



FEDERAL CONTRACTS



REPORT

Reproduced with permission from Federal Contracts Report, Vol. 87, No. 02, 01/16/2007. Copyright © 2007 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>

Security Clearances

The security clearance process for federal contractors received considerable attention in 2006 when investigations were halted temporarily due to what the Defense Department termed a funding shortfall. Although investigations were resumed within weeks, Congress included in the fiscal year 2007 defense authorization act a mandate for yearly reports by DOD on the security clearance process—including backlogs and delays—as well as a further report by the Government Accountability Office (86 FCR 376, 10/17/06).

In 2006, DOD also issued a rule revising the DOD adjudicative guidelines to be applied in evaluating individual security clearance applications (86 FCR 223, 9/12/06). This analysis details some of the significant revisions, and suggests that, by introducing new areas of individual discretion into the adjudication, they may contribute to further delays and inconsistencies in what GAO already has declared to be a “high risk” process.

The Conflict of Practicality and Protection: The Revised Guidelines for Adjudication of Personnel Security Clearances

By DANIEL C. SCHWARTZ, ANNA C. URSANO, AND
KATHERINE J. SEIKALY*

The investigation and adjudication of personnel security clearances by the federal government, for both government employees and contractor personnel, is undergoing a dramatic and destabilizing evolution. The demands of the wars in Iraq and Afghani-

stan, major initiatives dealing with terrorism and other national security threats, and greatly expanded defense, intelligence and homeland security budgets, all have significantly increased the responsibilities of the agencies managing clearances as well as the numbers of persons holding security clearances. By mid-2006, the Department of Defense (“DOD”) alone maintained approximately 2.5 million security clearances, of which

approximately 34 percent (about 850,000) were held by industry personnel.¹ In comparison, as of Sept. 30, 2003, industry personnel held about one-third of the approximately 2 million DOD-issued clearances (approximately 680,000).² In 2000, it was estimated that approximately 12,000 contractor cases a year were normally being sent to the Defense Office of Hearings and Appeals (“DOHA”).³

At the same time, the Government Accountability Office has identified persistent problems in the DOD personnel security program,⁴ and, in 2005, listed the program as being at “high risk” of waste, fraud and abuse.⁵ The Office of Personnel Management (“OPM”) (to which most of the DOD’s background investigations were transferred in 2005⁶) reported that “more than 185,000 of its clearance investigations has exceeded timeliness goals,” due, in part, to the fact that OPM and DOD had only slightly more than half of the estimated 8,000 full-time-equivalent investigative staff required to eliminate backlogs and deliver investigations on time.⁷

¹ United States Government Accountability Office, Report to Congressional Requesters, “DOD Personnel Clearances: Additional OMB Actions Are Needed to Improve the Security Clearance Process” (September 28, 2006), GAO-06-1070, (“September 2006 GAO Report”) at 1 (available at: <http://www.gao.gov/cgi-bin/getrpt?GAO-06-1070>); see also Statement of Thomas F. Gimble, Principle Deputy Inspector General, Department of Defense, before the House Committee on Government Reform, “Department of Defense Personnel Security Clearance Process,” May 17, 2006, at 1 (available at: <http://www.dodig.mil/IGInformation/archives/DoDIG-PSC-HGR-Final.pdf>).

² United States Government Accountability Office, Statement for the Record to the Committee on Government Reform, House of Representatives, “DOD Personnel Clearances: Funding Challenges and Other Impediments Slow Clearances for Industry Personnel,” GAO-06-747T, (May 17, 2006) at 1 (available at: <http://www.gao.gov/new.items/d06747t.pdf>).

³ Testimony of Harold J. Kwalwasser before the Senate Armed Services Committee, Apr. 6, 2000, at 3 (available at: <http://www.fas.org/sgp/congress/2000/kwalwasser.html>).

⁴ See List of GAO reports at Statement of Derek B. Stewart, Director, Defense Capabilities and Management, United States Government Accountability Office, “Some Progress Has Been Made but Hurdles Remain to Overcome the Challenges that Led to GAO’s High-Risk Designation,” June 28, 2005, at 17-19 (available at: <http://www.fas.org/irp/congress/2005/hr/062805stewart.pdf>).

⁵ GAO, *High-Risk Series: An Update*, GAO-05-207 (January 2005).

⁶ Under authority of Title III of the Intelligence Reform and Terrorism Act of 2004, 50 U.S.C.A. § 435b, the Defense Security Service transferred its security clearance resources and investigative functions to OPM. See DSS Industrial Security Letter No. 05L-1, January 18, 2005, (available at: <http://www.fas.org/sgp/library/nispom/islo5l-1.pdf>).

⁷ Statement of Stewart, footnote 4, at 2. Ultimately, this resources shortfall resulted in the announcement by the Defense Security Service on April 28, 2006, that it would accept no additional industry requests for personnel security clearances or periodic reinvestigations, due to the “overwhelming volume of requests . . . and funding constraints.” “Urgent Notice to All Cleared Contractor Organizations,” Defense Security Service, April 28, 2006, (available at: <http://www.fas.org/sgp/news/2006/04/dss042806.html>). DSS announced two weeks later it would resume processing investigations after the Department of Defense identified funding to resume processing. “Notice to Industry: Resumption of Processing Investigations (May 16, 2006),” (available at: <http://www.dss.mil/whatsnew/investresume.htm>).

The security significance of these events is obvious. Not only do government and contractor personnel who require security clearances to do their work not receive them in a timely fashion, but also already cleared persons who may constitute a risk to national security do not receive timely reinvestigations. GAO conducted an independent analysis of timeliness data on DOD personnel clearances and reported its results in September 2006.⁸ GAO found significant delays in the application-submission, initial investigation and adjudication stages of the clearance process.⁹ GAO concluded that factors contributing to the slowness in completing the investigative stage include “an inexperienced investigative workforce that has not reached its full performance level; and problems accessing national, state, and local records.”¹⁰ GAO also found that OPM regularly provided incomplete investigative reports to DOD and that adjudicators granted eligibility to industry personnel whose investigative reports contained unresolved issues. *Id.*¹¹

The Intelligence Reform and Terrorism Prevention Act of 2004 was an effort to address these problems in a number of ways, including by requiring that a government entity¹² develop a plan to ensure that 90 percent of all personnel security clearance applications were processed within an “average” of 60 days.¹³ This requirement puts a premium not only on finding and efficiently applying sufficient resources to conduct background investigations quickly, but also on applying uniform and easily understood adjudication standards.

Unfortunately, the new adjudication guidelines for personnel security clearances, issued by President Bush on December 29, 2005, after a long delay — and applied to DOD-administered clearances only as of Sept. 1, 2006¹⁴ (the “Revised Guidelines”) — are likely to have the opposite effect. As discussed below, the Revised Guidelines not only make significant changes to many of the standards for granting security clearances, but they also allow wholly new areas of individual discre-

⁸ September 2006 GAO Report (see footnote 1) at 6. GAO analyzed 2,259 cases. *Id.*

⁹ GAO found that it took an average of 446 days for initial clearances while it took 545 days for clearance updates. September 2006 GAO Report at 6. The Office of Management and Budget’s (“OMB”) goal for the application-submission phase of the clearance process is 14 days or less, but on average this phase took 111 days. *Id.* Additionally, GAO’s analysis indicates that OPM took an average of 286 days to complete initial top secret investigations, much longer than the 180-day goal identified in OMB’s plan for improvement. *Id.* at 7. The average time for determining clearance eligibility was 39 days. *Id.*

¹⁰ *Id.* at 7.

¹¹ Specifically, GAO found that 47 of 50 cases were missing documentation required by federal investigative standards. September 2006 GAO Report at 7-8.

¹² The statute required the President to select a single government agency to be responsible for executing the requirements of the Act. 50 U.S.C.A. § 435b(b). OMB was the “selected entity.”

¹³ 50 U.S.C.A. § 435b(g)(1), (2). The remaining determinations are to be made “without delay.” 50 U.S.C.A. § 435b(g)(2)(B).

¹⁴ See 32 CFR 154 (“Revised Guidelines”). They are currently characterized as an “interim final rule,” and comments were due Oct. 30, 2006. Most other federal agencies not included within the DOD clearance authority, including particularly the CIA, implemented the revised guidelines immediately at or near the beginning of 2006.

tion that will invariably lead to conflicting determinations, uncertainty and inconsistency.¹⁵

It is possible that agencies may be able to meet the timeliness requirements of the Intelligence Reform and Terrorism Prevention Act if they receive sufficient resources to do so. In practice, what is more likely to happen is that individual agency adjudicators and their supervisors will be unwilling to risk being “wrong” in granting clearances in borderline or fixable situations. This is particularly true because the historical “safe harbors” provided by the former Adjudication Guidelines and interpreted by DOHA decisions are no longer applicable. Instead, agency adjudicators will forward all difficult cases to DOHA for judges to decide. This may significantly prolong the time required to make final the personnel security decisions in cases with potentially disqualifying issues.

I. Summary of Changes to Adjudication Guidelines

Many of the changes contained in the Revised Guidelines reflect the natural evolution of the adjudication guidelines as they have developed since 1992¹⁶ through the decisions of hearing judges and the DOHA Appeal Board. They also reflect a more current and sophisticated understanding of such concerns as alcoholism, mental health and the threat of terrorism. On the other hand, the Revised Guidelines contain substantive changes that go beyond the natural evolution of that case law, and in some cases contradict the case law.

The Revised Guidelines will have a significant impact on DOHA security clearance adjudications. The revisions will affect not only how adjudications are conducted at DOHA, but also will change, in some cases dramatically, who can receive a personnel security clearance. Thus, it is important that applicants, security officers, human resources directors and government contractors be aware of the changes and become familiar with their potential impact.

The revisions will affect not only how adjudications are conducted at DOHA, but also will change, in some cases dramatically, who can receive a personnel security clearance.

Perhaps most significantly, the Revised Guidelines now require consideration of an applicant’s “life history,” significantly modifying the established “whole person concept” that was a central aspect of the former guidelines. The Revised Guidelines also allow for adjudicators to apply greater subjectivity in interpreting facts and applying the Revised Guidelines. Such in-

¹⁵ For a complete list of substantive revisions to the guidelines, see Appendix 1.

¹⁶ DOD Directive 5220.6, Defense Industrial Personnel Security Clearance Review Program, in the form largely applicable until the most recent revisions, was issued Jan. 2, 1992, with interim changes, the most recent of which was Change 4, Apr. 20, 1999 (available at: <http://www.dod.mil/dodgc/doha/directive.html>).

creased subjectivity empowers individual adjudicators to make personal judgments well beyond what had been permitted under the former guidelines. This subjectivity is taken to an extreme under Revised Guideline E (“Personal Conduct”), which now contains a “catch all” disqualifying condition allowing for rejection of eligibility based on any adverse information that is not specifically considered under any of the guidelines. Such “adverse information” is not limited by standards of illegality or even universal standards of ethics or morality, but can stem from highly individualized predilections of individual DOHA judges.

On the other hand, significant changes in Guideline B (“Foreign Influence”) and Guideline C (“Foreign Preference”) are consistent with a new focus on an applicant’s involvement with terrorism, terrorist activity and support of terrorist activity.

With such changes, applicants face new, previously unexplored challenges during DOHA security clearance adjudications.

II. The Whole Person Concept Versus “Life History”

Historically, an integral part of any evaluation of an individual’s suitability for a security clearance has centered around the “whole person concept” contained in the former guidelines at E2.2.¹⁷ The whole person concept requires that “available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination.”¹⁸ The Revised Guidelines continue to recognize the role of the whole person concept and, in fact, the guidance relating to it and the factors to be applied remain unchanged.¹⁹ However, as discussed below, the whole person concept’s primacy is called into question.

The Revised Guidelines’ introduction is now more elaborate and contains an entire paragraph of new text. This new text, which directly precedes the discussion of the whole person concept, states in pertinent part, “When a person’s life history shows evidence of unreliability or untrustworthiness, questions arise whether the person can be relied on and trusted to exercise the responsibility necessary for working in a secure environment where protecting classified information is

¹⁷ See e.g., ISCR Case No. 03-02878.a1 at 2 (Jun. 7, 2006) (affirming hearing judge’s grant of security clearance despite the judge’s misapplication of two mitigating conditions because the judge “articulated a detailed, rational explanation of her favorable determination under the whole person concept”); ISCR Case No. 02-21927.a1 (Dec. 30, 2005) at 5 (“[A] Judge’s obligation to apply pertinent provisions of the Adjudicative Guidelines does not override the Judge’s obligation to evaluate an applicant’s security eligibility in light of the ‘whole person’ concept.”).

¹⁸ *Id.* Among the factors to be considered in evaluating the relevance of an applicant’s conduct are the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, including knowledgeable participation; the frequency and recency of the conduct; the individual’s age and maturity at the time of the conduct; the voluntariness of participation; the presence or absence of rehabilitation and other pertinent behavioral changes; the motivation for the conduct; the potential for pressure, coercion, exploitation, or duress; and the likelihood of continuation or recurrence.

¹⁹ See Revised Guidelines at ¶ 2.

paramount.”²⁰ By incorporating this life history concept, the Revised Guidelines permit adjudicators for the first time to focus exclusively on an applicant’s past actions, without putting them in the context of an otherwise exemplary life history. Moreover, the Revised Guidelines do not expressly instruct the adjudicators to consider whether or not an applicant may have changed or learned from past mistakes, as would be part of any whole person concept consideration.

The life history concept’s focus on mistakes of the past without consideration of those mistakes in the context of the applicant’s “whole life,” suggests that mitigation and reform are no longer pertinent to the analysis of an applicant’s eligibility for a security clearance. Previously, the whole person concept was the core principle of adjudications and an applicant had the opportunity to present evidence showing that past poor judgment was just one factor in the context of his entire life. Under the Revised Guidelines, however, an applicant may be unable to escape from past poor judgment, no matter how minor in the context of his whole life. The life history concept suggests that an applicant must somehow “erase” any past mistakes because it may no longer be sufficient mitigation to put those mistakes in the context of his whole person.

This formulaic approach of the life history concept is in sharp contrast with the more flexible whole person concept, which requires that the adjudicator consider an applicant’s mistakes or lapses in judgment within the context of the applicant’s entire existence. The Revised Guidelines do not provide direction to the adjudicators on how to apply the life history concept in conjunction with the pre-existing whole person concept. Rather, the life history concept raises, but fails to answer, the newly presented question about how adjudicators should consider an applicant’s past in context of his present.²¹

III. Increased Subjectivity

The Revised Guidelines uniformly provide for greater subjectivity in the adjudication process. This increased subjectivity is evident in both the general language of the Revised Guidelines as well as in several individual guidelines.

A. Binding Precedent

It was previously well understood that no hearing judge’s decision could be binding on another hearing judge, but the guidelines did not expressly prohibit the use of others’ decisions as general guidance in determining the outcome of an adjudication. Furthermore, while hearing-level decisions were not binding, Appeal Board decisions did serve as binding precedent and applicants could rely on the outcome of Appeal Board decisions to guide the analysis of their suitability for a clearance. Now, however, the “Adjudicative Process” section of the Revised Guidelines expressly acknowl-

edges that “the ability to develop specific thresholds for action under these guidelines is limited by the nature and complexity of human behavior.”²²

It is clear that the removal from the Revised Guidelines of both “safe harbor” and time-specific criteria for disqualification and mitigation could greatly diminish the applicability of precedent relying on such specific strictures. In addition, the new provision quoted above appears to minimize the possibility of one hearing judge’s decision serving as guidance to other hearing judges. The Revised Guidelines do not state that Appeal Board decisions are no longer binding precedent, but they may have that effect, nonetheless. While each case brought before DOHA presents a unique set of facts and raises distinct questions on the “nature and complexity of human behavior,” the guidance previously provided by the guidelines on, for example, the period of sobriety required to mitigate abuse of alcohol concerns, offered some predictability for both applicants and DOHA. By making it clear that each case is “unique,” the Revised Guidelines appear to diminish the impact of precedent, and to leave the clearance decisions entirely to each hearing judge and adjudicator, as well as to increase the importance of the unique abilities of each applicant to convince a hearing judge of his or her own particular circumstances. This in turn greatly increases the premium on effective representation for applicants, who otherwise, will be left without guidance on the factors that may determine their security clearance adjudications, or how those factors will be applied.

B. Overall Common Sense “Judgment”

Additionally, the Revised Guidelines now state that the ultimate determination of whether to grant a security clearance must be an “overall common sense judgment.”²³ Previously, the Guidelines stated that each clearance decision must be “an overall common sense determination.”²⁴ By definition, a “judgment” is a personal, subjective perspective,²⁵ while Webster’s defines a “determination” as “the resolving of a question by argument or reasoning” (emphasis added).

By stating at the beginning that the adjudication is now a “judgment” (or “opinion”) rather than a “determination” (or “reasoning”), the Revised Guidelines set a tone that allows for greater individual subjectivity in the interpretation and analysis of cases before DOHA. Again, this greatly increases the risk that security clearance determinations will be made not only on the basis of the quality of the presentation made by the applicant or his or her representative, but also on the predilection and opinion of the individual hearing judge. Further, even if the judgment appears to be prejudiced, there would seem to be far more limited bases on which the Appeal Board could reverse it.

C. Greater Subjectivity in Evaluating the Passage of Time as Mitigation

The Revised Guidelines incorporate a new formula for considering the passage of time as a mitigating factor. Under the former guidelines, mitigation was appro-

²⁰ See Revised Guidelines at ¶ 1 (the “Life History Concept”).

²¹ The drafters of the Revised Guidelines may argue that the reference to life history concept is nothing more than the previous reliance on the whole person concept, and no such change is intended. That interpretation, however, conflicts with the references to the life history concept in the introduction. Also, since the life history concept provisions were added to, not substituted for, the whole person concept, it was obviously intended to add a new factor to the analysis.

²² See Revised Guidelines at ¶ 2(c).

²³ See Revised Guidelines at ¶ 2(c) (emphasis added).

²⁴ Former guidelines at E2.2.3 (emphasis added).

²⁵ Webster’s Third International Dictionary, 1976 (“Webster’s”) defines “judgment” as “(a) a formal utterance or pronouncing of an authoritative *opinion* after judging; b) an *opinion* so pronounced” (emphasis added).

appropriate when a problematic behavior was found to have occurred “not recently.”²⁶ The Revised Guidelines, however, in several individual guidelines, indicate that the simple passage of time no longer serves to mitigate problematic behavior.²⁷ Throughout the Revised Guidelines, this previously tangible and accessible mitigating factor has been altered to create a much more subjective and elusive standard. Thus, for example, in the former guidelines relating to alcohol consumption, there was a mitigating condition that states that a person who abused alcohol had to “abstain . . . from alcohol for a period of at least 12 months;”²⁸ that is, mitigation in this case was based in part on the passage of a specific period of time. Under the Revised Guidelines, all such specific time periods have been replaced by unspecified, subjective norms. Thus, the Revised Guidelines require that “so much time” have passed since the event occurred; that the event occurred under “such unusual circumstances”; or that it occurred “so infrequently.”

Upon first blush these new formulations appear consistent with the passage of time mitigation recognized under the former guidelines. The Revised Guidelines, however, provide no objective definition, or even the slightest guidance, on how to apply these new formulations. One adjudicator may find that two years constitutes “so long ago” while another might require eight years of time to have passed in order to fulfill the “so long ago” requirement. This subjectivity grows even more muddled when it applies to an analysis of the factual circumstances as well; what one individual finds to be “such unusual circumstances” another may consider common. Again, it is equally unclear upon what basis the Appeal Board could either view such determinations or try to make them consistent.

D. Greater Subjectivity Applied to Individual Guidelines

Finally, several individual guidelines have incorporated language that allows for greater subjectivity in their interpretation. Guideline F (“Financial Considerations”) has been broadened and now appears to cover generally irresponsible financial behavior, a concept tied to highly subjective evaluations of individual behavior. Specifically, Guideline F now considers as disqualifying conditions “indebtedness caused by frivolous or irresponsible spending” and “consistent spending beyond one’s means.”²⁹ Such presumably “irresponsible” financial behavior need not be documented with any proof under the Revised Guidelines, and no objective criteria are established for determining what is “frivolous or irresponsible” or how much

²⁶ See e.g., former guideline A at E2.A1.1.3.4 (“no recent involvement or association with such activities”); former guideline D at E2.A4.1.3.3 (“not recent and no evidence of subsequent conduct of a similar nature”); former guideline E at E2.A5.1.3.2 (“the falsification . . . was not recent”); former guideline F at E2.A6.1.3.1 (“the behavior was not recent”); former guideline G at E2.A7.1.3.2 (“the problem occurred a number of years ago”); former guideline H at E2.A8.1.3.1 (“the drug involvement was not recent”); former guideline J at E2.A10.1.3.1 (“the criminal behavior was not recent”); and former guideline M at E2.A13.1.3.1 (“the misuse was not recent”).

²⁷ For examples of where the new passage of time mitigation standard is applied, see Revised Guidelines A, B, E, F, G, H, J, K, and M.

²⁸ See former guideline G at E2.A7.1.3.4.

²⁹ See Revised Guidelines at ¶¶ 19(b) and (d).

overcharging one’s credit card constitutes “consistently spending beyond one’s means.”³⁰

Another example of the Revised Guidelines’ increased subjectivity can be found in Guideline G (“Alcohol Consumption”), which now covers “incidents of concern” relating to alcohol.³¹ Previously, Guideline G had been restricted to “criminal incidents.” Again, the question arises: what is the objective definition of an “incident of concern”? For example, does driving a car after having consumed alcohol, but not enough to constitute criminal driving while intoxicated, constitute an “incident of concern”? The Revised Guidelines offer no direction to individual adjudicators, nor do they indicate what objective standard of concern to consider.

Similarly, Revised Guideline I (“Psychological Conditions”) now expressly states that there need not be a “formal diagnosis of a disorder for there to be concern under this Guideline.”³² Revised Guideline I suggests that DOHA employees are now allowed to act as stand-in mental health analysts to determine whether an applicant’s psychological condition is cause for concern.

Revised Guideline J (“Criminal Conduct”) allows for mitigation if there is “evidence that the person did not commit the offense.”³³ This mitigation opens up the possibility that a DOHA adjudicator’s opinion could replace a court’s decision should the DOHA adjudicator find that evidence supports the conclusion that the individual did not commit the crime.³⁴ As with the other individual guidelines identified above, Revised Guideline J does not offer further explanation or guidance, but leaves decisions relating to an individual’s criminal conduct to the discretion of an individual adjudicator’s potentially arbitrary thought process.

DOHA adjudicators are not required to provide a public accounting of how they decide security clearances, and even the published decisions of hearing judges and the Appeal Board are sketchy at best. Therefore, it will be unclear how DOHA adjudicators will manage this increased level of subjectivity. Such increased subjectivity, however, creates uncertainty and, ultimately, the opportunity for inconsistency regarding how individual decisions will be made and how appeals

³⁰ Thus, no bankruptcy is required, nor do the particular circumstances or causes appear to be relevant to the disqualification.

³¹ See Revised Guidelines at ¶ 22(a).

³² See Revised Guidelines at ¶ 27. It should be noted that while Guideline I now allows for a more subjective interpretation of the disqualifying conditions, it also has become more sophisticated in considering mitigation. Revised Guideline I provides for mitigation where the condition is “readily controllable with treatment, and the individual has demonstrated ongoing and consistent compliance with the treatment plan.” Revised Guidelines at ¶ 29(a). Revised Guideline I also recognizes mitigation where “the individual has voluntarily entered a counseling or treatment program for a condition that is amenable to treatment and the individual is currently receiving counseling or treatment with a favorable prognosis by a duly qualified mental health professional.” Revised Guidelines at ¶ 29(b). The former guidelines did not explicitly recognize mitigation for treatment, requiring instead remission or a full cure. See former guidelines at E2.A9.1.3.2.

³³ See Revised Guidelines at ¶ 32(c).

³⁴ This invites each applicant with a criminal record to retry his or her criminal case before the hearing judge, in a one-sided fashion (without the prosecution’s case), again enhancing the need for adequate representation.

will be handled when the original adjudications are based on subjective standards.

IV. Personal Conduct – Where is the limit?

One of the changes that may prove the most detrimental to applicants appears in Guideline E (“Personal Conduct”). There are now two “catch all” provisions that, by their terms, give adjudicators and hearing judges almost complete discretion to consider virtually any conduct as sufficient to justify denial of a clearance.

Two “catch all” provisions give adjudicators and hearing judges almost complete discretion to consider virtually any conduct as sufficient to justify denial of a clearance.

Disqualifying Condition C under Revised Guideline E (“Personal Conduct”) permits consideration of “credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information.”³⁵ Additionally, Disqualifying Condition D now provides for disqualification based on “credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information.”³⁶

These new Disqualifying Conditions create the possibility of a “snowball” effect of behaviors that would not amount to a disqualification if considered individually. The Revised Guidelines leave unclear what constitutes “credible adverse information.” They also fail to identify the individual or party who will decide whether information is in fact credible, leaving that determination to the adjudicators or hearing judge.³⁷ These two new Disqualifying Conditions mean that DOHA is effectively

³⁵ See Revised Guidelines at ¶ 16(c).

³⁶ See Revised Guidelines at ¶ 16(d).

³⁷ This provision could greatly increase the burden on the applicant to show that such “adverse information” is not in fact “credible.” This is particularly true since the initial burden on Department Counsel (appearing on behalf of DOHA) can be met with hearsay evidence. See Additional Procedural Guidance at E3.1.19 (stating that the Federal Rules of Evidence “shall serve as a guide” and “may be relaxed . . . to permit the development of a full and complete record.”) The burden to disprove the information will then fall on applicant. See e.g., ISCR Case No. 01-20700.a1 at 3 (Dec. 19, 2002) (Applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.”)

not bound by the guidelines whatsoever. Rather, any individual adjudicator may consider any “adverse information” he or she deems credible and may issue an opinion on an applicant’s eligibility for a clearance based on that information. This leaves enormous discretion in the hands of individual adjudicators who can apply their own subjective criteria for what information is “adverse” and “credible.” Invariably, this application of individual moral and social standards will result in enormous inconsistency and unfairness.³⁸

Enhancing these new powers to disqualify, Revised Guideline E no longer provides for mitigation when adverse information is “not pertinent to a determination of judgment, trustworthiness or reliability,” as was provided for by former guideline E.³⁹ Rather, Revised Guideline E provides for mitigation where the information is “unsubstantiated or from a source of questionable reliability.”⁴⁰ Comparing these two mitigating factors, it appears that there is no longer information that is “not pertinent to a determination of judgment, trustworthiness or reliability.” Thus, all admissible information may be pertinent to a determination of judgment, trustworthiness or reliability. This result is particularly startling in light of the expansive revisions to Guideline E’s disqualifying conditions, which are now virtually limitless.

V. Terrorism

The Revised Guidelines respond in various ways to the events of Sept. 11, 2001, and after. Guideline A (“Allegiance to the United States”) has been expanded in response to terrorist threats and financial support of terrorist organizations. For example, Disqualifying Condition 1 under Guideline A has been revised to include “involvement in, support of, training to commit, or advocacy of any act of sabotage, espionage, treason, terrorism or sedition against the United States of America.”⁴¹

Guideline A now significantly expands the concept of the overthrow of government. An “association or sympathy with persons or organizations that advocate, threaten or use force or violence, or use any other illegal or unconstitutional means” is a disqualifying condition if the person or organization makes efforts to: “(1) overthrow or influence the government of the United States or any state or local government; (2) prevent Federal, state or local government personnel from performing their official duties; [or] (3) gain retribution for perceived wrongs caused by the Federal, state or local government”⁴² While this appears to be a reasonable response to 9/11 and seems to be a further effort to protect the citizens of the United States, it can be easily applied in an overly broad fashion by looking at protected political activities (or even sympathies) as wholly disqualifying.

³⁸ For example, some adjudicators may believe that obtaining an abortion, while legal, shows “questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations” so as to permit disqualification; another adjudicator may not. Such variety of judgments would appear to reach standards of caprice and arbitrariness which, by their nature, should invalidate the decisions, if properly reviewable.

³⁹ See former guidelines at E2.A5.1.3.

⁴⁰ Revised Guidelines at ¶ 17(f).

⁴¹ Revised Guidelines at ¶ 4(a).

⁴² Revised Guidelines at ¶ 4(c).

Surely it is logical to deny security clearances to individuals who sympathize with organizations threatening to completely overthrow the U.S. government, but what about groups that simply seek to *influence* the government?⁴³ It is unclear how this distinction will be made. Many organizations try to influence the local, state and federal government. While participants in organizations that internally use violence or force may be easily disqualified from holding a clearance, there are others whose actions are intended to influence the government but are only minimally illegal. For example, some non-violent groups may simply protest without a permit or fail to disperse after receiving a police order to do so. The Revised Guidelines do not indicate whether this level of disruptive political behavior will be considered sufficient to raise concerns under Revised Guideline A.

VI. Foreign Preference and Foreign Influence

Some of the most significant revisions contained in the Revised Guidelines are found in Guideline B (“Foreign Influence”). Under Revised Guideline B, disqualification can now be premised upon “contact with a foreign family member, business or professional associate, friend, or other person who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion.”⁴⁴ This is a far more stringent condition than the previous provision at E2.A2.1.2.1, which established a disqualifying condition if the applicant had “an immediate family member, or person to whom the individual has close ties of affection or obligation, [who] is a citizen of, or resident or present in, a foreign country.”

Revised Guideline B has eliminated any requirement that the person of concern be an immediate family member or that the applicant have close ties of affection or obligation. Now, all that is required to trigger disqualification is simple “contact.” This new formulation eliminates the potential mitigating condition that the applicant does not have *close* ties of affection to the individual in question. The revision, however, does provide the possibility to argue that the contact does not create a heightened risk of exploitation. This is clearly a greater burden of proof on an applicant.

A. Country of Concern

There is a new provision in the mitigating conditions under Guideline B that expressly allows adjudicators to consider whether “the country in which these persons are located . . . are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests in the U.S.”⁴⁵ This is a significant change which recognizes the way in which many of the Guideline B cases have been decided, despite contrary Appeal Board precedent.

The Appeal Board has declined to accept that a “friendly” country does not pose the same potential security risks as a “hostile” country, finding that “nothing in Guideline B indicates or suggests that it is limited to

countries that are hostile to the United States.”⁴⁶ Similarly, the Board has found that “[t]he compelling government interest in protecting classified information[] is not limited to protecting classified information only from persons, organizations, or countries that have interests that are inimical to the United States.”⁴⁷ Furthermore, Appeal Board precedent suggests that, while adjudicators may consider whether a country is particularly hostile to the United States in disqualifying an applicant, the hearing judge should not rely on the perception that a country is friendly to American interests as a mitigating factor. At least one hearing judge has acknowledged this dichotomy.⁴⁸

In light of this precedent, it is curious that the Revised Guidelines now provide for consideration of the country in which the potentially disqualifying contacts are located as a *mitigating* condition. DOHA may view the revision as an instruction to start considering a country’s “friendliness” in considering mitigation.

B. Use of Classified Information

Another provision that could present new difficulties for applicants appears as the new Disqualifying Condition C under Guideline B (“Foreign Preference”), allowing disqualification based on “counterintelligence information, that may be classified, [which] indicates that the individual’s access to protected information may involve unacceptable risk to national security.” Under the former guidelines, the use of classified information was prohibited in a security clearance adjudication hearing, except under special (and seldom used) circumstances requiring approval by the secretary of defense.⁴⁹

This change could establish significant barriers to a fair due process hearing, such as the ability to confront and cross-examine accusers. In addition, it raises new procedural issues. First, the hearings are not held in secure facilities and will require cleared facilities and granting of applicable clearances and accesses, at least for the DOHA judges and staff.⁵⁰ Furthermore, some applicants already have active clearances – if so, would they be allowed access to the classified information against them? What about their representative or counsel (some of whom may have adequate clearances)? Such scenarios greatly threaten the due process character of DOHA adjudications.

C. Business, Financial or Property Interests

The disqualifying condition addressing financial interests in a foreign country under Guideline B has also been expanded in the Revised Guidelines. The new version requires consideration of “a substantial business, financial, or property interest in a foreign country, or in any foreign-owned or foreign-operated business, which could subject the individual to heightened risk of for-

⁴⁶ ISCR Case No. 03-06267.a1 (Jan. 24, 2006) (internal citations omitted).

⁴⁷ ISCR Case No. 02-22461.a1 (Oct. 27, 2005) (internal references omitted).

⁴⁸ See e.g., ISCR Case No. 03-10312.h1 (May 31, 2006) (stating, “while the Appeal Board holds it is error for an administrative judge to consider a foreign country’s friendly relationship with the U.S., it also holds that it is error for a judge to fail to consider a hostile relationship between the U.S. and a foreign country.”)

⁴⁹ Exec. Order 10865, “Safeguarding Classified Information Within Industry,” Sec. 4.

⁵⁰ Presumably, the classified intelligence could also require special accesses.

⁴³ See Revised Guidelines at ¶ 4(c)(1).

⁴⁴ Revised Guidelines ¶ 7(a).

⁴⁵ Revised Guidelines at ¶ 8(a).

eign influence or exploitation.”⁵¹ This differs in several respects from the former guidelines. First, DOHA is no longer determining whether financial interests “could make the individual vulnerable to foreign influence” as the old version required — the concern is now whether the interests “could subject the individual to a heightened risk of foreign influence or exploitation.” *Id.*

Additionally, Disqualifying Condition 8 of the former guideline B mentions only “substantial financial interests” and the Revised Guidelines specify “substantial business, financial or property interests.” This new language does not, however, represent a significant change for applicants who already faced questions regarding business and property interests in foreign countries, but the broader language in Revised Guideline 8 significantly strengthens DOHA’s long-standing practice of holding even otherwise benign foreign business interests as possible grounds for denial of a clearance.

D. Statement or Action of Allegiance

Guideline C (“Foreign Preference”) has also been revised in significant ways. Disqualifying Condition D has been added to provide for disqualification based on “any statement or action that shows allegiance to a country other than the United States; for example, declaration of intent to renounce United States citizenship; renunciation of United States citizenship.”⁵² Again, the Revised Guidelines do not detail how such declarations should be considered or how much weight should be given to different types of declarations. The notion of “any statement or action that shows allegiance to a country other than the United States” seems incredibly broad. Apparently, it is not intended for situations where the applicant exercises a right or privilege of foreign citizenship, takes actions to serve the interests of a foreign entity, or takes actions to obtain foreign citizenship, since those situations are separately covered.⁵³ Thus, could Disqualifying Condition D apply to a person who vacations consistently in the South of France, or buys Israeli bonds? One could imagine a situation where an applicant may have expressed an affection for a foreign county which does not impact in any way his love for and loyalty to the United States. The Revised Guidelines do not make clear whether such statements or actions could be considered a disqualifying allegiance to a country other than the United States. The examples provided by the Revised Guidelines — declaration of intent to renounce citizenship or renunciation of United States citizenship — are clearly not meant to

be exclusive and the disqualifying condition leaves room for challenging virtually any intentional behavior or comments.

VII. Conclusion

The Revised Guidelines’ increased subjectivity influences not only the cases DOHA staff may choose to present for adjudication, but also how hearing judges will ultimately decide each case. DOHA now has between 1200-1400 cases that go to due process hearings a year, nearly 40 percent of which involve individuals who do not have legal representation. There are approximately 30 department counsel and 35 hearing judges who handle the cases. These increased numbers coupled with the Revised Guidelines’ greater focus on subjectivity, make it unclear how decisions may be made in a consistent manner.

Applicants face new challenges and there is no way to predict how the Revised Guidelines will be interpreted and implemented. Because the Revised Guidelines have only been in place since Sept. 1, 2006, there are no binding Appeal Board decisions to help direct and guide any analysis. As stated in ISCR Case No. 02-24254, “the precedential value of Board decisions is affected to the extent those decisions involve the interpretation of a provision of the Directive that is later revised or changed.”⁵⁴ A significant number of the guidelines have undergone revisions and even those that have not have been changed by revisions to the general language of the guidelines. Therefore, the significance of previous Appeal Board decisions is greatly reduced.

Adding to applicants’ challenges is the fact that the government may now rely on classified counterintelligence information to question an applicant’s suitability for a security clearance. Previously, applicants have always been entitled to see the adverse information upon which the government makes its case and hearings have been unclassified except in the most extreme cases. Applicants and the government, however, no longer will enter the adjudication process with equal information. It remains unclear what, if any, type of distilled version of the classified information the applicant may gain access to in order to fairly and completely present his case.

As a result of these changes, DOHA security clearance adjudications will likely go through a period of greater uncertainty until the standards of the Revised Guidelines are developed through case law. It is important, therefore, for applicants and the defense contracting industry to become familiar with the Revised Guidelines and to consider the use of counsel to help navigate the new system.

⁵¹ Revised Guidelines at ¶ 7(e).

⁵² Revised Guidelines at ¶ 10(d).

⁵³ See Revised Guidelines at ¶¶ 10(a) –(c).

⁵⁴ *Id.* at 18.

APPENDIX 1

Summary of Substantive¹ Revisions to Adjudicative Guidelines

GUIDELINE A – ALLEGIANCE TO THE UNITED STATES

Disqualifying Condition (a) now includes “support of, training to commit, or advocacy of” any act of sabotage, espionage, treason, terrorism or sedition against the U.S. Previous version only included “involvement in.”

Disqualifying Condition (c) now considers any association or sympathy with persons or organizations that “threaten” to use force or violence, or any other illegal or unconstitutional means, in an effort to do any of the relevant activities. The following activities have been added to the disqualifying condition: to “prevent Federal, state, or local government personnel from performing their official duties;” and to “gain retribution for perceived wrongs caused by the Federal, state, or local government.”

Mitigating Condition (d) changes the “no recent involvement” language from the previous version to consideration of whether “the involvement or association with such activities occurred under such unusual circumstances, or so much time has elapsed, that it is unlikely to recur and does not cast doubt on the individual’s current reliability, trustworthiness or loyalty.” This is a significant change and while it remains unclear how judges will interpret the new language, it likely represents a tougher burden for applicants.

GUIDELINE B – FOREIGN INFLUENCE

General Comments: The language of the disqualifying conditions has been altered to refer to a “heightened risk” of foreign exploitation, inducement, manipulation, coercion, or pressure. The previous iteration addressed the “vulnerability” of the applicant to those foreign pressures. Additionally, rather than referring only to pressure by foreign governments, the revisions also specifically mention a foreign “person, group, or country.”

Disqualifying Condition (a) now addresses “contact with a foreign family member, business or professional associate, friend or other person” who is a citizen of or resident in a foreign country “if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure or coercion.” The previous version referred to having “close ties of affection or obligation” with an immediate family member who is a foreign citizen or resident. The revision seems to eliminate the argument that one may have an immediate family member who is a foreign citizen or resident while not having close ties to that person. Moreover, the revision broadens the potentially disqualifying relationships beyond just immediate family members to include anyone (i.e., “other person”). Because the revision seems to require “contact,” there is now a potential argument that having no contact with an immediate family member who is a foreign citizen or resident should not disqualify an applicant. The revision also allows for sub-

jectivity by the judge to determine when a contact would create a heightened risk of exploitation.

Disqualifying Condition (b) now addresses “connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual’s obligation to protect sensitive information or technology and the individual’s desire to help a foreign person, group, or country by providing that information.” This replaces former provision E2.A2.1.2.3 which referred to “relatives, cohabitants, or associates who are connected with any foreign government.”

Disqualifying Condition (c) now allows for disqualification if “counterintelligence information, that *may be classified*, indicates that the individual’s access to protected information may involve unacceptable risk to national security.” (*emphasis added*) Under the previous version of the guidelines, classified information could only be used in very unique circumstances.

Disqualifying Condition (e) now takes into account “a substantial business, financial, or property interest in a foreign country, or in any foreign-owned or foreign-operated business, which could subject the individual to heightened risk of foreign influence or exploitation.” The “business” or “property” interest concern is new, as the previous version simply addressed “financial interests.”

Disqualifying Condition (i) now addresses “conduct, especially while traveling outside the U.S., which may make the individual vulnerable to exploitation, pressure or coercion by a foreign person, group, government or country.”

Mitigating Condition (a) now allows for consideration of “the nature of the relationship with foreign persons, the country in which these persons are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the U.S.” The condition is now articulated as the choice between “interests” rather than “loyalties” as under the previous version.

Mitigating Condition (b) contemplates applicants introducing evidence that “there is no conflict of interest, either because the individual’s sense of loyalty or obligation to the foreign person, group, government or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest.” This is an entirely new mitigating condition, which may prove beneficial to applicants by allowing them to prove strong loyalty to the United States or only minimal sense of loyalty or obligation to the foreign power.

Mitigating Condition (c) maintains the recognition from the previous version that “casual and infrequent” contacts with foreign citizens are typically less worrisome than regular contacts, but the provision is now more specific and provides that the contacts must be “so casual and infrequent that there is little likelihood that it could create a risk for foreign influence and exploitation.”

Mitigating Condition (d) allows for consideration of whether “the foreign contacts and activities are on U.S. Government business or are approved by the cognizant security authority.” This alters the previous mitigation where the foreign contacts are the result of official United States Government business by now requiring

¹ Minor changes to language or punctuation are not discussed in this summary.

that the contacts are themselves on U.S. Government business.

Mitigating Condition (e) requires that “the individual has promptly complied with existing agency requirements regarding the reporting of contacts, requests or threats from persons, groups, or organizations from a foreign country.” This new version is more specific than the previous mitigation by now requiring compliance with agency requirements, rather than simply reporting the contacts.

Mitigating Condition (f) relates to the disqualifying condition of business, financial or property interests and allows for mitigation where “the value or routine nature of the foreign business, financial or property interests is such that they are unlikely to result in a conflict and could not be used effectively to influence, manipulate, or pressure the individual.” This replaces the previous provision that the financial interests be “minimal and not sufficient to affect the individual’s security responsibility.”

GUIDELINE C – FOREIGN PREFERENCE

Disqualifying Condition (b) addresses an “action to acquire or obtain recognition of a foreign citizenship by an American citizen.” This is an entirely new provision.

Disqualifying Condition (d) adds a new provision for disqualification based on “any statement or action that shows allegiance to a country other than the United States: for example, declaration of intent to renounce United States citizenship; renunciation of United States citizenship.” The inclusion of any “statement” significantly broadens this disqualifying condition.

Mitigating Condition (c) now provides for mitigation where “exercise of the rights, privileges, or obligations of foreign citizenship occurred before the individual became a U.S. citizen or when the individual was a minor.” Consideration of the applicant’s age at the time of the potentially disqualifying events is new to the guidelines.

Mitigating Condition (d) has changed slightly to allow consideration of the use of a foreign passport approved by the “cognizant security authority.” In the previous version provided for approval only by the United States.

Mitigating Condition (e) provides for consideration of whether “the [foreign] passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated.” While this consideration was not specifically part of the previous version of the guidelines, it was arguably included in mitigating condition E2.A3.1.3.4 regarding the willingness to renounce dual citizenship.

Mitigating Condition (f) allows consideration of whether “the vote in a foreign election was encouraged by the United States Government.” This is a much more limited provision than the former E2.A3.1.3.3 concerning whether the “activity is sanctioned by the United States,” as it addresses only voting in foreign elections. There is no longer a general mitigating condition where other activities were sanctioned by the United States.

GUIDELINE D – SEXUAL BEHAVIOR

The Concern. Previous version of the guidelines identified the potential security concern presented by certain sexual behavior but also stated that “[s]exual orientation or preference may not be used as a basis for or a disqualifying factor in determining a persons’ eligibility for a security clearance.” The new version provides

that “[n]o adverse inference concerning the standards in this Guideline may be raised *solely* on the basis of the sexual orientation of the individual.” (emphasis added) The revision suggests that, while sexual orientation alone may not serve as a disqualifying factor, it may be raised in conjunction with another issue. Further, former section E2.A4.1.3.3 – providing for mitigation where “there is no other evidence of questionable judgment, irresponsibility, or emotional instability” – has been eliminated.

Mitigating Condition (b) provides for consideration of whether “the sexual behavior happened so long ago, so infrequently, or under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual’s current reliability, trustworthiness or good judgment.” The previous version allowed for mitigation where “the behavior was not recent and there is no evidence of subsequent conduct of a similar nature.” The new version presents a more difficult burden for applicants.

Mitigating Condition (d) is entirely new and allows for mitigation where “the sexual behavior is strictly private, consensual, and discreet.”

GUIDELINE E – PERSONAL CONDUCT

The Concern. The revised version specifies that “[o]f special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.” There is also a new provision regarding the type of conduct that will normally result in an unfavorable clearance action, which includes “failure without reasonable cause to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview.”

Disqualifying Condition (b) has eliminated the previous requirement that deliberately providing false or misleading information concerning relevant matters be “in connection with a personnel security or trustworthiness determination.”

Disqualifying Condition (c) is new and provides for consideration of “credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information.” This condition expands upon the previous provision E2.A5.1.2.1 which allowed for consideration of “reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances” which has been eliminated as a separate disqualifying condition.

Disqualifying Condition (d) is new and provides for consideration of “credible adverse information that is not explicitly covered by any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of: (1) untrustworthy or unreliable behavior to include breach of

client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information; (2) disruptive, violent or other inappropriate behavior in the workplace; (3) a pattern of dishonesty or rule violations; (4) evidence of significant misuse of Government or other employer's time or resources." This provision – by itself, and in conjunction with Disqualifying Condition (c) – serves as a "catch all" condition providing for possible disqualification based on activities that alone may not be sufficient for an adverse determination.

Disqualifying Condition (e) adds a new provision to former provision E2.A5.1.2.4, allowing now for consideration of "while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by a foreign security or intelligence service or other group."

Disqualifying Condition (f) is new and provides for consideration of a "violation of a written or recorded commitment made by the individual to the employer as a condition of employment."

Mitigating Condition (c) now provides for mitigation where "the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment." The previous version offered mitigation where "the falsification was an isolated incident, was not recent and the individual has subsequently provided correct information voluntarily." The use of the word "or" could be beneficial to applicants as under the previous version, the conduct had to be isolated, not recent *and* the applicant must have subsequently provided correct information.

Mitigating Condition (d) is entirely new and provides for consideration of whether "the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused the untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur."

Mitigating Condition (e) now provides for consideration of whether the association with persons involved in criminal activities "occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment or willingness to comply with rules and regulations." This provision was added to the previous condition requiring cessation of the association.

GUIDELINE F – FINANCIAL CONSIDERATIONS

The Concern. The revisions have expanded the explanation for why financial considerations may create a security concern, which now provides that "[f]ailure or inability to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness and ability to protect classified information . . . Compulsive gambling is a concern as it may lead to financial crimes including espionage." This expands upon the previously defined concern that "[a]n individual who is financially overextended is at risk of having to engage in illegal acts to generate funds" and "[a]ffluence that

cannot be explained by known sources of income" which "may indicate proceeds from financially profitable criminal acts."

Disqualifying Condition (b) is new and provides for possible disqualification for "indebtedness caused by frivolous or irresponsible spending and the absence of any evidence of willingness or intent to pay the debt or establish a realistic plan to pay the debt."

Disqualifying Condition (e) is new and addresses "consistent spending beyond one's means, which may be indicated by excessive indebtedness, significant negative cash flow, high debt-to-income ratio, and/or other financial analysis."

Disqualifying Condition (g) adds "failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same" as a new potentially disqualifying behavior.

Disqualifying Condition (h) expands upon the previous provision E2.A6.1.2.4 addressing unexplained affluence, and now allows for consideration of "unexplained affluence, as shown by a lifestyle or standard of living, increase in net worth, or money transfers that cannot be explained by subject's known legal sources of income."

Disqualifying Condition (i) is new and specifically explains the behavior related to gambling that could lead to disqualification as "compulsive or addictive gambling, as indicated by an unsuccessful attempt to stop gambling, 'chasing loses' (i.e. increasing the bets or returning another day in an effort to get even), concealment of gambling losses, borrowing money to fund gambling or pay gambling debts, family conflict or other problems caused by gambling."

Mitigating Condition (a) alters the passage of time and infrequency requirements from the previous mitigation factors to "the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, good judgment."

Mitigating Condition (b) adds to the previous consideration that the financial conditions were outside the applicant's control and now requires that "the individual acted responsibly under the circumstances."

Mitigating Condition (c) addressing counseling or control of the situation has changed the word "and" to "and/or," suggesting that counseling is no longer required for mitigation so long as there are "clear indications that the problem is being resolved or is under control."

Mitigating Condition (e) is new and provides for consideration of whether "the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions taken to resolve the issue."

GUIDELINE G – ALCOHOL CONSUMPTION

The Concern. The revised guidelines now identify a concern over alcohol consumption is that it "can raise questions about an individual's reliability and trustworthiness." The concern over "carelessness" has been eliminated.

Disqualifying Conditions (a), (b) and (c) now allow for disqualification based on alcohol-related incidents away from work, at work, or habitual or binge drinking "regardless of whether the individual is diagnosed as an alcohol abuser or an alcohol dependent." This change

is consistent with previous practice in adjudicative proceedings. Additionally, Disqualifying Condition (a) now includes “disturbing the peace” as an alcohol related incident away from work that could be cause for disqualification; there is no longer a specification that the incidents be “criminal in nature.”

Disqualifying Condition (f) now addresses “relapse after diagnosis of alcohol abuse or dependence and completion of an alcohol rehabilitation program.” The previous version simply identified “consumption of alcohol” after a diagnosis of alcoholism and completion of a rehabilitation program.

Disqualifying Condition (g) is new and allows consideration of the “failure to follow any court order regarding alcohol education, evaluation, treatment, or abstinence.”

Mitigating Condition (a) now encompasses the previous conditions of lapse of time and existence of a pattern, providing that “so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment.”

Mitigating Condition (b) now allows for consideration of whether “the individual acknowledges his or her alcoholism or issues of alcohol abuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence (if alcohol dependent) or responsible use (if an alcohol abuser).” This is an expanded version of the previous provision E2.A7.1.3.3 addressing “positive changes in behavior supportive of sobriety” which is no longer included.

Mitigating Condition (c) is entirely new and provides for mitigation where “the individual is a current employee who is participating in a counseling or treatment program, has no history of previous treatment and relapse, and is making satisfactory progress.”

Mitigating Condition (d) slightly alters the previous E2.A7.1.3.4 and allows for consideration of whether “the individual has successfully completed inpatient or outpatient counseling or rehabilitation along with any required aftercare, has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations, such as participation in meetings of Alcoholics Anonymous or a similar organization and has received a favorable prognosis by a duly qualified medical professional or a licensed clinical social worker who is a staff member of a recognized alcohol treatment program.”

GUIDELINE H – DRUG INVOLVEMENT

The Concern. The security concern raised by drug involvement has shifted from the individual’s willingness or ability to protect classified information and increased risk of unauthorized disclosure of classified information to the applicant’s possibly impaired judgment and “questions of a person’s ability or willingness to comply with laws, rules, and regulations.” The definitions of “drugs” and “drug abuse” remain unchanged.

Disqualifying Condition (b) is wholly new and provides for disqualification for “testing positive for illegal drug use.”

Disqualifying Condition (c) now includes “possession of drug paraphernalia.”

Disqualifying Conditions (g) and (h) were previously included with Mitigating Condition (f) in provision E2.A8.1.2.5, but have now been separated out into indi-

vidual conditions. Disqualifying Condition (g) now addresses “any illegal drug use after being granted a security clearance.” Disqualifying Condition (h) provides for disqualification where there has been “an expressed intent to continue illegal drug use or failure to clearly and convincingly commit to discontinue drug use.”

Mitigating Condition (a) now encompasses the previous issues of lapse of time and existence of a pattern, providing that “so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment.”

Mitigating Condition (b) still allows for consideration of “a demonstrated intent not to abuse any drugs in the future” but now also provides examples of how that intent may be manifested, including “(1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; (3) an appropriate period of abstinence; (4) a signed statement of intent with automatic revocation of clearance for any violation.”

Mitigating Condition (c) is entirely new and provides for consideration of whether “abuse of prescription drugs was after a severe or prolonged illness during which the drugs were prescribed, and abuse has since ended.”

GUIDELINE I – PSYCHOLOGICAL CONDITIONS

The Concern. The concern is now identified as follows: “Certain emotional, mental, and personality conditions can impair judgment, reliability, or trustworthiness. A formal diagnosis of a disorder is not required for there to be a concern under this guideline. A duly qualified mental health professional (e.g., clinical psychologist or psychiatrist) employed by, or acceptable to and approved by the U.S. Government, should be consulted when evaluating potentially disqualifying and mitigating information under this guideline. No negative inference concerning the standards in this Guideline may be raised solely on the basis of seeking mental health counseling.” The language stating that a formal diagnosis of a disorder is not required is new, as is the requirement that the mental health professional be employed by, or acceptable to and approved by the U.S. Government. The caveat that a negative inference for clearance cannot be raised solely on the basis of seeking mental health counseling is new.

Disqualifying Condition (a) now addresses “behavior that casts doubt on an individual’s judgment, reliability, or trustworthiness that is not covered under any other guideline, including but not limited to emotionally unstable, irresponsible, dysfunctional, violent, paranoid, or bizarre behavior.” This seems to include the previous provision E2.A9.1.2.4 of “information that suggests that the individual’s current behavior indicates a defect in his or her judgment or reliability.” The requirement of a “pattern” provided in E2.A9.1.2.3 no longer appears in the guidelines.

Disqualifying Condition (b) provides for consideration of “an opinion by a duly qualified mental health professional that the individual has a condition not covered under any other guideline that may impair judgment, reliability, or trustworthiness.” The revisions have altered the requirement that the mental health profes-

sional be “credentialed;” now the requirement is that he or she be “qualified.”

Disqualifying Condition (c) has been modified slightly to address whether “the individual has failed to follow treatment advice related to a diagnosed emotional, mental, or personality condition, e.g. failure to take prescribed medication.”

Mitigating Condition (a) is new and addresses whether “the identified condition is readily controllable with treatment, and the individual has demonstrated ongoing and consistent compliance with the treatment plan.”

Mitigating Condition (b) is new and allows consideration of whether “the individual has voluntarily entered a counseling or treatment program for a condition that is amenable to treatment, and the individual is currently receiving counseling or treatment with a favorable prognosis by a duly qualified mental health professional.”

Mitigating Condition (c) has changed slightly and allows for mitigation where a “recent opinion by a duly qualified mental health professional employed by, or acceptable to and approved by the U.S. Government that an individual’s previous condition is under control or in remission, and has a low probability of recurrence or exacerbation.” The requirement that the mental health professional be employed by or acceptable to and approved by the U.S. Government is a new concept within the guidelines. The previous version simply required that the mental health professional be “credentialed.”

GUIDELINE J – CRIMINAL CONDUCT

The Concern. The description of the security concern raised by criminal conduct is stated more harshly than in the previous version. There is no longer a requirement for a “history or pattern” of criminal activity. Additionally, the guidelines now explicitly state that “[b]y its very nature, [criminal activity] calls into question a person’s ability or willingness to comply with laws, rules and regulations.” This new language suggests that disqualification may be based on any criminal conduct, even a single instance.

Disqualifying Condition (b) is new and provides for disqualification based on “discharge or dismissal from the Armed Forces under dishonorable conditions.”

Disqualifying Condition (c) has been expanded and now addresses an “allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.” The language addressing prosecution and conviction is new.

Disqualifying Condition (d) newly provides for disqualification when the “individual is currently on parole or probation.”

Disqualifying Condition (e) is new and addresses the “violation of parole or probation, or failure to complete a court-mandated rehabilitation program.”

Mitigating Condition (a) now allows mitigation only where “so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment.”

Mitigating Condition (c) is new and provides for mitigation where there is “evidence that the person did not commit the offense.” It is unclear if this will be interpreted differently from the previous provision

E2.10.1.3.5 allowing for mitigation where there was an acquittal.

Mitigating Condition (d) now addresses whether “there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.” These examples of successful rehabilitation are new to the guidelines. It remains to be seen whether the “passage of time without recurrence of criminal activity” will be interpreted any differently from Mitigating Condition (a) requiring “so much time” to pass since the criminal behavior.

GUIDELINE K – HANDLING PROTECTED INFORMATION

The Concern. The concern regarding handling protected information is now more broad than the previous concern of “security violations.” Now, the guidelines describe the concern as follows: “Deliberate or negligent failure to comply with rules and regulations for protecting classified or other sensitive information raises doubt about an individual’s trustworthiness, judgment, reliability, or willingness and ability to safeguard such information, and is a serious security concern.”

Disqualifying Condition (a) is more specific and now addresses “deliberate or negligent disclosure of classified or other protected information to unauthorized persons, including but not limited to personal or business contacts, to the media, or to persons present at seminars, meetings, or conferences.” The previous version simply addressed “unauthorized disclosure of classified information” and deliberate, multiple or negligent violations.

Disqualifying Condition (b) is new and provides for disqualification for “collecting or storing classified or other protected information in any unauthorized location.”

Disqualifying Condition (c) is also new and allows disqualification for “loading, drafting, editing, modifying, storing, transmitting, or otherwise handling classified reports, data, or other information on any unapproved equipment including but not limited to any typewriter, word processor, or computer hardware, software, drive, system, gameboard, handheld, “palm” or pocket device or other adjunct equipment.”

Disqualifying Condition (d) is new and addresses “inappropriate efforts to obtain or view classified or other protected information outside one’s need to know.”

Disqualifying Condition (e) is entirely new and allows for disqualification for “copying classified or other protected information in a manner designed to conceal or remove classification or other document control markings.”

Disqualifying Condition (f) newly contemplates consideration of “viewing or downloading information from a secure system when the information is beyond the individual’s need-to-know.”

Disqualifying Condition (g) is new and permits disqualification based on “any failure to comply with rules for the protection of classified or other sensitive information.”

Disqualifying Condition (h) is new and addresses “negligence or lax security habits that persist despite counseling by management.”

Disqualifying Condition (i) newly allows for disqualification for “failure to comply with rules or regulations that results in damage to the National Security, regardless of whether it was deliberate or negligent.”

Mitigating Condition (a) is also new and allows for mitigation where “so much time has elapsed since the behavior, or it has happened so infrequently or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment.” This replaces the former provisions allowing for mitigation where the security violation(s) was inadvertent, isolated or infrequent.

Mitigating Condition (b) newly allows for consideration of whether “the individual responded favorably to counseling or remedial security training and now demonstrates a positive attitude toward the discharge of security responsibilities.”

GUIDELINE L – OUTSIDE ACTIVITIES

Disqualifying Condition (a) has been expanded and now provides for disqualification based on any employment or services, whether compensated or volunteer with any foreign “national, organization, or other entity.”

Disqualifying Condition (b) is new and addresses the “failure to report or fully disclose an outside activity when this is required.”

Mitigating Condition (a) has been altered and now provides for mitigation where an “evaluation of the outside employment or activity by the appropriate security or counterintelligence office indicates that it does not pose a conflict with an individual’s security responsibilities or with the national security interests of the United States.”

Mitigating Condition (b) was revised and now requires that “the individual terminated the employment or discontinued the activity upon being notified that it was in conflict with his or her security responsibilities.” The language now suggests that the activity already have been terminated or discontinued, rather than the possibility of doing so in the future.

GUIDELINE M – USE OF INFORMATION TECHNOLOGY SYSTEMS

The Concern. The concern has been expanded to provide more detail about the security risks raised by the

use of information technology systems. Specifically, the guidelines now state that “Information Technology Systems include all related computer hardware, software, firmware, and data used for the communication, transmission, processing, manipulation, storage, or protection of information.”

Disqualifying Condition (a) now addresses “illegal or unauthorized entry into any information technology system or component thereof.” The inclusion of system components is new.

Disqualifying Condition (c) is new and provides for disqualification for “use of any information technology system to gain unauthorized access to another system or to a compartmented area within the same system.”

Disqualifying Condition (d) is new and allows disqualification for “downloading, storing, or transmitting classified information on or to any unauthorized software, hardware, or information technology system.”

Disqualifying Condition (e) newly addresses the “unauthorized use of government or other information technology system.”

Disqualifying Condition (g) is entirely new and provides for consideration of “negligence or lax security habits in handling information technology that persist despite counseling by management.”

Disqualifying Condition (h) newly addresses “any misuse of information technology, whether deliberate or negligent, that results in damage to the national security.”

Mitigating Condition (a) is new and allows for mitigation only where “so much time has elapsed since the behavior has happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment.”

Mitigating Condition (b) is entirely new and provides for mitigation where “the misuse was minor and done only in the interest of organizational efficiency and effectiveness, such as letting another person use one’s password or computer when no other timely alternative was readily available.”