subject to specific access controls.

Medical assessment means an evaluation of an HRP candidate and HRP-certified individual's present health status and health risk factors by means of:

(1) Medical history review;

(2) Job task analysis;

(3) Physical examination;

(4) Appropriate laboratory tests and measurements; and

(5) Appropriate psychological and psychiatric evaluations.

Nuclear explosive means an assembly of fissionable and/or fusionable materials and main charge high explosive parts or propellants that is capable of producing a nuclear detonation.

Nuclear explosive duties means work assignments that allow custody of a nuclear explosive or access to a nuclear explosive device or area.

Occurrence means any event or incident that is a deviation from the planned or expected behavior or course of events in connection with any DOE or DOE-controlled operation if the deviation has environmental, public health and safety, or national security protection significance, including (but not limited to) incidents involving:

(1) Injury or fatality to any person involving actions of a DOE employee or contractor employee;

(2) An explosion, fire, spread of radioactive material, personal injury or death, or damage to property that involves nuclear explosives under DOE jurisdiction;

(3) Accidental release of pollutants that results from, or could result in, a significant effect on the public or environment; or

(4) Accidental release of radioactive material above regulatory limits.

Psychological assessment or test means a scientifically validated instrument designed to detect psychiatric, personality, and behavioral tendencies that would indicate problems with reliability and judgment.

Random alcohol testing means the unscheduled, unannounced alcohol testing of randomly selected employees by a process designed to ensure that selections are made in a nondiscriminatory manner.

Random drug testing means the unscheduled, unannounced drug testing of randomly selected employees by a process designed to ensure that selections are made in a nondiscriminatory manner.

Reasonable suspicion means a suspicion based on an articulable belief that an individual uses illegal drugs or is under the influence of alcohol, drawn from reasonable inferences from particular facts, as detailed further in part 707 of this title.

Recertification means the action the HRP certifying official takes annually, not to exceed 12 months, that permits an employee to remain in the HRP and perform HRP duties.

Reinstatement means the action taken after it has been determined that an employee who has been temporarily removed from the HRP meets the certification requirements of this part and can be returned to HRP duties, contingent on the individual completing any and all components of the annual recertification process under § 712.11 and any other specific requirements that must be completed in order to return to full HRP duties.

Reliability means an individual's ability to adhere to security and safety rules and regulations.

Restoration means the actions necessary to restore an individual's HRP duties after a final decision has been made by the cognizant Under Secretary or his/her designee to overturn the revocation decision. The restoration of HRP duties is contingent on the individual completing any and all components of the annual recertification process under § 712.11 and any other specific requirements that must be completed in order to return to full HRP duties.

Safety concern means any condition, practice, or violation that causes a reasonable probability of physical harm, property loss, and/or environmental impact.

Security concern means the presence of information regarding an individual that raises a question as to whether HRP certification and recertification would endanger the common defense and security and would be clearly consistent with the national interest.

Semi-structured interview means an interview by a Designated Psychologist, or a psychologist under his or her supervision, who has the latitude to vary the focus and content of the questions depending on the interviewee's responses.

Site Occupational Medical Director (SOMD) means the physician responsible for the overall direction and operation of the occupational medical program at a particular site or program.

Supervisor means the individual who has oversight and organizational responsibility for a person holding an HRP position, and whose duties include evaluating the behavior and performance of the HRP-certified individual.

Transfer means an HRP-certified individual moving from one site to another site.

Unacceptable damage means an incident that could result in a nuclear detonation; high-explosive detonation or deflagration from a nuclear explosive; the diversion, misuse, or removal of Category I special nuclear material; or an interruption of nuclear explosive operations with a significant impact on national security.

Unsafe practice means either a human action departing from prescribed hazard controls or job procedures or practices, or an action causing a person unnecessary exposure to a hazard.

§ 712.4 Exemptions.

The Department is authorized to grant exemptions from the requirements in § 712.11 of this part as it determines are authorized by law. Exemptions from requirements in this part are allowed only on a case-by-case basis. All requests for an exemption should be submitted in writing from the Manager to the Associate Under Secretary for Environment, Health, Safety and Security for coordination, and approval by the cognizant Under Secretary. A request for an exemption shall be

approved only if the cognizant Under Secretary determines that the exemption will not endanger life or property or the common defense and security, and is otherwise consistent with the national interest. The procedures in this section shall not be used to establish stricter recertification standards than those required by § 712.11.

Procedures

§ 712.10 Designation of HRP positions.

(a) HRP certification is required for each individual assigned to, or applying for, a position that:

(1) Affords access to Category I SNM or has responsibility for transportation or protection of Category I quantities of SNM;

(2) Involves nuclear explosive duties or has responsibility for working with, protecting, or transporting nuclear explosives, nuclear devices, or selected components;

(3) Affords access to information concerning vulnerabilities in protective systems when transporting nuclear explosives, nuclear devices, selected components, or Category I quantities of SNM; or

(4) Is not included in paragraphs (a)(1) through (3) of this section but affords the potential to significantly impact national security or cause unacceptable damage and is approved pursuant to paragraph (b) of this section.

(b) The Manager or the HRP management official may nominate positions for the HRP that are not specified in paragraphs (a)(1) through (3) of this section or that have not previously been designated HRP positions. All such nominations must be submitted to and approved by either the NNSA Administrator, his or her designee, the Associate Under Secretary for Environment, Health, Safety and Security or the appropriate Lead Program Secretarial Officer, or his or her designee.

(c) Before nominating a position for designation as an HRP position, the Manager or the HRP management official must analyze the risks the position poses for the particular operational program. If the analysis shows that more restrictive physical, administrative, or other controls could be implemented that would prevent the position from being designated an HRP position, those controls will be implemented, if practicable.

(d) Nothing in this part prohibits contractors from establishing stricter employment standards for individuals who are nominated to DOE for certification or recertification in the HRP.

§ 712.11 General requirements for HRP certification.

(a) The following requirements apply to each individual applying for or in an HRP position:

(1) A DOE ''Q'' access authorization;

(2) Signed releases, acknowledgments, and waivers to participate in the HRP on forms provided by DOE;

(3) Completion of initial and annual HRP instruction as provided in § 712.17;

(4) Successful completion of an initial and annual supervisory review, medical assessment, management evaluation, and a DOE personnel security review;

(5) No use of any hallucinogen in the preceding 5 years and no experience of flashback resulting from the use of any hallucinogen more than 5 years before applying for certification or recertification;

(6) An initial drug test and random drug tests for the use of illegal drugs at least once each 12 months;

(7) An initial alcohol test and random alcohol tests at least once each 12 months; and

(8) For designated positions, identified pursuant to 10 CFR part 709, successful completion of a counterintelligence evaluation, which may include a counterintelligence-scope polygraph examination in accordance with DOE's Polygraph Examination Regulation, 10 CFR part 709, and any subsequent revisions to that regulation.

(b) Each HRP candidate must be certified in the HRP before being assigned to HRP duties and must be recertified annually, not to exceed 12 months between recertifications.

(c) Individuals in newly identified HRP positions must immediately sign the releases, acknowledgments, and waivers to participate in the HRP and complete initial instruction on the importance of security, safety, reliability, and suitability. If these requirements are not met, the individual must be removed from the HRP position. All remaining HRP requirements listed in paragraph (a) of this section must be completed in an expedited manner.

(d) Alcohol consumption is prohibited within an eight-hour period preceding scheduled work for individuals performing nuclear explosive duties and for individuals in specific positions designated by either the Manager, the NNSA Administrator, his or her designee, or the appropriate Lead Program Secretarial Officer, or his or her designee.

(e) Individuals reporting for unscheduled nuclear explosive duties and those specific positions designated by either the Manager, the NNSA Administrator or his or her designee, or the appropriate Lead Program Secretarial Officer, or his or her designee, will be asked prior to performing any type of work if they have consumed alcohol within the preceding eight-hour period. If they answer ''no,'' they may perform their assigned duties but still may be tested.

(f) Any doubt as to an HRP candidate's or HRP certified individual's eligibility for certification shall be resolved against the candidate or individual in favor of national security and/or safety.

§ 712.12 HRP implementation.

(a) The implementation of the HRP is the responsibility of the appropriate Manager or his or her designee.

(b) The HRP Management Official must prepare an HRP implementation plan and submit it to the applicable Manager for review and approval. The implementation plan must:

(1) Be reviewed and updated every 2 years;

(2) Include the four annual components of the HRP process: supervisory review, medical assessment, management evaluation (which includes random drug and alcohol testing), and a DOE personnel security determination; and

(3) Include the HRP instruction and education component described in § 712.17 of this part.

(c) The Under Secretary for Nuclear Security, or his/her designee, must:

(1) Provide advice and assistance to the Associate Under Secretary for Environment, Health, Safety and Security regarding policies, standards, and guidance for all nuclear explosive duty requirements; and

(2) Be responsible for implementation of all nuclear explosive duty safety requirements.

(d) The Associate Under Secretary for Environment, Health, Safety and Security, or designee, is responsible for HRP policy and must:

(1) Ensure consistency of the HRP throughout the DOE and NNSA;

(2) Review and comment on all HRP implementation plans to ensure consistency with policy; and

(3) Provide policies and guidance, including instructional materials, to NNSA and non-NNSA field elements concerning the HRP, as appropriate.

(e) The Manager must:

(1) Review and approve the HRP implementation plan for sites/facilities under their cognizance and forward the plan to the Director, Office of Corporate Security Strategy, or designee; and

(2) Ensure that the HRP is implemented at the sites/facilities under their cognizance.

(f) The HRP certifying official must:

(1) Approve placement, certification, reinstatement, and recertification of individuals into HRP positions; for unresolved temporary removals, follow the process in § 712.19(f);

(2) Ensure that instructional requirements are implemented;

(3) Immediately notify (for the purpose of limiting access) the appropriate HRP management official of a personnel security action that results in the suspension of access authorization; and

(4) Ensure that the supervisory review, medical assessment, and management evaluation, including drug and alcohol testing, are conducted on an annual basis (not to exceed 12 months).

(g) Individuals assigned to HRP duties must:

(1) Execute HRP releases, acknowledgments, and waivers to facilitate the collection and dissemination of information, the performance of drug and alcohol testing, and medical examinations;

(2) Notify the Designated Physician, the Designated Psychologist, or the SOMD immediately of a physical or mental condition requiring medication or treatment;

(3) Report any observed or reported behavior or condition of another HRP-certified individual that could indicate a reliability concern, including those behaviors and conditions listed in § 712.13(c), to a supervisor, the Designated Physician, the Designated Psychologist, the SOMD, or the HRP management official; and

(4) Report to a supervisor, the Designated Physician, the Designated Psychologist, the SOMD, or the HRP management official, any behavior or condition, including those listed in § 712.13(c), that may affect his or her ability to perform HRP duties.

§ 712.13 Supervisory review.

(a) The supervisor must ensure that each HRP candidate and each individual occupying an HRP position but not yet HRP certified executes the appropriate HRP releases, acknowledgments, and waivers. If these documents are not executed:

(1) The request for HRP certification may not be further processed until these requirements are completed; and

(2) The individual is immediately removed from the position.

(b) Each supervisor of HRP-certified personnel must conduct an annual review of each HRP-certified individual during which the supervisor must evaluate information, based on his or her personal knowledge that is relevant to the individual's suitability to perform HRP tasks in a reliable and safe manner.

(c) The supervisor must report any concerns resulting from his or her review to the appropriate HRP management official. Types of behavior and conditions that would indicate a concern include, but are not limited to:

(1) Psychological or physical disorders that impair performance of assigned duties;

(2) Conduct that warrants referral for a criminal investigation or results in arrest or conviction;

(3) Indications of deceitful or delinquent behavior;

(4) Attempted or threatened destruction of property or life;

(5) Suicidal tendencies or attempted suicide;

(6) Use of illegal drugs or the abuse of legal drugs or other substances;

(7) Alcohol use disorders;

(8) Recurring financial irresponsibility;

(9) Irresponsibility in performing assigned duties;

(10) Inability to deal with stress, or the appearance of being under unusual stress;

(11) Failure to comply with work directives, hostility or aggression toward fellow workers or authority, uncontrolled anger, violation of safety or security procedures, or repeated absenteeism;

(12) Significant behavioral changes, moodiness, depression, or other evidence of loss of emotional control; and

(13) Any unusual conduct or being subject to any circumstances which tend to show that the individual is not reliable.

(d) A supervisor must immediately remove an individual from HRP duties:

(1) When the supervisor has a reasonable belief that the individual is not reliable, based on either a safety or security concern based on one or more of the types of behaviors and conditions identified in § 712.13(c);

(2) When the individual does not obtain HRP recertification; or

(3) When requested to do so by the HRP certifying official and/or HRP management official.

(e) The supervisor must contact the appropriate personnel office for guidance as to any actions that should occur as a result of the immediate removal.

(f) Immediate removal: If the supervisor immediately removes an HRP-certified individual for any reason specified in this part, he or she must, at a minimum:

(1) Require the individual to stop performing HRP duties;

(2) Take action to ensure the individual is denied both escorted and unescorted access to the material access areas; and

(3) Notify, within 24 hours, the HRP management official of the immediate removal. The HRP management official shall take actions consistent with § 712.19.

§ 712.14 Medical assessment.

(a) *Purpose.* The HRP medical assessment is performed to evaluate whether an HRP candidate or an HRP-certified individual:

(1) Represents a security concern; or

(2) Has a condition that may prevent the individual from performing HRP duties in a reliable and safe manner.

(b) *When performed.* (1) The medical assessment is performed initially on HRP candidates and individuals occupying HRP positions who have not yet received HRP certification. The medical assessment is performed annually for HRP-certified individuals, or more often as required by the SOMD.

(2) The Designated Physician and other examiners working under the direction of the Designated Physician also will conduct an evaluation:

(i) If an HRP-certified individual requests an evaluation (*i.e.,* self-referral); or

(ii) If an HRP-certified individual is referred by management for an evaluation.

(c) *Process.* The Designated Physician, under the supervision of the SOMD, is responsible for the medical assessment of HRP candidates and HRP-certified individuals. In performing this responsibility, the Designated Physician or the SOMD must integrate the medical evaluations, available testing results, psychological evaluations, any psychiatric evaluations, a review of current legal drug use, and any other relevant information. This information is used to determine if a reliability, safety, or security concern exists and if the individual is medically qualified for his or her assigned duties.

(d) *Evaluation.* The Designated Physician, with the assistance of the Designated Psychologist, must determine the existence or nature of any of the following:

(1) Physical or medical disabilities, such as a lack of visual acuity, defective color vision, impaired hearing, musculoskeletal deformities, and neuromuscular impairment;

(2) Mental/personality disorders or behavioral problems, including alcohol and other substance use disorders, as described in the *Diagnostic and Statistical Manual of Mental Disorders;*

(3) Use of illegal drugs or the abuse of legal drugs or other substances, as identified by self-reporting or by

medical or psychological evaluation or testing;

(4) Threat of suicide, homicide, or physical harm; or

(5) Medical conditions such as cardiovascular disease, endocrine disease, cerebrovascular or other neurologic disease, or the use of drugs for the treatment of conditions that may adversely affect the judgment or ability of an individual to perform assigned duties in a reliable and safe manner.

(e) *Job task analysis.* Before the initial or annual medical assessment and psychological evaluation, employers must provide, to both the Designated Physician and Designated Psychologist, a job task analysis for each HRP candidate or HRP-certified individual. Medical assessments and psychological evaluations may not be performed if a job task analysis has not been provided.

(f) *Psychological evaluations.* Psychological evaluations must be conducted:

(1) For initial HRP certification. This psychological evaluation consists of a psychological assessment (test), approved by the Associate Under Secretary for Environment, Health, Safety and Security or his or her designee, and a semi-structured interview.

(2) For recertification: This psychological evaluation consists of a semi-structured interview. A psychological assessment (test) may also be conducted as warranted.

(3) Every third year: The medical assessment for recertification must include a psychological assessment (test) approved by the Associate Under Secretary for Environment, Health, Safety and Security or his or her designee. This requirement can be implemented over a 3-year period for individuals who are currently in an HRP position.

(4) When additional psychological or psychiatric evaluations are required by the SOMD to resolve any concerns.

(g) *Return to work after sick leave.* HRP-certified individuals who have been on sick leave for five or more consecutive days, or an equivalent time period for those individuals on an alternative work schedule, must report in person to the Designated Physician, the Designated Psychologist, or the SOMD before being allowed to return to normal duties. The Designated Physician, the Designated Psychologist, or the SOMD must provide a written recommendation to the appropriate HRP supervisor regarding the individual's return to work. An HRP-certified individual also may be required to report to the Designated Physician, the Designated Psychologist, or the SOMD for written recommendation to return to normal duties after any period of sick leave.

(h) *Temporary removal or restrictions.* The Designated Physician, the Designated Psychologist, or the SOMD may recommend temporary removal of an individual from an HRP position or restrictions on an individual's work in an HRP position if a medical condition or circumstance develops that affects the individual's ability to perform assigned job duties. The Designated Physician, the Designated Psychologist, or the SOMD must immediately recommend medical removal or medical restrictions in writing to the appropriate HRP management official. If the HRP management official concurs, he or she will then notify the appropriate HRP certifying official. To reinstate or remove such restrictions, the Designated Physician, the Designated Psychologist, or the SOMD must make written recommendation to the HRP management official. The HRP management official will then notify the appropriate HRP certifying official.

(i) *Medical evaluation after rehabilitation.* (1) Individuals who request reinstatement in the HRP following rehabilitative treatment for alcohol use disorder, use of illegal drugs, or the abuse of legal drugs or other substances, must undergo an evaluation, as prescribed by the SOMD, to ensure continued rehabilitation and adequate capability to perform their job duties.

(2) The HRP certifying official may reinstate HRP certification of an individual who successfully completes an SOMD-approved drug or alcohol rehabilitation program. Recertification is based on the SOMD's follow-up evaluation and recommendation. The individual is also subject to unannounced follow-up tests for illegal drugs or alcohol and relevant counseling for 3 years.

(j) *Medication and treatment.* HRP-certified individuals are required to immediately report to the Designated Physician, the Designated Psychologist, or the SOMD any physical or mental condition requiring medication or treatment. The Designated Physician, the Designated Psychologist, or the SOMD determines if temporary removal of the individual from HRP duties is recommended and follows the procedures pursuant to paragraph (h) of this section.

§ 712.15 Management evaluation.

(a) *Evaluation components.* An evaluation by the HRP management official is required before an individual can be considered for initial certification or recertification in the HRP. This evaluation must be based on a careful review of the results of the supervisory review, medical assessment, and drug and alcohol testing. If a safety or security concern is identified with respect to an HRP-certified individual, the HRP management official must take actions consistent with § 712.19(a).

(b) *Drug testing.* All HRP candidates and HRP-certified individuals are subject to testing for the use of illegal drugs, as required by this part. Testing must be conducted in accordance with 10 CFR part 707, the workplace substance abuse program for DOE contractor employees, and DOE Order 343.1, ''Federal Substantive Abuse Testing Program,'' for DOE employees. The program must include an initial drug test, random drug tests at least once every 12 months from the previous test, and tests of HRP-certified individuals if they are involved in an incident, unsafe practice, occurrence, or based on reasonable suspicion. Failure to appear for unannounced testing within 2 hours of notification constitutes a refusal to submit to a test. Sites may establish a shorter time period between notification and testing but may not exceed the two-hour requirement. If an HRP-certified individual refuses to submit to a drug test or, based on a drug test, is determined to use illegal drugs, the supervisor must immediately remove the individual from HRP duties and take actions consistent with § 712.13(f).

(c) *Alcohol testing.* All HRP candidates and HRP-certified individuals are subject to testing for the use of alcohol, as required by this part. The alcohol testing program must include, as a minimum, an initial alcohol test prior to performing HRP duties and random alcohol tests at least once every 12 months from the previous test, and tests of HRP-certified individuals if they are involved in an incident, unsafe practice, occurrence, or based on reasonable suspicion. The supervisor who has been informed that an HRP-certified individual's confirmatory breath alcohol test result is at or above an alcohol concentration of 0.02 percent shall send that individual home and not allow that individual to perform HRP duties for 24 hours, and take all appropriate administrative action consistent with § 712.13(f).

(1) Breath alcohol testing must be conducted by a certified breath alcohol technician and conform to the DOT procedures (49 CFR part 40, Procedures for Transportation Workplace Drug and Alcohol Testing Programs, subparts J through N) for use of an evidential-grade breath analysis device approved for

0.02/0.04 cutoff levels, which conforms to the DOT model specifications and the most recent ''Conforming Products List'' issued by NHTSA.

(2) An individual required to undergo DOT alcohol testing is subject to the regulations of the DOT. If such an individual's blood alcohol level exceeds DOT standards, the individual's employer may take appropriate disciplinary action.

(3) The following constitutes a refusal to submit to a test and shall be considered as a positive alcohol concentration test of 0.02 percent, which requires the individual be sent home and not allowed to perform HRP duties for 24 hours:

(i) Failure to appear for unannounced testing within 2 hours of notification (or established shorter time for the specific site);

(ii) Failure to provide an adequate volume of breath in 2 attempts without a valid medical excuse; and

(iii) Engaging in conduct that clearly obstructs the testing process, including failure to cooperate with reasonable instructions provided by the testing technician.

(d) *Occurrence testing.* (1) When an HRP-certified individual is involved in, or associated with, an occurrence requiring immediate reporting to the DOE, the following procedures must be implemented:

(i) Testing for the use of illegal drugs in accordance with the provisions of the DOE policies implementing Executive Order 12564, and 10 CFR part 707 or DOE Order 3792.3, which establish workplace substance abuse programs for contractor and DOE employees, respectively.

(ii) Testing for use of alcohol in accordance with this section.

(2) Testing must be performed as soon as possible after an occurrence that requires immediate notification or reporting.

(3) The supervisor must immediately remove an HRP-certified individual from HRP duties if the individual refuses to undergo the testing required by this subsection.

(e) *Testing for reasonable suspicion.* (1) If the behavior of an individual in an HRP position creates the basis for reasonable suspicion of the use of an illegal drug or alcohol, that individual must be tested if two or more supervisory or management officials, at least one of whom is in the direct chain of supervision of the individual or is the Designated Physician, the Designated Psychologist, or the SOMD, agree that such testing is appropriate.

(2) Reasonable suspicion must be based on an articulable belief, drawn from facts and reasonable inferences from those particular facts that an HRP-certified individual is in possession of, or under the influence of, an illegal drug or alcohol. Such a belief may be based on, among other things:

(i) Observable phenomena, such as direct observation of the use or possession of illegal drugs or alcohol, or the physical symptoms of being under the influence of drugs or alcohol;

(ii) A pattern of abnormal conduct or erratic behavior;

(iii) Information provided by a reliable and credible source that is independently corroborated; or

(iv) Detection of alcohol odor on the breath.

(f) *Counterintelligence evaluation.* HRP candidates and, when selected, HRP-certified individuals, must submit to and successfully complete a counterintelligence evaluation, which may include a polygraph examination in accordance with 10 CFR part 709, Polygraph Examination Regulations and any subsequent revisions to that regulation.

§ 712.16 Security review.

(a) A personnel security specialist must review the personnel security file of every HRP candidate and every HRP-certified individual up for certification or recertification.

(b) If the personnel security file review is favorable, this information must be forwarded to the HRP certifying official and so noted on the certification form. If the review reveals a security concern, or if a security concern is identified during another component of the HRP process, the HRP certifying official must be notified, and the personnel security specialist must evaluate the concern in accordance with 10 CFR part 710. If a final determination is made by DOE personnel security to suspend access authorization, the HRP management official must be notified, the individual shall be temporarily removed from the HRP position, the HRP certifying official notified, and the information noted on the certification form.

(c) A favorable adjudication of security concerns under 10 CFR part 710 does not require granting or continuing HRP certification. Security concerns can be reviewed and evaluated for purposes of granting or continuing HRP certification even if the concerns have been favorably resolved under part 710.

(d) Any mental/personality disorder or behavioral issues found in a personnel security file, which could impact an HRP candidate or HRP-certified individual's ability to perform HRP duties, may be provided in writing to the SOMD, Designated Physician, and Designated Psychologist previously identified for receipt of this information. Medical personnel may not share any information obtained from the personnel security file with anyone who is not an HRP certifying official, except as consistent with the Privacy Act of 1974.

(e) If the DOE personnel security review is not completed within the 12-month time period for recertification and the individual's access authorization is not suspended, the HRP certification form shall be forwarded to the HRP certifying official for recertification or temporary removal, pending completion of the personnel security review.

§ 712.17 Instructional requirements.

(a) HRP management officials at each DOE site or facility with HRP positions must establish an initial and annual HRP instruction and education program. The program must provide:

(1) HRP candidates, HRP-certified individuals, supervisors, and managers, and supervisors and managers responsible for HRP positions with the knowledge described in paragraph (b)(1) of this section; and

(2) For all HRP medical personnel, a detailed explanation of HRP duties and responsibilities.

(b) The following program elements must be included in initial and annual instruction. The elements may be tailored to accommodate group differences and refresher training needs:

(1) The objectives of the HRP and the role and responsibilities of each individual in the HRP to include recognizing and responding to behavioral change and aberrant or unusual behavior that may result in a risk to national security or nuclear explosive safety; recognizing and reporting safety and/or security concerns, physical, mental, or emotional conditions that could adversely affect the performance of HRP duties or that require treatment by a doctor, physician's assistant or other health care professional; and prescription drug use; and an explanation of return-to-work requirements and continuous evaluation of HRP participants; and

(2) For those who have nuclear explosive responsibilities, a detailed explanation of duties and safety requirements.

§ 712.18 Transferring HRP certification.

(a) For HRP certification to be transferred, the individual must currently be certified in the HRP.

(b) Transferring the HRP certification from one site to another requires the following before the individual is allowed to perform HRP duties at the new site:

(1) Verify that the individual is currently certified in the HRP and is transferring into a designated HRP position;

(2) Incorporate the individual into the new site's alcohol and drug-testing program;

(3) Ensure that the 12-month time period for HRP requirements that was established at the prior site is not exceeded; and

(4) Provide site-specific instruction.

(c) Temporary assignment to HRP positions at other sites requires verification that the individual is currently enrolled in the HRP and has completed all site-specific instruction. The individual is required to return to the site that maintains his or her HRP certification for recertification.

§ 712.19 Actions related to removal, revocation and/or reinstatement.

(a) *Temporary removal.* The HRP management official shall direct the temporary removal of an HRP-certified individual when the management official:

(1) Identifies, during the course of the management evaluation, a safety or security concern that warrants such removal based on one or more of the types of behaviors and conditions identified in § 712.13(c);

(2) Receives a supervisor's written notice of the immediate removal of an HRP-certified individual; or

(3) Receives a recommendation from the Designated Physician, the Designated Psychologist, or the SOMD to medically remove an HRP-certified individual consistent with § 712.14(h).

(b) The temporary removal of an HRP-certified individual from HRP duties pending a determination of the individual's reliability is an interim, precautionary action and does not constitute a determination that the individual is not fit to perform his or her required duties. Removal is not, in itself, cause for loss of pay, benefits, or other changes in employment status. Immediately upon directing a temporary removal, the HRP management official must notify the supervisor to take appropriate actions consistent with an immediate removal. Within five (5) business days of placing the individual on a temporary removal, the HRP management official must notify the individual in writing that s/he is temporarily removed.

(c) If temporary removal is based on derogatory information that is a security concern, the HRP management official must notify the HRP certifying official and the applicable DOE personnel security office.

(d) If temporary removal is based on a medical concern, the HRP management official must obtain a recommendation from the Designated Physician, Designated Psychologist, or the SOMD consistent with § 712.14(h).

(e) If the HRP management official determines, after conducting an evaluation of the circumstances or information that led to the temporary removal, that an individual who has been temporarily removed continues to meet the requirements for certification, the HRP management official must:

(1) Direct that the supervisor reinstate the individual and provide written explanation of the reasons and factual bases for the action;

(2) Notify the individual; and

(3) Notify the HRP certifying official.

(f) If the HRP management official determines that an individual who has been temporarily removed does not meet the HRP requirements for certification, the HRP management official must prepare a case chronology that explains why the individual does not meet the requirement for certification and forward it to the HRP certifying official. The HRP management official's determination that an individual does not meet certification requirement must be based on one or more of the types of behaviors and conditions identified in § 712.13(c). The HRP certifying official must review the case chronology from the HRP management official and take one of the following actions:

(1) Direct that the supervisor reinstate the individual, with any applicable medical restrictions, provide written explanation of the reasons and factual bases for the action, and notify the individual;

(2) Direct continuation of the temporary removal pending completion of specified actions (*e.g.,* medical assessment, treatment) to resolve the concerns about the individual's reliability; or

(3) Recommend to the Manager the revocation of the individual's certification and provide the case chronology to the Manager. If the HRP certifying official is the Manager, he or she should take actions consistent with paragraph (g)(2) of this section.

(g) The Manager, on receiving the HRP management official's case chronology and the HRP certifying official's recommendation (if any), must take one of the following actions:

(1) Direct that the supervisor reinstate the individual, provide written explanation of the reasons and factual bases for the action, and notify the individual;

(2) Direct revocation of the individual's HRP certification, in accordance with paragraph (h) of this section; or

(3) Direct continuation of the temporary removal pending completion of specified actions (*e.g.,* medical assessment, treatment) to resolve the concerns about the individual's reliability.

(h) Notification of Manager's initial decision: If the action is revocation, the Manager must direct the HRP management official to prepare an evaluative report. The appropriate DOE or NNSA counsel must review the evaluative report for legal sufficiency. Upon completion of the evaluative report, the Manager must send a letter by certified mail (return receipt requested) or hand deliver it with record of delivery to the individual whose certification is revoked notifying him or her of the reasons for the revocation and the options for review. The evaluative report must be appended to the letter. The Manager may withhold such a report, or portions thereof, to the extent that he or she determines that the report, or portions thereof, may be exempt from access by the employee under the Privacy Act or the Freedom of Information Act.

(i) If an individual is directed by the Manager or HRP certifying official to take specified actions to resolve HRP concerns pursuant to paragraph (f)(2) or (g)(3) of this section he or she must be reevaluated after those actions have been completed, and the Manager must direct either:

(1) Reinstatement of the individual; or

(2) Revocation of the individual's HRP certification. In the case of revocation, the HRP management official will be directed to prepare an evaluative report.

§ 712.20 Request for reconsideration or certification review hearing.

(a) An individual who receives notification of the Manager's decision to revoke his or her HRP certification under § 712.19 may choose one of the following options:

(1) Submit a written request to the Manager for reconsideration of the decision to revoke certification. The request must include the individual's response to the information that gave rise to the concern. The request must be sent by certified mail to the Manager within 20 working days after the individual received notice of the Manager's decision; or

(2) Submit a written request to the Manager for a certification review

hearing. The request for a hearing must be sent by certified mail to the Manager within 20 working days after the individual receives notice of the Manager's decision.

(b) If an individual requests reconsideration by the Manager but not a certification review hearing, the Manager must, within 20 working days after receipt of the individual's request, send by certified mail (return receipt requested) a final agency decision to the individual.

(c) If an individual requests a certification review hearing, the Manager must forward the request to the Office of Hearings and Appeals.

(d) If an individual takes no action within 20 working days after receipt of the Manager's decision, the Manager's decision will become a final agency decision.

§ 712.21 Appointment of DOE counsel.

(a) Upon receipt from the individual of a written request for a certification review hearing, the Manager shall request appointment of DOE counsel as soon as possible.

(b) DOE Counsel is authorized to consult directly with the individual if he is not represented by counsel, or with the individual's counsel or representative if so represented, to clarify issues and reach stipulations with respect to testimony and contents of documents and other physical evidence. Such stipulations shall be binding upon the individual and the DOE Counsel for the purposes of this subpart.

§ 712.22 Office of Hearings and Appeals.

(a) Upon receipt of the hearing request from the Manager, the Director, DOE Office of Hearings and Appeals, shall appoint, as soon as practicable, an Administrative Judge.

(b) The Administrative Judge must have a DOE ''Q'' access authorization.

(c) An individual who requests a certification review hearing has the right to appear personally before the Administrative Judge; to present evidence in his or her own behalf, through witnesses or by documents, or by both; and to be accompanied and represented at the hearing by counsel or any other person of the individual's choosing and at the individual's own expense.

(d) An individual must come forward with evidence to demonstrate that the decision to revoke his or her HRP certification was clearly erroneous or that extraordinary circumstances warrant recertification into HRP. Evidence that the individual has rehabilitated or reformed since the time of the Manager's decision will not be considered by the Administrative Judge.

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

(f) In conducting the proceedings, the Administrative Judge will:

(1) Determine the date, time, and location of the hearing, including whether the hearing will be conducted by video teleconference;

(2) At least 7 calendar days prior to date scheduled for the hearing, convene a prehearing conference for the purpose of discussing stipulations and exhibits, identifying witnesses, and disposing of other appropriate matters. The conference will usually be conducted by telephone;

(3) Receive all relevant and material information relating to the individual's fitness for HRP duties through witnesses or documentation;

(4) Ensure that the individual is permitted to offer information in his or her behalf; to call, examine, and cross-examine witnesses and other persons who have made written or oral statements, and to present and examine documentary evidence to the extent permitted by national security;

(5) Require the testimony of the individual and all witnesses be given under oath or affirmation;

(6) Ensure that a transcript of the certification review proceedings is made; and

(7) Not engage in ex parte communications with either party.

(g) The Administrative Judge shall have all powers necessary to regulate the conduct of proceedings, including, but not limited to, establishing a list of persons to receive service of papers, issuing subpoenas for witnesses to attend the hearing or for the production of specific documents or other physical evidence, administering oaths and affirmations, ruling upon motions, receiving evidence, regulating the course of the hearing, disposing of procedural requests or similar matters, and taking other actions consistent with the regulations in this part. Requests for subpoenas shall be granted except where the Administrative Judge finds that the grant of subpoenas would clearly result in evidence or testimony that is repetitious, incompetent, irrelevant, or immaterial to the issues in the case.

(h) The Administrative Judge may return a case to the HRP Manager for a final agency decision consistent with § 712.20(b) if—

(1) The individual or his or her attorney fails to heed the instructions of the Administrative Judge;

(2) The individual fails to appear at the appointed time, date and location for the certification review hearing;

(3) The individual otherwise fails to cooperate at the hearing phase of the process; or

(4) The individual withdraws his/her request for a certification review hearing.

(i) Based on a review of the administrative hearing record, the Administrative Judge shall prepare a decision regarding the individual's eligibility for recertification in the HRP, which shall consist of written findings and a supporting statement of reasons. In making a decision, the Administrative Judge shall ensure that any doubt as to an individual's certification shall be resolved against the individual in favor of national security and/or safety.

§ 712.23 Administrative Judge's decision.

(a) Within 30 calendar days of the receipt of the hearing transcript by the Administrative Judge or the closing of the record, whichever is later, the Administrative Judge should forward his or her decision to the Associate Under Secretary for Environment, Health, Safety, and Security. The Administrative Judge's decision must be accompanied by a copy of the record.

(b) Within 10 calendar days of receipt of the decision and the administrative record, the Associate Under Secretary for Environment, Health, Safety, and Security should:

(1) Notify the individual and Manager in writing of the Administrative Judge's decision;

(2) Advise the individual in writing of the appeal procedures available to the individual in paragraph (c) of this section if the decision is unfavorable to the individual;

(3) Advise the Manager in writing of the appeal procedures available to the Manager in paragraph (c) of this section if the decision is favorable to the individual; and

(4) Provide the individual and/or counsel or representative, and the Manager a copy of the Administrative Judge's decision and the administrative record.

(c) The individual or the Manager may file with the Associate Under Secretary for Environment, Health, Safety, and Security a written request for further review of the decision by the cognizant Under Secretary along with a statement required by paragraph (e) of

this section within 20 working days of the individual's or Manager's receipt of the Administrative Judge's decision;

(d) The copy of any request for further review of the individual's case by the cognizant Under Secretary filed by the Manager shall be provided to the individual by the Manager.

(e) The party filing a request for review of the individual's case by the cognizant Under Secretary shall include with the request a statement identifying the issues on which it wishes the cognizant Under Secretary to focus.

(f) The Administrative Judge's decision shall be considered final if a written request for review is not filed in accordance with paragraph (c) of this section.

§ 712.24 Final decision by DOE Under Secretary.

(a) Within 10 calendar days of receipt of the written request for review, the Associate Under Secretary for Environment, Health, Safety and Security should forward to the cognizant Under Secretary the written request for review, the Administrative Judge's decision, and the administrative record.

(b) Upon receipt of the written request for review, the Administrative Judge's decision, and the administrative record, the cognizant Under Secretary, in consultation with the DOE General Counsel, will issue a final written decision. The cognizant Under Secretary may delegate this authority. In issuing a final decision, the cognizant Under Secretary shall expressly state that he or she is either revoking or restoring an individual's HRP certification. A copy of this decision must be sent by certified mail (return receipt requested) to the Manager and to the individual.

(c) The cognizant Under Secretary shall consider only that evidence and information in the administrative record at the time of the Administrative Judge's decision.

§ 712.25 Cooperation by the individual.

(a) It is the responsibility of the HRP candidate or HRP certified individual to provide full, frank, and truthful answers to relevant and material questions, and when requested, furnish, or authorize others to furnish, information that DOE deems pertinent to reach a decision regarding HRP certification or recertification. This obligation to cooperate applies at any stage, including but not limited to initial certification, recertification, temporary removal, revocation, and/or hearing. The individual or candidate may elect not to cooperate; however, such refusal may prevent DOE from reaching an affirmative finding required for granting or continuing HRP certification. In this event, any HRP certification then in effect may be revoked, or, for HRP candidates, may not be granted.

(b) An HRP certified individual who receives notification of the Manager's decision to revoke his or her certification due to failure to cooperate may choose one of the following options:

(1) Take no action; or

(2) Within 20 working days after the individual received notice of the Manager's revocation decision, submit a written request by certified mail to the Manager for reconsideration. The request must include the individual's response to the information that gave rise to the revocation decision.

(c) Upon receipt of the request for reconsideration, the Manager shall notify the individual, in writing, within 20 calendar days of receipt of the written appeal, as to whether the action to revoke certification was appropriate. If the Manager determines that the action was inappropriate, he or she shall reverse revocation.

§ 712.34 [Amended]

■ 3. Section 712.34 is amended by removing the language, ''Director, Office of Health and Safety'' in paragraphs (a), (b) introductory text, (c), and (d) and adding in its place ''Associate Under Secretary for Environment, Health, Safety and Security''.

■ 4. Section 712.35 is amended by revising the section heading and in the introductory text by removing the language, ''Director, Office of Health and Safety'' and adding in its place ''Associate Under Secretary for Environment, Health, Safety and Security''.

The revision reads as follows:

§ 712.35 Associate Under Secretary for Environment, Health, Safety and Security.

* * * * *

§ 712.36 [Amended]

■ 5. Section 712.36 is amended by:

■ a. Removing the language, ''Director, Office of Health and Safety'' in paragraphs (d)(1) and (d)(3) and adding in its place ''Associate Under Secretary for Environment, Health, Safety and Security''.

■ b. Removing paragraph (i).

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2018–0304; Product Identifier 2018–NM–065–AD; Amendment 39–19261; AD 2018–09–05]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: We are adopting a new airworthiness directive (AD) for The Boeing Company Model 787–8 and 787–9 airplanes powered by Rolls-Royce plc (RR) Trent 1000–A2, Trent 1000–AE2, Trent 1000–C2, Trent 1000–CE2, Trent 1000–D2, Trent 1000–E2, Trent 1000–G2, Trent 1000–H2, Trent 1000–J2, Trent 1000–K2, and Trent 1000–L2 turbofan engines. This AD requires revising the airplane flight manual (AFM) to limit extended operations (ETOPS). This AD was prompted by a report from the engine manufacturer indicating that after an engine failure, prolonged operation at high thrust settings on the remaining engine during an ETOPS diversion may result in failure of the remaining engine before the diversion can be safely completed. We have determined that updated AFM limitations are needed to minimize the potential for intermediate pressure compressor (IPC) blade failures under certain conditions. We are issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective April 26, 2018.

We must receive comments on this AD by June 11, 2018.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.