



Management Report 06-02
March 2006

Summary and Explanation of Changes to the Adjudicative Guidelines Approved by the President December 29, 2005

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Released By – James A. Riedel
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PREFACE

This report identifies and explains the rationale for the more significant changes to the Adjudicative Guidelines as approved by the President on December 29, 2005. The revised guidelines update the Adjudicative Guidelines that were previously approved by the President in 1997. The initial draft of the updated guidelines was prepared by and coordinated within the Department of Defense by the Defense Personnel Security Research Center. That draft was then reviewed and revised by a subcommittee of the Personnel Security Working Group prior to submission to the National Security Council Policy Coordinating Committee.

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Director

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INTRODUCTION

A new paragraph is added after the first paragraph to summarize the main concerns of the adjudicative process: identifying any conflicts of interest that put a person in a position of having to choose between commitments to the United States and any other compelling loyalty, and determining a person's reliability, trustworthiness and ability to protect classified information as demonstrated by the facts of the person's life.

In Section B, which discusses The Adjudicative Process, the following sentence is added at the start of subparagraph (c): "The ability to develop specific thresholds for action under these guidelines is limited by the nature and complexity of human behavior." This explains why the guidelines are not more specific. Consistent with this policy, mitigating factors for "not recent" and "infrequent" in several of the previous guidelines have been changed, because this wording suggested a need for specific thresholds for time or frequency that determine when behavior is disqualifying. The previous wording is replaced with wording along the lines of the following: "the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment." The time elapsed since the behavior occurred needs to be evaluated in the context of the past frequency of the behavior, circumstances such as the Subject's age at the time of the behavior, and a whole person judgment about the Subject's reliability, trustworthiness, or good judgment. This makes it clear that the difference between behavior that happened 11 months ago and behavior that happened 13 months ago, by itself, is not adjudicatively significant. The behavior must be evaluated in the context of all the other factors that impact on its significance.

GUIDELINE A: ALLEGIANCE TO THE UNITED STATES

Potentially disqualifying issues are expanded to cover a broader range of uses of force or violence to achieve political ends, e.g., use of force or violence "to influence the government," not just to overthrow it, or "to prevent government personnel from performing their official duties." This covers various types of terrorist and extremist activities.

GUIDELINE B: FOREIGN INFLUENCE

The statement of The Concern is changed to indicate that voluntary cooperation with a foreign interest, which can result from (or lead to) divided loyalties or conflicting interests, is at least as much of a concern as the potential for duress or coercion. It also states that: "Adjudication under this Guideline can and should consider the identity of the foreign country in question, including, but not limited

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to, such considerations as whether the foreign country is known to target United States citizens to obtain protected information or is associated with a risk of terrorism.” This recognizes that the country in which a person’s foreign contacts are located is an important factor in assessing some types of security risk.

Potentially disqualifying conditions have been changed to better deal with changes in the security environment, including changing intelligence and terrorist threats, the increasingly global economy, and our increasingly multiethnic society. The term “immediate” family member in the previous guideline is too limiting. People in many countries that target the United States have close ties to an extended family including aunts, uncles, and cousins. The previous guideline does not apply to business contacts or professional associates unless there are “close ties of affection or obligation” or they are “connected with a foreign government.” The emphasis on foreign contacts connected with a foreign government is also too limiting. Foreign contacts not connected with foreign government may be a concern if they are associated with any other organization or group interested in obtaining information on U.S. policy, military capabilities, technology, or scientific research.

The following potentially disqualifying condition is added: “counterintelligence information, that may be classified, indicates that the individual’s access to protected information may involve unacceptable risk to national security.” It is recognized that due process considerations may prevent some organizations from using relevant classified counterintelligence information in their adjudication process. However, classified information is sometimes the only basis for adverse adjudicative action, and this condition makes it easier for some agencies to use it.

The mitigating conditions are adjusted to make them commensurate with the potentially disqualifying conditions. One of the principal mitigating conditions is rewritten as follows: “the nature of the relationships 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 choosing between the interests of a foreign individual, group, organization, or government and the interests of the U.S.”

In order to provide adjudicators with the information needed to make informed judgments under the revised guideline, changes will be needed in investigator questioning on foreign influence issues.

GUIDELINE C: FOREIGN PREFERENCE

“Possession and/or use of a foreign passport” is changed to “possession of a current foreign passport.” Possession alone is potentially disqualifying, regardless of whether it is used, if the passport is current. This removes expired passports as an issue. Many people save old passports as keepsakes. It has been argued that the expired passport can be used to obtain a current passport. This is true, but there is no way to prevent persons who are eligible for a foreign passport from obtaining one

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if they wish to do so. If a person cannot be trusted not to obtain a new foreign passport, why should they be trusted with access to classified information?

“Action to acquire or obtain recognition of a foreign citizenship by an American citizen” is added as a potentially disqualifying condition. In recent years a number of countries have started actively encouraging American citizens born in their country, or whose parents were born in their country, to apply for a second citizenship.

A mitigating condition was added for voting in a foreign election if “the vote in a foreign election was encouraged by the U.S. Government.” This is intended specifically to apply to the recent election in Iraq and future elections held in Iraq or perhaps other countries under similar circumstances.

Procedures for mitigating the possession of a foreign passport are changed significantly. The goal of these changes is to provide an alternative to surrendering the passport to the foreign consulate or embassy as is currently required by some agencies, which is deemed ill-advised for reasons discussed below.

- The mitigating condition “activity is sanctioned by the United States” is changed to “use of a foreign passport is approved by the cognizant security authority,” as it was not clear who could act on behalf of “the United States” to sanction the possession of a foreign passport. Some agencies may need to define their own procedures for applying this mitigating condition.
- Requiring that the foreign passport be “destroyed, surrendered to the cognizant security authority, or otherwise invalidated” is another option. Even if the passport is destroyed, however, there is no way to prevent a person who is eligible for a foreign passport and wants a foreign passport from getting one.

The past practice of requiring individuals who have dual citizenship to surrender their passport to their consulate or embassy and obtain a receipt is considered ill-advised. As a general rule, the people who surrender their passport to a foreign consulate or embassy and ask for a receipt are those who are required to do so in order to obtain a security clearance. In other words, this action tends to label the individual as a person who has or is obtaining a security clearance and risks bringing the person into contact with an undercover intelligence officer whose job is to recruit Americans with access to desired information. This may increase security risk rather than mitigate it.

GUIDELINE D: SEXUAL BEHAVIOR

A mitigating condition has been added for sexual behavior that “is strictly private, consensual, and discreet.” This makes it clear that “unusual” sexual behavior is not a concern as long as it is legal, private, consensual, and discreet. Even private, consensual, and discreet sexual behavior can be a concern if it is indicative of a mental health issue or causes the individual to be vulnerable to pressure or coercion.

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GUIDELINE E: PERSONAL CONDUCT

Potentially disqualifying conditions are added or reworded to clarify the focus of the personal conduct element, as distinct from the falsification element, of this guideline. One condition covers “credible adverse information in several adjudicative 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...” Another condition covers credible adverse information that is not explicitly covered by any other guideline, but which, when combined with all available information, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability...” A corresponding mitigating measure is also added.

The potentially disqualifying condition on vulnerability to coercion, exploitation, or duress is modified to include emphasis on behaviors that cause vulnerability while traveling or stationed overseas, which is where the main risks are.

The only significant change in the falsification element of this guideline is that the phrase “relevant and material facts” is changed to simply “relevant facts.” The word “material” is deleted to give the adjudicator increased flexibility. For example, the adjudicator may feel that adverse action is appropriate if an individual has deliberately fabricated employment qualifications, even if the fabrication is not “material” because the individual probably would have been hired without the fabricated qualifications.

GUIDELINE F: FINANCIAL CONSIDERATIONS

A potentially disqualifying condition has been added for “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.” This recognizes that financial stress from excessive debt can be a security concern even when none of the debt is overdue. Agencies that use a financial disclosure form will have the information on both income and debt that is needed to make such an assessment. Other agencies will need to rely on information developed during the subject interview. This will require changes in the investigative guidance, probably a threshold for total non-mortgage debt that triggers the investigator to ask about the reasons for the debt and Subject’s ability to handle it.

Compulsive or addictive gambling is added as a potentially disqualifying condition, because it is said to be the fastest growing and most under-diagnosed addiction in America. A desperate attempt to make up for gambling losses is a significant cause of financial crimes. This is another one of the changes in the guidelines that is expected to lead to changes in the investigation.

Potentially disqualifying conditions have been added for “failure to file annual income taxes as required” and for “indebtedness caused by frivolous or

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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.”

Unexplained affluence is defined by citing examples of how it can be observed.

Mitigating conditions for “not recent” and “isolated incident” are clarified to the extent possible, and a mitigating condition is added for the individual who “has a reasonable basis for disputing the legitimacy of a past-due debt and provides documented proof to substantiate this.”

GUIDELINE G: ALCOHOL CONSUMPTION

It is made clear that certain behaviors may be disqualifying “regardless of whether an individual is diagnosed as an alcohol abuser or alcohol dependent.” An individual’s behavior alone is sufficient for action under this guideline.

“Failure to follow any court order regarding alcohol education, evaluation, treatment, or abstinence” is added as a disqualifying condition.

The current mitigating condition regarding “positive changes in behavior supportive of sobriety” has been expanded and clarified by describing specific favorable behaviors.

A mitigating condition is added for cases when “the individual who is already approved for access to classified information is participating in a counseling or treatment program, has no history of previous treatment and relapse, and is making satisfactory progress.” This will enable many employees to continue working while undergoing treatment. It will make it easier for employees who develop an alcohol problem to seek treatment for it, rather than feel compelled to hide the problem in order to protect their security clearance.

Mitigating condition (d) dealing with completion of inpatient or outpatient rehabilitation and aftercare requirements has been modified. The requirement to “abstain from alcohol for a period of at least 12 months” has been deleted. This is because total abstinence is required only if the individual was diagnosed as alcohol dependent; it may not be required if the diagnosis was alcohol abuse. The requirement under the new guidelines is to demonstrate “a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations.”

GUIDELINE H: DRUG INVOLVEMENT

A positive drug test is added as a potentially disqualifying condition. The mitigating condition, “a demonstrated intent not to abuse drugs in the future” is clarified by adding four examples of ways to demonstrate such intent.

A mitigating condition is added to cover the circumstance that “abuse of prescription drugs was after a severe or prolonged illness during which these drugs

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were prescribed, and abuse has since ended.” This allows for some compassion in dealing with cases where addiction followed a severe or prolonged illness.

The mitigating conditions for “not recent” and “isolated or infrequent” use as well as “demonstrated intent not to abuse any drugs in the future” are clarified to the extent that this is possible.

GUIDELINE I: PSYCHOLOGICAL CONDITIONS

The title Emotional, Mental, and Personality Disorders is changed to Psychological Conditions, and the word “disorders” is changed to “conditions” throughout the guideline. The term “disorder” sets an unnecessarily high standard for action under this guideline. Psychologists and psychiatrists frequently disagree on whether an individual’s behavior qualifies as a disorder, and behavior that does not meet all criteria for diagnosis as a disorder may still be disqualifying. The statement of The Concern states that “A formal diagnosis of a disorder is not required for there to be a concern under this guideline.” The key criterion is any condition that “impairs judgment, reliability, or trustworthiness.”

A mitigating condition is added for a “condition that is readily controllable with treatment, and the individual has demonstrated ongoing and consistent compliance with the treatment plan.” Another new mitigating condition is: “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.” This is intended to encourage current employees who need counseling or treatment to get it, rather than avoid it for fear it will affect their security clearance.

The word “cured” has been deleted from the mitigating conditions, as psychological conditions are seldom cured. The generally accepted terminology is that they are controlled or in remission.

GUIDELINE J: CRIMINAL CONDUCT

Potentially disqualifying conditions have been added for “discharge or dismissal from the Armed Forces under dishonorable conditions;” “currently on parole or probation;” and “violation of parole or probation, or failure to complete a court-mandated rehabilitation program.” The mitigating conditions for “not recent,” “isolated incident,” and “successful rehabilitation” have all been clarified.

The mitigating condition for “acquittal” is changed to “evidence that the person did not commit the offense.” Acquittal on the basis of a technicality that does not address the substance of the charge should not be a basis for mitigation. The revised condition mitigates only on the basis of evidence that the person did not commit the offense. The burden of proof is different in the courtroom than in the personnel security system. No one has a right to a clearance. In the personnel

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security system, the burden of proof is on the government to show “positive evidence of reliability, trustworthiness, etc.”

GUIDELINE K: HANDLING PROTECTED INFORMATION

The Security Violations guideline is renamed and rewritten for two reasons: (1) to focus more attention, including investigative attention, on serious security concerns and counterintelligence indicators as compared with administrative violations, and (2) to cover negligent handling of sensitive unclassified information (e.g., proprietary, privacy, export-controlled, For Official Use Only, etc.) as well as classified information.

Seven behaviors that put protected information at risk or indicate potential counterintelligence concerns were added to the two very general statements of concern in the existing guideline. These additional behaviors are directly related to potential espionage or other serious risk of compromise of classified information. Since the adjudicative guidelines drive the content of investigations, it is expected that this change in the guideline will cause investigators to ask questions about these behaviors during Subject, supervisor, and character reference interviews.

GUIDELINE L: OUTSIDE ACTIVITIES

The only significant change is addition of “failure to report or fully disclose an outside activity when this is required” as a potentially disqualifying condition.

GUIDELINE M: USE OF INFORMATION TECHNOLOGY SYSTEMS

To maintain a consistent style throughout all the guideline titles, “Misuse” is changed to “Use” in the title of this guideline. The statement of concern is modified to include any sensitive system, not just classified systems. The four disqualifying conditions in the current guideline are retained, and five new disqualifying conditions are added to reflect current technical concerns. A mitigating condition is added to cover circumstances when “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.