



6450-01-P

DEPARTMENT OF ENERGY

10 CFR Part 710

[Docket No. DOE-HQ-2012-0001-0274]

RIN 1992-AA36

Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material

AGENCY: Department of Energy.

ACTION: Final rule.

SUMMARY: The Department of Energy (DOE) is amending its regulations which set forth the policies and procedures for resolving questions concerning eligibility for DOE access authorization. The revisions update and provide added clarity throughout the regulations, and streamline the process for resolving access authorization eligibility determinations. Additionally, DOE is updating references to DOE Offices and officials to reflect the current DOE organizational structure.

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

FOR FURTHER INFORMATION CONTACT: Mark R. Pekrul, Office of Departmental Personnel Security, (202) 586-4097, mark.pekrul@hq.doe.gov; or Christina Pak, Office of the General Counsel, (202) 586-4114, christina.pak@hq.doe.gov.

SUPPLEMENTARY INFORMATION:

I. Background

II. Summary of Comments and Responses

III. Section-by-Section Analysis

IV. Procedural Analysis

- A. Review under Executive Order 12866 and 13563
- B. Review under Executive Order 12988
- C. Review under the Regulatory Flexibility Act
- D. Review under the Paperwork Reduction Act
- E. Review under the National Environmental Policy Act
- F. Review under Executive Order 13132
- G. Review under the Unfunded Mandates Reform Act of 1995
- H. Review under the Treasury and General Government Appropriations Act, 1999
- I. Review under Executive Order 13211
- J. Review under the Treasury and General Government Appropriations Act, 2001
- K. Approval by the Office of the Secretary of Energy
- L. Congressional Notification

I. Background

The Department of Energy is publishing this final rule in order to update and clarify DOE's policies and procedures for the denial and revocation of access authorizations.

10 CFR part 710 had not been substantively updated since 2001 (66 FR 47062, Sept. 11, 2001). Since that time, as the Department has gained operational experience under the existing rule, revisions to update and clarify provisions in the rule became appropriate. On April 19, 2016, DOE issued a notice of proposed rulemaking (NPR) to propose the updating of part 710 (81 FR 22920). The NPR proposed amending the existing rule to: (1) accord primacy to the national Adjudicative Standards when determining eligibility for

access authorization; (2) clarify that DOE can, in exigent circumstances, suspend an access authorization without recourse to certain administrative procedures; (3) permit individuals subject to criminal proceedings to suspend access authorization revocation proceedings under this part, subject to certain conditions; (4) limit the ability of the Appeal Panel to consider new evidence on appeal of a decision by the Department's Office of Hearings and Appeals or the Manager to deny or revoke access authorization; (5) introduce a one-year waiting period before an individual, previously the subject of denial or revocation of access authorization, may be reconsidered for access authorization; (6) add to part 710 the requirements of Presidential Policy Directive 19, which provides appeal rights to the Department's Office of Inspector General under certain circumstances; (7) revise, delete, and add definitions for certain terms used in the regulation; and (8) update references to DOE Offices and officials to reflect the current DOE organizational structure.

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

Laws, regulations and directives which may apply to part 710 include, but are not limited to: the Atomic Energy Act of 1954; Executive Order 13467 (73 FR 38103, June 30, 2008; Executive Order 12968 (60 FR 40245, August 2, 1995, as amended); Executive Order 13526 (75 FR 707, January 5, 2010); Executive Order 10865 (25 FR 1583, February 24, 1960, as amended); Executive Order 10450 (18 FR 2489, April 27, 1954, as amended); Presidential Policy Directive 19 (October 10, 2012).

II. Summary of Comments and Responses

DOE published a NOPR on April 19, 2016 (81 FR 22920), inviting public comments on proposed regulatory changes in the NOPR. In response to the publication of the NOPR, DOE received the following comments:

1. A commenter indicated that the need for the rule is not clearly addressed and that it seems the new rule will slow down rather than streamline the process.

Response: DOE disagrees with both observations. The rule is needed to ensure DOE has an efficient, effective and fair program for determining whether individuals are eligible for access classified matter, and to provide due process procedures for those who are determined ineligible for such access. The rule is also necessary to implement certain existing requirements (see §710.1, Purpose). Further, in many ways, as described in section II of this final rulemaking, the rule does bring greater efficiencies to the process.

Response: As the commenter failed to provide any specific suggested edits or other indication of language he or she wished changed or added, DOE will not alter the wording of the rule in response to this comment.

2. Another commenter expressed concern with the proposed changes to §§710.29 and 710.30 of the previous rule that would limit the introduction of new evidence on appeal. The commenter notes that the changes would not allow for an individual to show continued rehabilitation after the closing of the administrative record. DOE acknowledges that the changes to §§710.29 and 710.30 would mean that an individual would not be able to show continued rehabilitation after the closing of the administrative record. However, the DOE does not believe the

Appeal Panel is the appropriate venue for the consideration of new evidence, including evidence that may demonstrate continued rehabilitation or reformation. The introduction of new information should be limited to the administrative review hearing where an Administrative Judge can assign proper weight to new information by questioning the individual and other witnesses about the evidence and consulting with the DOE psychologist or psychiatrist, as appropriate, about the relevance and significance of the information. These changes would be consistent with the policies governing the introduction of new evidence during the appeal process at other federal agencies. For example, the Defense Office of Hearings and Appeals (DOHA) makes industrial security clearance determinations for contractor employees of Department of Defense organizations and approximately 20 other federal agencies and organizations. The Appeal Board that decides appeals from decisions issued by DOHA is prohibited from receiving or considering new evidence. Response: Not accepted.

In addition to the foregoing comments, DOE has determined that, for purposes of clarity and consistency with the previous rule, the term “appeal” as used in §§710.9(e) and 710.21(c)(2) to refer to a federal employee’s right to request further review by the Office of the Inspector General (OIG) should be replaced with “request for review” or “review” since the term “appeal” does not accurately reflect the role of the OIG under part 710. OIG is not an appellate body with authority to correct or order the reversal of a security clearance decision.

III. Section-by-Section Analysis

DOE amends 10 CFR part 710 as follows:

The title of this part is revised to delete the words “CRITERIA AND” to reflect the proposed deletion of the criteria in current §710.8, and because the term “Procedures” adequately describes the content of the rule. Additionally, the heading, Subpart A, “General Criteria and Procedures for Determining Eligibility for Access to Classified Matter and Special Nuclear Material,” is deleted. Previously, the entire body of this rule was denominated as Subpart A to Part 710. In this revision, each existing undesignated subpart heading is designated as an individual subpart, in accordance with the U.S. Government Printing Office’s Document Drafting Handbook.

1. The current heading “GENERAL PROVISIONS” located above current §710.1 is revised to add “SUBPART A –” at the beginning.
2. Section 710.1 “Purpose” deletes references to the specific types of individuals to which this part applies since this information is set forth in §710.2; and updates the applicable legal authorities.
3. Section 710.2 “Scope” clarifies that determining eligibility for an individual’s access authorization requires application of the national Adjudicative Guidelines, and reference to “criteria” is deleted.
4. Section 710.3 “Reference” deletes the reference to the Atomic Energy Act and replaces it with a reference to the Adjudicative Guidelines.
5. Section 710.4 “Policy” replaces the phrase “criteria for determining eligibility for access authorization and” with “procedures” in paragraph (a) to reflect the deletion of the criteria in current §710.8. Previous §710.4(c) is renumbered §710.32(b)(1). Previous §710.4(d) is renumbered §710.32(b)(2). Previous paragraphs (e) and (f) are

deleted since the situations addressed in those paragraphs are already covered in the rule. Previous paragraph (g) is renumbered §710.32(c).

6. In §710.5 “Definitions” a number of new or revised definitions are added. In addition, the terms contained in this section have been re-ordered so that they are listed in alphabetical order; previous §710.5(b) would be deleted as unnecessary.

The term “DOE Counsel” is amended to delete the requirement that such an individual be subject to a favorably adjudicated background investigation. Instead, the requirement that such an individual must hold a DOE Q access authorization, the grant of which is predicated on a favorably adjudicated background investigation, is added.

The term “Administrative Judge” is amended in the same fashion and for the same reasons as the definition of “DOE Counsel,” and also to delete the requirement that this person be a “senior management official.”

The term “Director” is added and defined as the Director, Office of Departmental Personnel Security, to reflect organizational changes within the DOE’s personnel security program.

The terms “Local Director of Security” and “Manager” are revised to reflect organizational changes throughout DOE.

The term “national security information” is deleted as it does not appear anywhere in this rule.

7. The previous heading “CRITERIA AND PROCEDURES FOR DETERMINING ELIGIBILITY FOR ACCESS TO CLASSIFIED MATTER OR SPECIAL NUCLEAR MATERIAL” located above previous §710.6 is revised to add

“SUBPART B –” at the beginning, and to delete “CRITERIA AND” to reflect the deletion of the criteria in proposed §710.8.

8. Section 710.6 “Cooperation by the individual.”

(1) Paragraph (a)(1) revises the language for clarity but does not change it substantively.

(2) Paragraph (a)(2) updates the reference to polygraph examinations to be consistent with the intent of 10 CFR part 709, and updates terms as in paragraph (a)(1), described above.

(3) Paragraph (b) reflects current DOE organizational structures.

(4) Paragraph (c) clarifies the process by which an individual could appeal decisions taken by DOE under proposed paragraphs (a)(1) and (a)(2).

9. The previous §710.7 “Application of the criteria” removes references to the criteria and clarifies that all determinations of eligibility for access authorization at DOE will be made in accordance with the national Adjudicative Guidelines. DOE has for several decades utilized the criteria previously in §710.8 to determine eligibility for access authorization. When the national Adjudicative Guidelines were introduced in 1997, DOE began using them in conjunction with the criteria previously in §710.8. This revision makes all access authorization determinations in reliance solely on the Adjudicative Guidelines. The previous title “Application of the criteria” is revised to replace “criteria” with “Adjudicative Guidelines.” Additionally, the previous §710.9(a) is renumbered §710.7(d) to clearly indicate how information obtained by DOE may be considered derogatory under the Adjudicative Guidelines and used to

determine access authorization eligibility. The last sentence of the previous §710.7(a) is moved to the beginning of §710.7(d) where it more logically fits.

10. Previous §710.8 “Criteria” is removed in its entirety, since exclusive reliance on the national Adjudicative Guidelines for making access authorization eligibility determinations renders this section unnecessary.

11. The previous §710.9 “Action on derogatory information” is renumbered § 710.8.

(1) Previous paragraph (a) is moved to §710.7(d) as indicated in the discussion of §710.7.

(2) Paragraph (a) – previously paragraph (b) – removes the specific reference to a DOE mental evaluation as an example of actions that can be taken to resolve derogatory information. Since a mental evaluation is just one of many actions DOE can take to resolve derogatory information, DOE is deleting the example to avoid any misperception that DOE is limited to this action.

(3) Previous paragraph (e) is renumbered as paragraph (d) and is revised to reflect changes in the DOE organizational structure.

12. Previous §710.10 “Suspension of access authorization” is renumbered §710.9.

(1) Paragraph (b) clarifies that the Department can take immediate action to suspend an individual’s access authorization, without taking actions to investigate derogatory information, when there are immediate threats to the national security or to the safety and security of a DOE facility or employee. An individual whose access authorization has been suspended under these circumstances is entitled to due process protections as set forth in part 710 before the Department makes a final decision on the individual’s eligibility for access authorization.

- (2) Previous paragraph (b) is renumbered as paragraph (c). Paragraph (c) clarifies the responsibilities of the Manager upon the recommendation of a Local Director of Security that an individual's access authorization should be suspended.
- (3) Paragraph (e) is added to reflect the requirements of Presidential Policy Directive 19, and provides that a Federal employee who believes action to suspend his or her access authorization was taken as retaliation for having made a protected disclosure of information may submit a request for review of the decision to the Department's Office of the Inspector General.
13. The previous heading, "ADMINISTRATIVE REVIEW," located above previous § 710.20, is predesignated as Subpart C by adding, "SUBPART C –" at the beginning.
14. 710.20 "Purpose of administrative review" remains unchanged except for an editorial revision clarifying that the procedures in proposed Subpart C "govern" and not just "establish methods for" the conduct of administrative review proceedings under this part.
15. Section 710.21 "Notice to the individual"
- (1) Paragraph (b)(7) clarifies that the Administrative Judge has the option of conducting administrative review hearings via video teleconferencing. The use of video teleconferencing for this purpose has been piloted with successful results. Additionally, paragraph (b)(7) includes information previously contained in §710.34, "Attorney representation," which is deleted. The previous §710.34 addressed the responsibility of the individual to provide DOE with notice of representation by an attorney, so the substance of §710.34 fits better in paragraph (b)(7) since it already addresses the individual's right to attorney representation.

- (2) Paragraph (b)(8) clarifies that in the event that an individual fails to file a timely written request for a hearing before an Administrative Judge, the Manager shall issue a final decision to revoke or deny an individual's access authorization.
- (3) Previous paragraphs (c)(1) and (c)(3) are renumbered as paragraphs (b)(10) and (b)(11), respectively, for better flow.
- (4) Paragraphs (b)(12)(i) through (iii) address the rights of individuals who, at the time they receive a notification letter pursuant to §710.21, are the subject of criminal proceedings for a felony offense or for an offense which is punishable by more than a year in prison. The addition clarifies that individuals in that situation have the right to decide whether to continue with or withdraw from the Administrative Review process. Under the previous rule, the discretion to continue with the Administrative Review process resided with DOE. Under the revision, the individual concerned decides to either 1) proceed with Administrative Review, requiring him/her to participate fully in the process, or 2) withdraw from the Administrative Review process, resulting in the administrative withdrawal of the individual's access authorization. Once the individual's criminal law matter concludes, a request for access authorization could be resubmitted.
- (5) Paragraph (c)(2), embodying the requirements of Presidential Policy Directive 19, is added providing that a Federal employee who believes action to deny or revoke access authorization under the Administrative Review process was taken as retaliation for having made a protected disclosure of information may submit a

request for review of the decision to the Department's Office of the Inspector General.

16. Section 710.22 "Initial Decision Process" clarifies, in paragraph (c)(4), that if the individual does not exercise his/her right to appeal the initial decision of a Manager to deny or revoke access authorization within 30 calendar days of that decision, the Manager's initial decision would become final action not subject to further review or appeal.
17. Section 710.25 "Appointment of Administrative Judge; prehearing conference; commencement of hearings" clarifies the authority of the Administrative Judge to conduct hearings via video teleconferencing and shorten the time limit for the Administrative Judge to commence a hearing, from 90 days to 60 days from the date the individual's request for hearing is received by the Office of Hearings and Appeals. This change reflects the DOE Office of Hearings and Appeals' current internal procedures for commencing a hearing.
18. Section 710.26(d) was proposed to be amended to delete "if possible" after "All witnesses shall be subject to cross-examination," and add "except as provided in §710.26(l)" in its place. Upon review, the reference to §710.26(l) is not necessary, so this change is not being made in the revised rule.
19. Section 710.27 "Administrative Judge's decision" indicates that the Administrative Judge shall render a decision as to the granting or restoring of an individual's access authorization within 30 calendar days from the date of receipt of the hearing transcript. This change reflects the DOE Office of Hearings and Appeals' current internal procedures for issuing a decision.

20. Section 710.28 “Action on the Administrative Judge’s decision” clarifies that an Administrative Judge’s decision shall constitute final action not subject to review or further appeal if a written request for a review of the decision by the Appeal Panel is not filed within a timely manner with the Director. Additionally, paragraph (c) addresses the process by which the Department may appeal a decision by the Administrative Judge to grant or to continue an individual’s access authorization, to comport with the process in previous paragraph (b) which addresses how the individual may appeal a decision by the Administrative Judge to deny or revoke access authorization.
21. Section 710.29 “Final appeal process” reflects, in paragraph (e), that an appeal decision would be based solely upon information in the administrative record at the time of the Manager’s decision or the Administrative Judge’s initial decision. Consequently, previous paragraphs (h), (i) and (j) are deleted in their entirety. Paragraphs (a) through (d) are revised to reflect the current Departmental organization and to more clearly describe the process by which an Appeal Panel is convened. Paragraph (f) is revised to clarify that the Appeal Panel’s decision is not subject to further review or appeal.
22. Previous §710.30 “New evidence” is deleted to reflect that an appeal decision is based solely upon information in the administrative record at the time of the Manager’s decision or the Administrative Judge’s initial decision.
23. Section 710.30 “Action by the Secretary,” previously §710.31 and renumbered § 710.30 in the revised rule, states that the Secretary’s responsibilities could be

delegated in accordance with Executive Orders 12968 and 10865. Also, references to previous §710.29(h) and (i) are deleted since those sections are deleted.

24. Section 710.31 “Reconsideration of Access Eligibility.” This section, renumbered from §710.32, provides for a minimum of one year between a final decision to deny or revoke access authorization and the time when an individual may apply for reconsideration. Previously, part 710 contained no time limit and many individuals sought reconsideration within days of receiving a final decision denying or revoking the individual’s access authorization. Further, individuals had been permitted to file a request for reconsideration repeatedly, even after previous reconsideration requests have been denied. A one-year time limit conveys clear expectations to the individual as to when a reconsideration request could be accepted and would reduce the undue burden on the Department of considering multiple close-in-time appeals. In addition, paragraph (d) more clearly describes the reconsideration process.
25. The previous heading, “TERMINATIONS,” located above previous §710.33 is predesignated as Subpart D by adding, “SUBPART D –” at the beginning.
26. Section 710.32 “Terminations.” This section, is renumbered from §710.33. Section 710.32(a), previously §710.33, clarifies that if the procedures of this part are terminated after an unfavorable initial agency decision has been rendered, any subsequent requests for access authorization for an individual would be processed as a review of the decision by the Appeal Panel, unless a minimum of one year has elapsed. Section 710.32(b)(1), previously §710.4(c), indicates that the type of criminal proceedings for which DOE may take action to terminate processing an access authorization application include felony offenses and offenses punishable by

one year of imprisonment or longer. Previously, this threshold was six months; this change to one year is consistent with the one-year time frame in §710.21. Section 710.32(b)(2) and §710.32(c), are renumbered from previous §710.4(d) and (g), respectively.

27. Previous §710.34 “Notice to individual” is deleted. The substance of previous § 710.34 is added to §710.21.

28. Section 710.33 “Time frames,” previously §710.35, is renumbered as § 710.33.

29. Section 710.34 “Acting Officials,” previously §710.36, reflects organizational changes within the Department and permits the Deputy Associate Under Secretary for Environment, Health, Safety and Security greater flexibility to delegate his/her responsibilities under part 710. Previously, these responsibilities could only be exercised by persons in security-related Senior Executive Service positions. The change permits the Deputy Associate Under Secretary for Environment, Health, Safety and Security to delegate his/her authorities under part 710 to persons in senior security-related positions. It is expected that only persons in GS-15 or Senior Executive Service positions would meet this requirement. This change enhances the Department’s ability to effectively manage the Administrative Review process prescribed by part 710.

APPENDICES

The national Adjudicative Guidelines are Appendix A.

IV. Procedural Requirements

A. Review under Executive Orders 12866 and 13563

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

DOE has also reviewed the regulation pursuant to Executive Order 13563, issued on January 18, 2011 (76 FR 3281 (Jan. 21, 2011)). Executive Order 13563 is supplemental to and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, agencies are required by Executive Order 13563 to: (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and (5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.

DOE emphasizes as well that Executive Order 13563 requires agencies to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible. In its guidance, the Office of Information and Regulatory Affairs has

emphasized that such techniques may include identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes. DOE believes that this rule is consistent with these principles, including the requirement that, to the extent permitted by law, agencies adopt a regulation only upon a reasoned determination that its benefits justify its costs and, in choosing among alternative regulatory approaches, those approaches maximize net benefits.

B. Review under Executive Order 12988

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

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

the required review and determined that, to the extent permitted by law, this regulation meets the relevant standards of Executive Order 12988.

C. Review under the Regulatory Flexibility Act

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

This rule amends procedures that apply to the determination of eligibility of individuals for access to classified information and access to special nuclear material. The rule applies to individuals, and would not apply to “small entities,” as that term is defined in the Regulatory Flexibility Act. As a result, the rule does not have a significant economic impact on a substantial number of small entities.

Accordingly, DOE certifies that the rule will not have a significant economic impact on a substantial number of small entities, and, therefore, no regulatory flexibility analysis is required.

D. Review under the Paperwork Reduction Act

This rule does not impose a collection of information requirement subject to the Paperwork Reduction Act, 44 U.S.C. 3501 et seq.

E. Review under the National Environmental Policy Act

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

F. Review under Executive Order 13132

Executive Order 13132, 64 FR 43255 (August 4, 1999), imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and carefully assess the necessity for such actions. DOE has examined this rule and has determined that it does not preempt State law and does not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. No further action is required by Executive Order 13132.

G. Review under the Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (Public Law 104—4) generally requires a Federal agency to perform a detailed assessment of costs and benefits of any rule imposing a Federal Mandate with costs to State, local or tribal governments, or to the private sector, of

\$100 million or more. This rulemaking does not impose a Federal mandate on State, local or tribal governments or on the private sector.

H. Review under the Treasury and General Government Appropriations Act, 1999

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

I. Review under Executive Order 13211

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

J. Review under the Treasury and General Government Appropriations Act, 2001

The Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516, note) provides for agencies to review most disseminations of information to the public under implementing guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (February 22, 2002), and DOE's guidelines were published at 67 FR 62446 (October 7, 2002). DOE has reviewed this rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

K. Approval by the Office of the Secretary of Energy.

The Office of the Secretary of Energy has approved issuance of this rule.

L. Congressional Notification

As required by 5 U.S.C. 801, DOE will report to Congress on the promulgation of this rule prior to its effective date. The report will state that it has been determined that the rule is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects in 10 CFR Part 710

Administrative practice and procedure, Classified information, Government contracts, Government employees, Nuclear energy.

Issued in Washington, DC, on September 30, 2016.

Dr. Elizabeth Sherwood-Randall
Deputy Secretary

For the reasons set out in the preamble, DOE is revising part 710 of title 10

of the Code of Federal Regulations as set forth below.

PART 710 – PROCEDURES FOR DETERMINING ELIGIBILITY FOR ACCESS TO CLASSIFIED MATTER AND SPECIAL NUCLEAR MATERIAL

Subpart A – General Provisions

Sec.

710.1 Purpose.

710.2 Scope.

710.3 Reference.

710.4 Policy.

710.5 Definitions.

Subpart B – Eligibility for Access to Classified Matter or Special Nuclear Material

710.6 Cooperation by the individual.

710.7 Application of the adjudicative guidelines.

710.8 Action on derogatory information.

710.9 Suspension of access authorization.

Subpart C – Administrative Review

710.20 Purpose of administrative review.

710.21 Notice to the individual.

710.22 Initial decision process.

710.23 Extensions of time by the manager.

710.24 Appointment of DOE Counsel.

710.25 Appointment of Administrative Judge; prehearing conference; commencement of hearings.

710.26 Conduct of hearings.

710.27 Administrative Judge's decision.

710.28 Action on the Administrative Judge's decision.

710.29 Final appeal process.

710.30 Action by the Secretary.

710.31 Reconsideration of access eligibility.

Subpart D – Miscellaneous

710.32 Terminations.

710.33 Time frames.

710.34 Acting officials.

Appendix A – Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (December 30, 2005)

Authority: 42 U.S.C. 2165, 2201, 5815, 7101, *et seq.*, 7383h-l; 50 U.S.C. 2401 *et seq.*; E.O. 10450, 3 CFR 1949-1953 comp., p. 936, as amended; E.O. 10865, 3 CFR 1959-1963 comp., p. 398, as amended, 3 CFR Chap. IV; E.O. 13526, 3 CFR 2010 Comp., pp. 298-327 (or successor orders); E.O. 12968, 3 CFR 1995 Comp., p. 391.

Subpart A - General Provisions

§710.1 Purpose.

(a) This part establishes the procedures for determining the eligibility of individuals described in §710.2 for access to classified matter or special nuclear material, pursuant to the Atomic Energy Act of 1954, or for access to national security information in accordance with Executive Order 13526 (Classified National Security Information).

(b) This part implements: Executive Order 12968, 60 FR 40245 (August 2, 1995), as amended; Executive Order 13526, 75 FR 707 (January 5, 2010); Executive Order 10865, 25 FR 1583 (February 24, 1960), as amended; Executive Order 10450, 18 FR 2489 (April 27, 1954), as amended; and the Adjudicative Guidelines for Determining Eligibility for Access to Classified Information approved by the President (the “Adjudicative Guidelines”; see Appendix A of this part).

§710.2 Scope.

The procedures outlined in this rule require the application of the Adjudicative Guidelines (see §710.7) in determining eligibility for access authorization for:

(a) Employees (including consultants) of, and applicants for employment with, contractors and agents of the DOE;

(b) Access permittees of the DOE and their employees (including consultants) and applicants for employment;

(c) Employees (including consultants) of, and applicants for employment with, the DOE; and

(d) Other persons designated by the Secretary of Energy.

§710.3 Reference.

The Adjudicative Guidelines are set forth in Appendix A to this part.

§710.4 Policy.

(a) It is the policy of DOE to provide for the security of its programs in a manner consistent with traditional American concepts of justice and fairness. To this end, the Secretary has established procedures that will afford those individuals described in §710.2 the opportunity for administrative review of questions concerning their eligibility for access authorization.

(b) It is also the policy of DOE that none of the procedures established for determining eligibility for access authorization shall be used for an improper purpose, including any attempt to coerce, restrain, threaten, intimidate, or retaliate against individuals for exercising their rights under any statute, regulation or DOE directive. Any DOE officer or

employee violating, or causing the violation of this policy, shall be subject to appropriate disciplinary action.

§710.5 Definitions.

(a) As used in this part:

Access authorization means an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material.

Administrative Judge means a DOE attorney appointed by the Director, Office of Hearings and Appeals, pursuant to §710.25 of this part. An Administrative Judge shall be a U.S. citizen and shall hold a Q access authorization.

Classified matter means the material of thought or expression that is classified pursuant to statute or Executive Order.

Director means the Director, DOE Office of Departmental Personnel Security.

DOE Counsel means a DOE attorney assigned to represent DOE in proceedings under this part. DOE Counsel shall be a U.S. citizen and shall hold a Q access authorization.

Local Director of Security means the individual with primary responsibility for safeguards and security at the Chicago, Idaho, Oak Ridge, Richland, and Savannah River Operations Offices; for Naval Reactors, the individual(s) designated under the authority of the Director of the Naval Nuclear Propulsion Program; for the National Nuclear Security Administration (NNSA), the individual designated in writing by the Chief, Defense Nuclear

Security; and for DOE Headquarters cases the Director, Office of Headquarters Personnel Security Operations.

Manager means the senior Federal official at the Chicago, Idaho, Oak Ridge, Richland, or Savannah River Operations Offices; for Naval Reactors, the individual designated under the authority of the Director of the Naval Nuclear Propulsion Program; for the NNSA, the individual designated in writing by the NNSA Administrator or Deputy Administrator; and for DOE Headquarters cases, the Director, Office of Headquarters Security Operations.

Secretary means the Secretary of Energy, as provided by section 201 of the Department of Energy Organization Act.

Special nuclear material means plutonium, uranium enriched in the isotope 233, or in the isotope 235, and any other material which, pursuant to the provisions of section 51 of the Atomic Energy Act of 1954, has been determined to be special nuclear material, but does not include source material; or any material artificially enriched by any of the foregoing, not including source material.

(b) [Reserved]

Subpart B - Eligibility for Access to Classified Matter or Special Nuclear Material

§710.6 Cooperation by the individual.

(a)(1) It is the responsibility of the individual to provide full, frank, and truthful answers to DOE's relevant and material questions, and when requested, to furnish or

authorize others to furnish information that the DOE deems pertinent to the individual's eligibility for access authorization. This obligation to cooperate applies when completing security forms, during the course of a personnel security background investigation or reinvestigation, and at any stage of DOE's processing of the individual's access authorization request, including but not limited to, personnel security interviews, DOE-sponsored mental health evaluations, and other authorized DOE investigative activities under this part. The individual may elect not to cooperate; however, such refusal may prevent DOE from reaching an affirmative finding required for granting or continuing access authorization. In this event, any access authorization then in effect may be administratively withdrawn or, for applicants, further processing may be administratively terminated.

(2) It is the responsibility of an individual subject to 10 CFR 709.3(d) to consent to and take a polygraph examination required by part 709. A refusal to consent to or take such an examination may prevent DOE from reaching an affirmative finding required for continuing access authorization. In this event, any access authorization then in effect may be administratively withdrawn.

(b) If the individual believes that the provisions of paragraph (a) of this section have been inappropriately applied, the individual may file a written appeal of the action with the Director within 30 calendar days of the date the individual was notified of the action.

(c) Upon receipt of the written appeal, the Director shall conduct an inquiry as to the circumstances involved in the action and shall, within 30 calendar days of receipt of the written appeal, notify the individual, in writing, of his/her decision. If the Director determines that the action was inappropriate, the Director shall notify the Manager that

access authorization must be reinstated or, for applicants, that the individual must continue to be processed for access authorization. If the Director determines the action was appropriate, the Director shall notify the individual of this fact in writing. The Director's decision is final and not subject to further review or appeal.

§710.7 Application of the adjudicative guidelines.

(a) The decision on an access authorization request is a comprehensive, common-sense judgment, made after consideration of all relevant information, favorable and unfavorable, as to whether the granting or continuation of access authorization will not endanger the common defense and security and is clearly consistent with the national interest. Any doubt as to an individual's access authorization eligibility shall be resolved in favor of the national security.

(b) All such determinations shall be based upon application of the Adjudicative Guidelines, or any successor national standard issued under the authority of the President.

(c) Each Adjudicative Guideline sets forth a series of concerns that may create a doubt regarding an individual's eligibility for access authorization. In resolving these concerns, all DOE officials involved in the decision-making process shall consider: the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, to include knowledgeable participation; the frequency and recency of the conduct; the age and maturity of the individual at the time of the conduct; the voluntariness of participation; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the motivation for the conduct; the potential for pressure, coercion, exploitation, or duress; the likelihood of continuation or recurrence; and other relevant and material factors.

(d) If the reports of investigation of an individual or other reliable information tend to establish the validity and significance of one or more areas of concern as set forth in the Adjudicative Guidelines, such information shall be regarded as derogatory and create a question as to the individual's access authorization eligibility. Absent any derogatory information, a favorable determination will be made as to access authorization eligibility.

§710.8 Action on derogatory information.

(a) If a question arises as to the individual's access authorization eligibility, the Local Director of Security shall authorize the conduct of an interview with the individual, or other appropriate actions and, on the basis of the results of such interview or actions, may authorize the granting of the individual's access authorization. If, in the opinion of the Local Director of Security, the question as to the individual's access authorization eligibility has not been favorably resolved, the Local Director of Security shall submit the matter to the Manager with a recommendation that authority be obtained to process the individual's case under administrative review procedures set forth in this part.

(b) If the Manager agrees that unresolved derogatory information is present and that appropriate attempts to resolve such derogatory information have been unsuccessful, the Manager shall notify the Director of the proposal to conduct an administrative review proceeding, accompanied by an explanation of the security concerns and a duplicate Personnel Security File. If the Manager believes that the derogatory information has been favorably resolved, the Manager shall direct that access authorization be granted for the individual. The Manager may also direct the Local Director of Security to obtain additional information prior to deciding whether to grant the individual access authorization or to

submit a request for authority to conduct an administrative review proceeding. A decision in the matter shall be rendered by the Manager within 10 calendar days of its receipt.

(c) Upon receipt of the Manager's notification, the Director shall review the matter and confer with the Manager on:

(1) The institution of administrative review proceedings set forth in §§710.20 through 710.30;

(2) The granting of access authorization; or

(3) Other actions as the Director deems appropriate.

(d) The Director shall act pursuant to one of these options within 30 calendar days of receipt of the Manager's notification unless an extension is granted by the Deputy Associate Under Secretary for Environment, Health, Safety and Security.

§710.9 Suspension of access authorization.

(a) If derogatory information is received, the Local Director of Security shall authorize action(s), to be taken on an expedited basis, to resolve the question pursuant to §710.8(a). If the question as to the individual's continued access authorization eligibility is not resolved in favor of the individual, the Local Director of Security shall submit the matter to the Manager with the recommendation that the individual's access authorization be suspended pending the final determination resulting from the procedures set forth in this part.

(b) If the information received is determined to represent an immediate threat to national security or to the safety or security of a DOE facility or employee, or is determined

to be so serious in nature that action(s) to resolve the matter as set forth in §710.8(b) are not practical or advisable, the Local Director of Security shall immediately submit the matter to the Manager with a recommendation that the individual's access authorization be suspended pending the final determination resulting from the procedures set forth in this part. The Manager shall either authorize the immediate suspension of access authorization, or shall direct the Local Director of Security to take action(s) as set forth in §710.8(b), in an expedited manner, to resolve the matter.

(c) The Manager shall, within two working days of receipt of the recommendation from the Local Director of Security to suspend the individual's DOE access authorization:

- (1) Approve the suspension of access authorization; or
- (2) Direct the continuation of access authorization, or
- (3) Take or direct other such action(s) as the Manager deems appropriate.

(d) Upon suspension of an individual's access authorization pursuant to paragraph (c)(1) of this section, the individual, the individual's employer, any other DOE office or program having an access authorization interest in the individual, and, if known, any other government agency where the individual holds an access authorization, security clearance, or access approval, or to which the DOE has certified the individual's DOE access authorization, shall be notified immediately in writing. The appropriate DOE database for tracking access authorizations and related actions shall also be updated. Notification to the individual shall reflect, in general terms, the reason(s) why the suspension has been affected. Pending final determination of the individual's eligibility for access authorization from the operation of the procedures set forth in this part, the individual shall not be afforded access to

classified matter, special nuclear material, or unescorted access to security areas that require the individual to possess a DOE access authorization.

(e) Written notification to the individual shall include, if the individual is a Federal employee, notification that if the individual believes that the action to suspend his/her access authorization was taken as retaliation against the individual for having made a protected disclosure, as defined in Presidential Policy Directive 19, *Protecting Whistleblowers with Access to Classified Information*, or any successor directive issued under the authority of the President, the individual may submit a request for review of this matter directly to the DOE Office of the Inspector General. Such a request shall have no impact upon the continued processing of the individual's access authorization eligibility under this part.

(f) Following the decision to suspend an individual's DOE access authorization pursuant to paragraph (c)(1) of this section, the Manager shall immediately notify the Director in writing of the action and the reason(s) therefor. In addition, the Manager, within 10 calendar days of the date of suspension (unless an extension of time is approved by the Director), shall notify the Director in writing of his/her proposal to conduct an administrative review proceeding, accompanied by an explanation of its basis and a duplicate Personnel Security File.

(g) Upon receipt of the Manager's notification, the Director shall review the matter and confer with the Manager on:

(1) The institution of administrative review procedures set forth in §§710.20 through 710.30; or

(2) The reinstatement of access authorization; or

(3) Other actions as the Director deems appropriate.

(h) The Director shall act pursuant to one of these options within 30 calendar days of the receipt of the Manager's notification unless an extension is granted by the Deputy Associate Under Secretary for Environment, Health, Safety and Security.

Subpart C - Administrative Review

§710.20 Purpose of administrative review.

These procedures govern the conduct of the administrative review of questions concerning an individual's eligibility for access authorization when it is determined that such questions cannot be favorably resolved by interview or other action.

§710.21 Notice to the individual.

(a) Unless an extension is authorized in writing by the Director, within 30 calendar days of receipt of authority to institute administrative review procedures, the Manager shall prepare and deliver to the individual a notification letter approved by the local Office of Chief Counsel, or the Office of the General Counsel for Headquarters cases. Where practicable, the letter shall be delivered to the individual in person.

(b) The letter shall state:

(1) That reliable information in the possession of DOE has created a substantial doubt concerning the individual's eligibility for access authorization.

(2) The information which creates a substantial doubt regarding the individual's access authorization eligibility (which shall be as comprehensive and detailed as the national security permits) and why that information creates such doubt.

(3) That the individual has the option to have the substantial doubt regarding eligibility for access authorization resolved in one of two ways:

(i) By the Manager, without a hearing, on the basis of the existing information in the case; or

(ii) By personal appearance before an Administrative Judge (a "hearing").

(4) That, if the individual desires a hearing, the individual must, within 20 calendar days of the date of receipt of the notification letter, make a written request for a hearing to the Manager from whom the letter was received.

(5) That the individual may also file with the Manager the individual's written answer to the reported information which raises the question of the individual's eligibility for access authorization, and that, if the individual requests a hearing without filing a written answer, the request shall be deemed a general denial of all of the reported information.

(6) That, if the individual so requests, a hearing shall be scheduled before an Administrative Judge, with due regard for the convenience and necessity of the parties or their representatives, for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization. The Administrative Judge shall decide whether the hearing will be conducted via video conferencing.

(7) That, if a hearing is requested, the individual will have the right to appear personally before an Administrative Judge or, at the discretion of the Administrative Judge, via video teleconferencing; to present evidence in his/her own behalf, through witnesses, or by documents, or both; and, subject to the limitations set forth in §710.26(g), to be present during the entire hearing and be accompanied, represented, and advised by counsel or other representative of the individual's choosing and at the individual's own expense at every stage of the proceedings. Such representative or counsel, if applicable, shall be identified in writing to the Administrative Judge and DOE Counsel and authorized by the individual to receive all correspondence, transcripts and other documents pertaining to the proceedings under this part.

(8) That the individual's failure to file a timely written request for a hearing before an Administrative Judge in accordance with paragraph (b)(4) of this section, unless time deadlines are extended for good cause, shall be considered as a relinquishment by the individual of the right to a hearing provided in this part, and that in such event a final decision to deny or revoke the individual's access authorization shall be made by the Manager.

(9) That in any proceedings under this subpart DOE Counsel will participate on behalf of and representing DOE and that any statements made by the individual to DOE Counsel may be used in subsequent proceedings;

(10) The individual's access authorization status until further notice;

(11) The name and telephone number of the designated DOE official to contact for any further information desired concerning the proceedings, including an explanation of the individual's rights under the Freedom of Information Act and Privacy Act;

(12) If applicable, that if the individual is currently the subject of criminal charges for a felony offense or an offense punishable by imprisonment of one year or more, the individual must elect either to continue with the Administrative Review process and have the substantial doubt regarding eligibility for access authorization resolved by the Manager or by a hearing, or to withdraw from the Administrative Review process.

(i) If the individual elects to continue with the Administrative Review process a determination as to the individual's access authorization shall be made by the Manager or by an Administrative Judge via a hearing. The individual will be expected to participate fully in the process. Any refusal to cooperate, answer all questions, or provide requested information may prevent DOE from reaching an affirmative finding required for granting or continuing access authorization.

(ii) If the individual elects to withdraw from the Administrative Review process, the individual's access authorization shall be administratively withdrawn. Such action shall be taken in accordance with applicable procedures set forth in pertinent Departmental directives. Any future requests for access authorization for the individual must be accompanied by documentary evidence of resolution of the criminal charges.

(iii) The individual must, within 20 calendar days of receipt of the notification letter, indicate in writing his/her decision to continue or to withdraw from the Administrative

Review process. Such notification must be made to the Manager from whom the notification letter was received.

(c) The notification letter referenced in paragraph (b) of this section shall also:

(1) Include a copy of this part, and

(2) For Federal employees only, indicate that if the individual believes that the action to process the individual under this part was taken as retaliation against the individual for having made a protected disclosure, as defined in Presidential Policy Directive 19, *Protecting Whistleblowers with Access to Classified Information*, or any successor directive issued under the authority of the President, the individual may submit a request for review of this matter directly to the DOE Office of the Inspector General. Such a request shall have no impact upon the continued processing of the individual's access authorization eligibility under this part.

§710.22 Initial decision process.

(a) The Manager shall make an initial decision as to the individual's access authorization eligibility based on the existing information in the case if:

(1) The individual fails to respond to the notification letter by filing a timely written request for a hearing before an Administrative Judge or fails to respond to the notification letter after requesting an extension of time to do so;

(2) The individual's response to the notification letter does not request a hearing before an Administrative Judge; or

(3) The Administrative Judge refers the individual's case to the Manager in accordance with §710.25(e) or §710.26(b).

(b) Unless an extension of time is granted by the Director, the Manager's initial decision as to the individual's access authorization eligibility shall be made within 15 calendar days of the date of receipt of the information in paragraph (a) of this section. The Manager shall either grant or deny, or reinstate or revoke, the individual's access authorization.

(c) A letter reflecting the Manager's initial decision shall be signed by the Manager and delivered to the individual within 15 calendar days of the date of the Manager's decision unless an extension of time is granted by the Director. If the Manager's initial decision is unfavorable to the individual, the individual shall be advised:

(1) Of the Manager's unfavorable decision and the reason(s) therefor;

(2) That within 30 calendar days from the date of receipt of the letter, the individual may file a written request for a review of the Manager's initial decision, through the Director, to the DOE Headquarters Appeal Panel (Appeal Panel);

(3) That the Director may, for good cause shown, at the written request of the individual, extend the time for filing a written request for a review of the case by the Appeal Panel; and

(4) That if the written request for a review of the Manager's initial decision by the Appeal Panel is not filed within 30 calendar days of the individual's receipt of the Manager's

letter, the Manager's initial decision in the case shall be final and not subject to further review or appeal.

§710.23 Extensions of time by the manager.

The Manager may, for good cause shown, at the written request of the individual, extend the time for filing a written request for a hearing, and/or the time for filing a written answer to the matters contained in the notification letter. The Manager shall notify the Director, in writing, when such extensions have been approved.

§710.24 Appointment of DOE Counsel.

(a) Upon receipt from the individual of a written request for a hearing, a DOE attorney shall forthwith be assigned by the Manager to act as DOE Counsel.

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

§710.25 Appointment of Administrative Judge; prehearing conference; commencement of hearings.

(a) Upon receipt of a request for a hearing, the Manager shall in a timely manner transmit that request to the Office of Hearings and Appeals, and identify the DOE Counsel.

The Manager shall at the same time transmit a copy of the notification letter and the individual's response to the Office of Hearings and Appeals.

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

(c) Immediately upon appointment, the Administrative Judge shall notify the individual and DOE Counsel of his/her identity and the address to which all further correspondence should be sent.

(d) The Administrative Judge shall have all powers necessary to regulate the conduct of proceedings under this part, including, but not limited to, establishing a list of persons to receive service of papers, issuing subpoenas for witnesses to attend the hearing or for the production of specific documents or physical evidence, administering oaths and affirmations, ruling upon motions, receiving evidence, regulating the course of the hearing, disposing of procedural requests or similar matters, and taking other actions consistent with the regulations in this part. Requests for subpoenas shall be liberally granted except where the Administrative Judge finds that the issuance of subpoenas would result in evidence or testimony that is repetitious, incompetent, irrelevant, or immaterial to the issues in the case. The Administrative Judge may take sworn testimony, sequester witnesses, and control the dissemination or reproduction of any record or testimony taken pursuant to this part, including correspondence, or other relevant records or physical evidence including, but not limited to, information retained in computerized or other automated systems in possession of the subpoenaed person.

(e) The Administrative Judge shall determine the day, time, and place for the hearing and shall decide whether the hearing will be conducted via video teleconferencing. Hearings will normally be held at or near the relevant DOE facility, unless the Administrative Judge determines that another location would be more appropriate. Normally the location for the hearing will be selected for the convenience of all participants. In the event the individual fails to appear at the time and place specified, without good cause shown, the record in the case shall be closed and returned to the Manager, who shall then make an initial determination regarding the eligibility of the individual for DOE access authorization in accordance with §710.22(a)(3).

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

(g) Hearings shall commence within 60 calendar days from the date the individual's request for a hearing is received by the Office of Hearings and Appeals. Any extension of the hearing date past 60 calendar days from the date the request for a hearing is received by the Office of Hearings and Appeals shall be decided by the Director, Office of Hearings and Appeals.

§710.26 Conduct of hearings.

(a) In all hearings conducted under this part, the individual shall have the right to be represented by a person of his/her own choosing, at the individual's own expense. The

individual is responsible for producing witnesses in his/her own behalf, including requesting the issuance of subpoenas, if necessary, or presenting testimonial, documentary, or physical evidence before the Administrative Judge to support the individual's defense to the derogatory information contained in the notification letter. With the exception of procedural or scheduling matters, the Administrative Judge is prohibited from initiating or otherwise engaging in *ex parte* discussions about the case during the pendency of proceedings under this part.

(b) Unless the Administrative Judge finds good cause for deferring issuance of a decision, in the event that the individual unduly delays the hearing, such as by failure to meet deadlines set by the Administrative Judge, the record shall be closed, and an initial decision shall be made by the Manager on the basis of the record in the case per §710.22(a)(3).

(c) Hearings shall be open only to DOE Counsel, duly authorized representatives of DOE, the individual and the individual's counsel or other representatives, and such other persons as may be authorized by the Administrative Judge. Unless otherwise ordered by the Administrative Judge, witnesses shall testify in the presence of the individual but not in the presence of other witnesses.

(d) DOE Counsel shall assist the Administrative Judge in establishing a complete administrative hearing record in the proceeding and bringing out a full and true disclosure of all facts, both favorable and unfavorable, having a bearing on the issues before the Administrative Judge. The individual shall be afforded the opportunity of presenting testimonial, documentary, and physical evidence, including testimony by the individual in the individual's own behalf. The proponent of a witness shall conduct the direct examination of

that witness. All witnesses shall be subject to cross-examination, if possible. Whenever reasonably possible, testimony shall be given in person.

(e) The Administrative Judge may ask the witnesses any questions which the Administrative Judge deems appropriate to assure the fullest possible disclosure of relevant and material facts.

(f) During the course of the hearing, the Administrative Judge shall rule on all objections raised.

(g) In the event it appears during the course of the hearing that classified matter may be disclosed, it shall be the duty of the Administrative Judge to assure that disclosure is not made to persons who are not authorized to receive it, and take other appropriate measures.

(h) Formal rules of evidence shall not apply, but the Federal Rules of Evidence may be used as a guide for procedures and principles designed to assure production of the most probative evidence available. The Administrative Judge shall admit into evidence any matters, either oral or written, which are material, relevant, and competent in determining issues involved, including the testimony of responsible persons concerning the integrity of the individual. In making such determinations, the utmost latitude shall be permitted with respect to relevancy, materiality, and competency. The Administrative Judge may also exclude evidence which is incompetent, immaterial, irrelevant, or unduly repetitious. Every reasonable effort shall be made to obtain the best evidence available. Subject to §§710.26(l), 710.26(m), 710.26(n) and 710.26(o), hearsay evidence may, at the discretion of the Administrative Judge and for good cause show, be admitted without strict adherence to

technical rules of admissibility and shall be accorded such weight as the Administrative Judge deems appropriate.

(i) Testimony of the individual and witnesses shall be given under oath or affirmation. Attention of the individual and each witness shall be directed to 18 U.S.C. 1001 and 18 U.S.C. 1621.

(j) The Administrative Judge shall endeavor to obtain all the facts that are reasonably available in order to arrive at a decision. If, prior to or during the proceedings, in the opinion of the Administrative Judge, the derogatory information in the notification letter is not sufficient to address all matters into which inquiry should be directed, the Administrative Judge may recommend to the Manager concerned that, in order to give more adequate notice to the individual, the notification letter should be amended. Any amendment shall be made with the concurrence of the local Office of Chief Counsel or the Office of the General Counsel in Headquarters cases. If, in the opinion of the Administrative Judge, the circumstances of such amendment may involve undue hardship to the individual because of limited time to respond to the new derogatory information in the notification letter, an appropriate adjournment shall be granted upon the request of the individual.

(k) A written or oral statement of a person relating to the characterization in the notification letter of any organization or person other than the individual may be received and considered by the Administrative Judge without affording the individual an opportunity to cross-examine the person making the statement on matters relating to the characterization of such organization or person, provided the individual is given notice that such a statement has been received and may be considered by the Administrative Judge, and is informed of the

contents of the statement, provided such notice is not prohibited by paragraph (g) of this section.

(l) Any oral or written statement adverse to the individual relating to a controverted issue may be received and considered by the Administrative Judge without affording an opportunity for cross-examination in either of the following circumstances:

(1) The head of the agency supplying the statement certifies that the person who furnished the information is a confidential informant who has been engaged in obtaining intelligence information for the Government and that disclosure of the informant's identity would be substantially harmful to the national interest;

(2) The Secretary or the Secretary's special designee for that particular purpose has preliminarily determined, after considering information furnished by the investigative agency as to the reliability of the person and the accuracy of the statement concerned, that:

(i) The statement concerned appears to be reliable and material; and

(ii) Failure of the Administrative Judge to receive and consider such statement would, in view of the access sought to classified matter or special nuclear material, be substantially harmful to the national security and that the person who furnished the information cannot appear to testify:

(A) Due to death, severe illness, or similar cause, in which case the identity of the person and the information to be considered shall be made available to the individual, or

(B) Due to some other specified cause determined by the Secretary to be good and sufficient.

(m) Whenever procedures under paragraph (l) of this section are used:

(1) The individual shall be given a summary or description of the information which shall be as comprehensive and detailed as the national interest permits, and

(2) Appropriate consideration shall be accorded to the fact that the individual did not have an opportunity to cross-examine such person(s).

(n) Records compiled in the regular course of business, or other evidence other than investigative reports obtained by DOE, may be received and considered by the Administrative Judge subject to rebuttal without authenticating witnesses, provided that such information has been furnished to DOE by an investigative agency pursuant to its responsibilities in connection with assisting the Secretary to safeguard classified matter or special nuclear material.

(o) Records compiled in the regular course of business, or other evidence other than investigative reports, relating to a controverted issue which, because they are classified, may not be inspected by the individual, may be received and considered by the Administrative Judge, provided that:

(1) The Secretary or the Secretary's special designee for that particular purpose has made a preliminary determination that such evidence appears to be material;

(2) The Secretary or the Secretary's special designee for that particular purpose has made a determination that failure to receive and consider such evidence would, in view of the access sought to classified matter or special nuclear material, be substantially harmful to the national security; and

(3) To the extent that national security permits, a summary or description of such evidence is made available to the individual. In every such case, information as to the authenticity and accuracy of such evidence furnished by the investigative agency shall be considered.

(p) The Administrative Judge may request the Local Director of Security to arrange for additional investigation on any points which are material to the deliberations of the Administrative Judge and which the Administrative Judge believes need further investigation or clarification. In this event, the Administrative Judge shall set forth in writing those issues upon which more evidence is requested, identifying where possible persons or sources from which the evidence should be sought. The Local Director of Security shall make every effort through appropriate sources to obtain additional information upon the matters indicated by the Administrative Judge.

(q) A written transcript of the entire hearing shall be made and, except for portions containing classified matter, a copy of such transcript shall be furnished to the individual without cost.

(r) Whenever information is made a part of the record under the exceptions authorized by paragraphs (l) or (o) of this section, the record shall contain certificates evidencing that the determinations required therein have been made.

§710.27 Administrative Judge's decision.

(a) The Administrative Judge shall carefully consider the entire record of the proceeding and shall render a decision, within 30 calendar days of the receipt of the hearing transcript, as to whether granting or restoring the individual's access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. In resolving a question concerning the eligibility of an individual for access authorization under these procedures, the Administrative Judge shall consider the factors stated in §710.7(c) to determine whether the findings will be favorable or unfavorable.

(b) In reaching the findings, the Administrative Judge shall consider the demeanor of the witnesses who have testified at the hearing, the probability or likelihood of the truth of their testimony, their credibility, and the authenticity and accuracy of documentary evidence, or lack of evidence on any material points in issue. If the individual is, or may be, handicapped by the non-disclosure to the individual of undisclosed information or by lack of opportunity to cross-examine confidential informants, the Administrative Judge shall take that fact into consideration. The possible adverse impact of the loss of the individual's access authorization upon the DOE program in which the individual works shall not be considered by the Administrative Judge.

(c) The Administrative Judge shall make specific findings based upon the record as to the validity of each instance of derogatory information contained in the notification letter and the significance which the Administrative Judge attaches to it. These findings shall be supported fully by a statement of reasons which constitute the basis for such findings.

(d) The Administrative Judge's decision shall be based on the Administrative Judge's findings of fact. If, after considering all of the factors set forth in §710.7(c) in light of the Adjudicative Guidelines, the Administrative Judge is of the opinion that it will not endanger the common defense and security and will be clearly consistent with the national interest to grant or reinstate access authorization for the individual, the Administrative Judge shall render a favorable decision; otherwise, the Administrative Judge shall render an unfavorable decision. Within 15 calendar days of the Administrative Judge's written decision, the Administrative Judge shall provide copies of the decision and the administrative record to the Manager and the Director.

§710.28 Action on the Administrative Judge's decision.

(a) Within 10 calendar days of receipt of the decision and the administrative record, unless an extension of time is granted by the Director, the Manager shall:

- (1) Notify the individual in writing of the Administrative Judge's decision;
- (2) Advise the individual in writing of the appeal procedures available to the individual in paragraph (b) of this section if the decision is unfavorable to the individual;

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

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

(b) If the Administrative Judge's decision is unfavorable to the individual:

(1) The individual may file with the Director a written request for further review of the decision by the Appeal Panel along with a statement required by paragraph (e) of this section within 30 calendar days of the individual's receipt of the Manager's notice;

(2) The Director may, for good cause shown, extend the time for filing a request for further review of the decision by the Appeal Panel at the written request of the individual, provided the request for an extension of time is filed by the individual within 30 calendar days of receipt of the Manager's notice;

(3) The Administrative Judge's decision shall be final and not subject to review or appeal if the individual does not:

(i) File a written request for a review of the decision by the Appeal Panel or for an extension of time to file a written request for review of the decision by the Appeal Panel in accordance with paragraphs (b)(1) or (b)(2) of this section, or

(ii) File a written request for review of the decision by the Appeal Panel after having been granted an extension of time to do so.

(c) If the Administrative Judge's decision is favorable to the individual:

(1) The Manager, with the concurrence of the Director, shall grant or reinstate the individual's access authorization within 30 calendar days of the Administrative Judge's decision becoming final, or

(2) The Manager or the Director may file a written request with the Deputy Associate Under Secretary for Environment, Health, Safety and Security for review of the decision by the Appeal Panel, along with statement required by paragraph (e) of this section, within 30 calendar days of the individual's receipt of the Manager's notice.

(3) The Deputy Associate Under Secretary for Environment, Health, Safety and Security may, for good cause shown, extend the time for filing a request for review of the decision by the Appeal Panel at the request of the Manager or Director, provided the request for an extension of time is filed by the Manager or Director within 30 calendar days of the receipt of the Manager's notice;

(4) The Administrative Judge's decision shall constitute final action, and not be subject to review or appeal, if the Manager or Director does not:

(i) File a written request for review of the decision by the Appeal Panel or for an extension of time to file a written request for review of the decision by the Appeal Panel in accordance with paragraphs (c)(2) or (c)(3) of this section, or

(ii) File a written request for a review of the decision by the Appeal Panel after having been granted an extension of time to do so.

(d) A copy of any request for review of the individual's case by the Appeal Panel filed by the Manager or the Director shall be provided to the individual by the Manager.

(e) The party filing a request for review by the Appeal Panel shall include with the request a statement identifying the issues upon which the appeal is based. A copy of the request and statement shall be served on the other party, who may file a response with the Appeal Panel within 20 calendar days of receipt of the statement.

§710.29 Final appeal process.

(a) The Appeal Panel shall be convened by the Deputy Associate Under Secretary for Environment, Health, Safety and Security to review and render a final decision in access authorization eligibility cases referred by the individual, the Manager, or the Director in accordance with §§710.22 or 710.28.

(b) The Appeal Panel shall consist of three members, each of whom shall be a DOE Headquarters employee, a United States citizen, and hold a DOE Q access authorization. The Deputy Associate Under Secretary for Environment, Health, Safety and Security shall serve as a permanent member of the Appeal Panel and as the Appeal Panel Chair. The second member of the Appeal Panel shall be a DOE attorney designated by the General Counsel. The head of the DOE Headquarters element which has cognizance over the individual whose access authorization eligibility is being considered may designate an employee to act as the third member on the Appeal Panel; otherwise, the third member shall be designated by the Chair. Only one member of the Appeal Panel shall be from the security field.

(c) In filing a written request for a review by the Appeal Panel in accordance with §§710.22 and 710.28, the individual, or his/her counsel or other representative, shall identify the issues upon which the appeal is based. The written request, and any response, shall be made a part of the administrative record. The Director shall provide staff support to the Appeal Panel as requested by the Chair.

(d) Within 15 calendar days of the receipt of the request for review of a case by the Appeal Panel, the Chair shall arrange for the Appeal Panel members to convene and review the administrative record or provide a copy of the administrative record to the Appeal Panel members for their independent review.

(e) The Appeal Panel shall consider only that evidence and information in the administrative record at the time of the Manager's or the Administrative Judge's initial decision.

(f) Within 45 calendar days of receipt of the administrative record, the Appeal Panel shall render a final decision in the case. If a majority of the Appeal Panel members determine that it will not endanger the common defense and security and will be clearly consistent with the national interest, the Chair shall grant or reinstate the individual's access authorization; otherwise, the Chair shall deny or revoke the individual's access authorization. The Appeal Panel's written decision shall be made a part of the administrative record and is not subject to further review or appeal.

(g) The Chair, through the Director, shall inform the individual in writing, as well as the individual's counsel or other representative, of the Appeal Panel's final decision. A copy of the correspondence shall also be provided to the other panel members and the Manager.

§710.30 Action by the Secretary.

(a) Whenever an individual has not been afforded an opportunity to cross-examine witnesses who have furnished information adverse to the individual under the provisions of §§710.26(l) or (o), the Secretary may issue a final decision to deny or revoke access authorization for the individual after personally reviewing the administrative record and any additional material provided by the Chair. The Secretary's authority may, in accordance with applicable provisions of Executive Order 12968, be delegated to the Deputy Secretary where the effected individual is a Federal employee. The Secretary's authority, in accordance with applicable provisions of Executive Order 10865, may not be delegated where the effected individual is a contractor employee. This authority may be exercised only when the Secretary determines that the circumstances described in §710.26(l) or (o) are present, and such determination shall be final and not subject to review or appeal.

(b) Whenever the Secretary issues a final decision as to an individual's access authorization eligibility, the individual and other concerned parties shall be notified in writing by the Chair of that decision and of the Secretary's findings with respect to each instance of derogatory information contained in the notification letter and each substantial issue identified in the statement in support of the request for review to the extent allowed by the national security.

(c) Nothing contained in these procedures shall be deemed to limit or affect the responsibility and powers of the Secretary to issue subpoenas or to deny or revoke access to classified matter or special nuclear material.

§710.31 Reconsideration of access eligibility.

(a) If, pursuant to the procedures set forth in §§710.20 through 710.30, the Manager, Administrative Judge, Appeal Panel, or the Secretary has made a decision granting or reinstating an individual's access authorization, eligibility shall be reconsidered as a new administrative review under the procedures set forth in this part when previously unconsidered derogatory information is identified, or the individual violates a commitment upon which the DOE previously relied to favorably resolve an issue of access authorization eligibility.

(b) If, pursuant to the procedures set forth in §§710.20 through 710.31, the Manager, Administrative Judge, Appeal Panel, or the Secretary has made a decision denying or revoking the individual's access authorization, eligibility may be reconsidered only when the individual so requests in writing, when there is a bona fide offer of employment requiring access authorization, and when there is either material and relevant new evidence which the individual and the individual's representatives were without fault in failing to present earlier, or convincing evidence of rehabilitation or reformation.

(1) A request for reconsideration shall be accepted when a minimum of one year has elapsed since the date of the Manager's, Administrative Judge's, Appeal Panel's or Secretary's final decision, or of a previous denial of reconsideration. Requests must be submitted in writing to the Deputy Associate Under Secretary for Environment, Health,

Safety and Security, and must include an affidavit setting forth in detail the new evidence or evidence of rehabilitation or reformation.

(2) If the Deputy Associate Under Secretary for Environment, Health, Safety and Security approves the request for reconsideration of an individual's access authorization eligibility, he/she shall so notify the individual, and shall direct the Manager to take appropriate actions to determine whether the individual is eligible for access authorization.

(3) If the Deputy Associate Under Secretary for Environment, Health, Safety and Security denies the request for reconsideration of an individual's access authorization eligibility, he/she shall so notify the individual in writing. Such a denial is final and not subject to review or appeal.

(4) If, pursuant to the provisions of §710.31(2), the Manager determines the individual is eligible for access authorization, the Manager shall grant access authorization.

(5) If, pursuant to the provisions of §710.31(2), the Manager determines the individual remains ineligible for access authorization, the Manager shall so notify the Director in writing. If the Director concurs, the Director shall notify the individual in writing. This decision is final and not subject to review or appeal. If the Director does not concur, the Director shall confer with the Manager on further actions.

(6) Determinations as to eligibility for access authorization pursuant to paragraphs (f) or (g) of this section may be based solely upon the mitigation of derogatory information which was relied upon in a final decision to deny or to revoke access authorization. If, pursuant to the procedures set forth in paragraph (d) of this section, previously unconsidered

derogatory information is identified, a determination as to eligibility for access authorization must be subject to a new Administrative Review proceeding.

Subpart D – Miscellaneous

§710.32 Terminations.

(a) If the individual is no longer an applicant for access authorization or no longer requires access authorization, the procedures of this part shall be terminated without a final decision as to the individual's access authorization eligibility, unless a final decision has been rendered prior to the DOE being notified of the change in the individual's pending access authorization status. Where the procedures of this part have been terminated pursuant to this paragraph after an unfavorable initial agency decision as to the individual's access authorization eligibility has been rendered, any subsequent request for access authorization for the individual will be processed as a request for a review of the initial agency decision by the Appeal Panel and a final agency decision will be rendered pursuant to §710.29, unless a minimum of one year has elapsed since the date of the initial agency decision.

(b) With regard to applicants (individuals for whom DOE has not yet approved access authorization), DOE may administratively terminate processing an application for access authorization under the following circumstances:

(1) If the applicant is currently the subject of criminal proceedings for a felony offense or an offense that is punishable by a term of imprisonment of one year or longer, or is awaiting or serving a form of probation, suspended or deferred sentencing, or parole. Once all judicial proceedings on the criminal charges have been finally resolved, and the

term (if any) of imprisonment, probation, or parole has been completed, DOE processing of a request for access authorization shall resume upon receipt by DOE of a written request therefor, provided that the individual has a bona fide offer of employment requiring access authorization.

(2) If sufficient information about the individual's background cannot be obtained to meet the investigative scope and extent requirements for the access authorization requested.

(c) If an individual believes that the provisions of paragraph (b) of this section have been inappropriately applied, a written appeal may be filed with the Director within 30 calendar days of the date the individual was notified of the action. The Director shall act on the written appeal as described in §710.6(c).

§710.33 Time frames.

Statements of time established for processing aspects of a case under this part are the agency's desired time frames in implementing the procedures set forth in this part. However, failure to meet the time frames shall have no impact upon the final disposition of an access authorization by a Manager, Administrative Judge, the Appeal Panel, or the Secretary, and shall confer no procedural or substantive rights upon an individual whose access authorization eligibility is being considered.

§710.34 Acting officials.

Except for the Secretary, the responsibilities and authorities conferred in this part may be exercised by persons who have been designated in writing as acting for, or in the temporary capacity of, the following DOE positions: the Local Director of Security; the

Manager; the Director, or the General Counsel. The responsibilities and authorities of the Deputy Associate Under Secretary for Environment, Health, Safety and Security may be exercised by persons in senior security-related positions within the Office of Environment, Health, Safety and Security who have been designated in writing as acting for, or in the temporary capacity of, the Deputy Associate Under Secretary for Environment, Health, Safety and Security, with the approval of the Associate Under Secretary for Environment, Health, Safety and Security.

Appendix A – Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (December 30, 2005)

1. *Introduction.* The following adjudicative guidelines are established for all U.S. government civilian and military personnel, consultants, contractors, employees of contractors, licensees, certificate holders or grantees and their employees and other individuals who require access to classified information. They apply to persons being considered for initial or continued eligibility for access to classified information, to include sensitive compartmented information and special access programs, and are to be used by government departments and agencies in all final clearance determinations. Government departments and agencies may also choose to apply these guidelines to analogous situations regarding persons being considered for access to other types of protected information.

Decisions regarding eligibility for access to classified information take into account factors that could cause a conflict of interest and place a person in the position of having to choose between his or her commitment to the United States, including the commitment to protect

classified information, and any other compelling loyalty. Access decisions also take into account a person's reliability, trustworthiness and ability to protect classified information. No coercive policing could replace the self-discipline and integrity of the person entrusted with the nation's secrets as the most effective means of protecting them. 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 paramount.

2. The Adjudicative Process.

(a) The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is an acceptable security risk. Eligibility for access to classified information is predicated upon the individual meeting these personnel security guidelines. The adjudication process is the careful weighing of a number of variables known as the whole-person concept. Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination. In evaluating the relevance of an individual's conduct, the adjudicator should consider the following factors:

- (1) The nature, extent, and seriousness of the conduct;
- (2) The circumstances surrounding the conduct, to include knowledgeable participation;
- (3) The frequency and recency of the conduct;

- (4) The individual's age and maturity at the time of the conduct;
- (5) The extent to which participation is voluntary;
- (6) The presence or absence of rehabilitation and other permanent behavioral changes;
- (7) The motivation for the conduct;
- (8) The potential for pressure, coercion, exploitation, or duress; and
- (9) The likelihood of continuation or recurrence.

(b) Each case must be judged on its own merits, and final determination remains the responsibility of the specific department or agency. Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security.

(c) The ability to develop specific thresholds for action under these guidelines is limited by the nature and complexity of human behavior. The ultimate determination of whether the granting or continuing of eligibility for a security clearance is clearly consistent with the interests of national security must be an overall common sense judgment based upon careful consideration of the following guidelines, each of which is to be evaluated in the context of the whole person.

- (1) Guideline A: Allegiance to the United States;
- (2) Guideline B: Foreign Influence;

- (3) Guideline C: Foreign Preference;
- (4) Guideline D: Sexual Behavior;
- (5) Guideline E: Personal Conduct;
- (6) Guideline F: Financial Considerations;
- (7) Guideline G: Alcohol Consumption;
- (8) Guideline H: Drug Involvement;
- (9) Guideline I: Psychological Conditions;
- (10) Guideline J: Criminal Conduct;
- (11) Guideline K: Handling Protected Information;
- (12) Guideline L: Outside Activities;
- (13) Guideline M: Use of Information Technology Systems.

(d) Although adverse information concerning a single criterion may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or emotionally unstable behavior. Notwithstanding the whole-person concept, pursuit of further investigation may be terminated by an appropriate adjudicative agency in the face of reliable, significant, disqualifying, adverse information.

(e) When information of security concern becomes known about an individual who is currently eligible for access to classified information, the adjudicator should consider whether the person:

- (1) Voluntarily reported the information;
- (2) Was truthful and complete in responding to questions;
- (3) Sought assistance and followed professional guidance, where appropriate;
- (4) Resolved or appears likely to favorably resolve the security concern;
- (5) Has demonstrated positive changes in behavior and employment;
- (6) Should have his or her access temporarily suspended pending final adjudication of the information.

(f) If after evaluating information of security concern, the adjudicator decides that the information is not serious enough to warrant a recommendation of disapproval or revocation of the security clearance, it may be appropriate to recommend approval with a warning that future incidents of a similar nature may result in revocation of access.

GUIDELINE A: ALLEGIANCE TO THE UNITED STATES

3. *The Concern.* An individual must be of unquestioned allegiance to the United States. The willingness to safeguard classified information is in doubt if there is any reason to suspect an individual's allegiance to the United States.

4. *Conditions that could raise a security concern and may be disqualifying include:*

(a) 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;

(b) Association or sympathy with persons who are attempting to commit, or who are committing, any of the above acts;

(c) Association or sympathy with persons or organizations that advocate, threaten, or use force or violence, or use any other illegal or unconstitutional means, in an effort 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;

(3) Gain retribution for perceived wrongs caused by the Federal, state, or local government;

(4) Prevent others from exercising their rights under the Constitution or laws of the United States or of any state.

5. Conditions that could mitigate security concerns include:

(a) The individual was unaware of the unlawful aims of the individual or organization and severed ties upon learning of these;

(b) The individual's involvement was only with the lawful or humanitarian aspects of such an organization;

(c) Involvement in the above activities occurred for only a short period of time and was attributable to curiosity or academic interest;

(d) 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.

GUIDELINE B: FOREIGN INFLUENCE

6. *The Concern.* Foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign financial interests, may be manipulated or induced to help a foreign person, group, organization, or government in a way that is not in U.S. interests, or is vulnerable to pressure or coercion by any foreign interest. Adjudication under this Guideline can and should consider the identity of the foreign country in which the foreign contact or financial interest is located, including, but not limited to, such considerations as whether the foreign country is known to target United States citizens to obtain protected information and/or is associated with a risk of terrorism.

7. *Conditions that could raise a security concern and may be disqualifying include:*

(a) 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;

(b) 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;

(c) Counterintelligence information, that may be classified, indicates that the individual's access to protected information may involve unacceptable risk to national security;

(d) Sharing living quarters with a person or persons, regardless of citizenship status, if that relationship creates a heightened risk of foreign inducement, manipulation, pressure, or coercion;

(e) 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;

(f) Failure to report, when required, association with a foreign national;

(g) Unauthorized association with a suspected or known agent, associate, or employee of a foreign intelligence service;

(h) Indications that representatives or nationals from a foreign country are acting to increase the vulnerability of the individual to possible future exploitation, inducement, manipulation, pressure, or coercion;

(i) 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.

8. Conditions that could mitigate security concerns include:

(a) 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 having to choose between the interests of a foreign individual, group, organization, or government and the interests of the U.S.;

(b) 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;

(c) Contact or communication with foreign citizens is so casual and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation;

(d) The foreign contacts and activities are on U.S. Government business or are approved by the cognizant security authority;

(e) 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;

(f) 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.

GUIDELINE C: FOREIGN PREFERENCE

9. *The Concern.* When an individual acts in such a way as to indicate a preference for a foreign country over the United States, then he or she may be prone to provide information or make decisions that are harmful to the interests of the United States.

10. *Conditions that could raise a security concern and may be disqualifying include:*

(a) Exercise of any right, privilege or obligation of foreign citizenship after becoming a U.S. citizen or through the foreign citizenship of a family member. This includes but is not limited to:

(1) Possession of a current foreign passport;

(2) Military service or a willingness to bear arms for a foreign country;

(3) Accepting educational, medical, retirement, social welfare, or other such benefits from a foreign country;

(4) Residence in a foreign country to meet citizenship requirements;

(5) Using foreign citizenship to protect financial or business interests in another country;

(6) Seeking or holding political office in a foreign country;

(7) Voting in a foreign election;

(b) Action to acquire or obtain recognition of a foreign citizenship by an American citizen;

(c) Performing or attempting to perform duties, or otherwise acting, so as to serve the interests of a foreign person, group, organization, or government in conflict with the national security interest;

(d) 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.

11. Conditions that could mitigate security concerns include:

(a) Dual citizenship is based solely on parents' citizenship or birth in a foreign country;

(b) The individual has expressed a willingness to renounce dual citizenship;

(c) 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;

(d) Use of a foreign passport is approved by the cognizant security authority;

(e) The passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated;

(f) The vote in a foreign election was encouraged by the United States Government.

GUIDELINE D: SEXUAL BEHAVIOR

12. *The Concern.* Sexual behavior that involves a criminal offense, indicates a personality or emotional disorder, reflects lack of judgment or discretion, or which may subject the individual to undue influence or coercion, exploitation, or duress can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. No adverse inference concerning the standards in the Guideline may be raised solely on the basis of the sexual orientation of the individual.

13. *Conditions that could raise a security concern and may be disqualifying include:*

(a) Sexual behavior of a criminal nature, whether or not the individual has been prosecuted;

(b) A pattern of compulsive, self-destructive, or high-risk sexual behavior that the person is unable to stop or that may be symptomatic of a personality disorder;

(c) Sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress;

(d) Sexual behavior of a public nature and/or that which reflects lack of discretion or judgment.

14. *Conditions that could mitigate security concerns include:*

- (a) The behavior occurred prior to or during adolescence and there is no evidence of subsequent conduct of a similar nature;
- (b) 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;
- (c) The behavior no longer serves as a basis for coercion, exploitation, or duress;
- (d) The sexual behavior is strictly private, consensual, and discreet.

GUIDELINE E: PERSONAL CONDUCT

15. *The Concern.* Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of 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.

The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:

- (a) Refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject

interview, completing security forms or releases, and cooperation with medical or psychological evaluation;

(b) Refusal to provide full, frank and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

16. Conditions that could raise a security concern and may be disqualifying also include:

(a) Deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

(b) Deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative;

(c) 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;

(d) 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. 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;

(e) Personal conduct or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as:

(1) Engaging in activities which, if known, may affect the person's personal, professional, or community standing, or

(2) 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 the foreign security or intelligence service or other group;

(f) Violation of a written or recorded commitment made by the individual to the employer as a condition of employment;

(g) Association with persons involved in criminal activity.

17. Conditions that could mitigate security concerns include:

(a) The individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) The refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(c) 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;

(d) 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 untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) The individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

(f) Association with persons involved in criminal activities has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

GUIDELINE F: FINANCIAL CONSIDERATIONS

18. *The Concern.* Failure 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. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. Compulsive gambling is a concern as it may lead to financial crimes including espionage. Affluence that cannot be explained by known sources of income is also a security concern. It may indicate proceeds from financially profitable criminal acts.

19. *Conditions that could raise a security concern and may be disqualifying include:*

- (a) Inability or unwillingness to satisfy debts;
- (b) 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.
- (c) A history of not meeting financial obligations;
- (d) Deceptive or illegal financial practices such as embezzlement, employee theft, check fraud, income tax evasion, expense account fraud, filing deceptive loan statements, and other intentional financial breaches of trust;

(e) 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;

(f) Financial problems that are linked to drug abuse, alcoholism, gambling problems, or other issues of security concern.

(g) Failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same;

(h) 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;

(i) Compulsive or addictive gambling as indicated by an unsuccessful attempt to stop gambling, "chasing losses" (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.

20. Conditions that could mitigate security concerns include:

(a) 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, or good judgment;

(b) The conditions that resulted in the financial problem were largely beyond the person's control (e.g. loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances;

(c) The person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control;

(d) The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts;

(e) 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 to resolve the issue;

(f) The affluence resulted from a legal source of income.

GUIDELINE G: ALCOHOL CONSUMPTION

21. *The Concern.* Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness.

22. *Conditions that could raise a security concern and may be disqualifying include:*

(a) Alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, disturbing the peace, or other incidents of concern, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent;

(b) Alcohol-related incidents at work, such as reporting for work or duty in an intoxicated or impaired condition, or drinking on the job, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent;

(c) Habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent;

(d) Diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of alcohol abuse or alcohol dependence;

(e) Evaluation of alcohol abuse or alcohol dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program;

(f) Relapse after diagnosis of alcohol abuse or dependence and completion of an alcohol rehabilitation program;

(g) Failure to follow any court order regarding alcohol education, evaluation, treatment, or abstinence.

23. Conditions that could mitigate security concerns include:

(a) So much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(b) 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);

(c) 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;

(d) 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

24. *The Concern.* Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations.

(a) Drugs are defined as mood and behavior altering substances, and include:

(1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens), and

(2) Inhalants and other similar substances

(b) Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

25. Conditions that could raise a security concern and may be disqualifying include:

(a) Any drug abuse (see above definition);

(b) Testing positive for illegal drug use;

(c) Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;

(d) Diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of drug abuse or drug dependence;

(e) Evaluation of drug abuse or drug dependence by a licensed clinical social worker who is a staff member of a recognized drug treatment program;

(f) Failure to successfully complete a drug treatment program prescribed by a duly qualified medical professional;

(g) Any illegal drug use after being granted a security clearance;

(h) Expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use.

26. Conditions that could mitigate security concerns include:

(a) 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;

(b) A demonstrated intent not to abuse any drugs in the future, such as:

(1) Dissociation 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;

(c) Abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended;

(d) Satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

GUIDELINE I: PSYCHOLOGICAL CONDITIONS

27. *The Concern.* 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.

28. *Conditions that could raise a security concern and may be disqualifying include:*

(a) 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;

(b) 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;

(c) The individual has failed to follow treatment advice related to a diagnosed emotional, mental, or personality condition, e.g. failure to take prescribed medication.

29. *Conditions that could mitigate security concerns include:*

(a) The identified condition is readily controllable with treatment, and the individual has demonstrated ongoing and consistent compliance with the treatment plan;

(b) 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;

(c) 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;

(d) The past emotional instability was a temporary condition (e.g., one caused by a death, illness, or marital breakup), the situation has been resolved, and the individual no longer shows indications of emotional instability;

(e) There is no indication of a current problem.

GUIDELINE J: CRIMINAL CONDUCT

30. *The Concern.* Criminal activity creates doubt about a person's judgment, reliability and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

31. *Conditions that could raise a security concern and may be disqualifying include:*

(a) A single serious crime or multiple lesser offenses;

(b) Discharge or dismissal from the Armed Forces under dishonorable conditions;

(c) Allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted;

(d) Individual is currently on parole or probation;

(e) Violation of parole or probation, or failure to complete a court-mandated rehabilitation program.

32. Conditions that could mitigate security concerns include:

(a) So much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(b) The person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;

(c) Evidence that the person did not commit the offense;

(d) 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.

GUIDELINE K: HANDLING PROTECTED INFORMATION

33. *The Concern.* 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.

34. Conditions that could raise a security concern and may be disqualifying include:

(a) 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;

(b) Collecting or storing classified or other protected information in any unauthorized location;

(c) 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;

(d) Inappropriate efforts to obtain or view classified or other protected information outside one's need to know;

(e) Copying classified or other protected information in a manner designed to conceal or remove classification or other document control markings;

(f) Viewing or downloading information from a secure system when the information is beyond the individual's need to know;

(g) Any failure to comply with rules for the protection of classified or other sensitive information;

(h) Negligence or lax security habits that persist despite counseling by management;

(i) Failure to comply with rules or regulations that results in damage to the National Security, regardless of whether it was deliberate or negligent.

35. *Conditions that could mitigate security concerns include:*

(a) So much time has elapsed since the behavior, or it happened so infrequently or under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(b) The individual responded favorably to counseling or remedial security training and now demonstrates a positive attitude toward the discharge of security responsibilities;

(c) The security violations were due to improper or inadequate training.

GUIDELINE L: OUTSIDE ACTIVITIES

36. *The Concern.* Involvement in certain types of outside employment or activities is of security concern if it poses a conflict of interest with an individual's security responsibilities and could create an increased risk of unauthorized disclosure of classified information.

37. *Conditions that could raise a security concern and may be disqualifying include:*

(a) Any employment or service, whether compensated or volunteer, with:

(1) The government of a foreign country;

(2) Any foreign national, organization, or other entity;

(3) A representative of any foreign interest;

(4) Any foreign, domestic, or international organization or person engaged in analysis, discussion, or publication of material on intelligence, defense, foreign affairs, or protected technology;

(b) Failure to report or fully disclose an outside activity when this is required.

38. *Conditions that could mitigate security concerns include:*

(a) 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;

(b) The individual terminates the employment or discontinued the activity upon being notified that it was in conflict with his or her security responsibilities.

GUIDELINE M: USE OF INFORMATION TECHNOLOGY SYSTEMS

39. *The Concern.* Noncompliance with rules, procedures, guidelines or regulations pertaining to information technology systems may raise security concerns about an individual's reliability and trustworthiness, calling into question the willingness or ability to properly protect sensitive systems, networks, and information. Information Technology Systems include all related computer hardware, software, firmware, and data used for the communication, transmission, processing, manipulation, storage, or protection of information.

40. Conditions that could raise a security concern and may be disqualifying include:

- (a) Illegal or unauthorized entry into any information technology system or component thereof;
- (b) Illegal or unauthorized modification, destruction, manipulation or denial of access to information, software, firmware, or hardware in an information technology system;
- (c) Use of any information technology system to gain unauthorized access to another system or to a compartmented area within the same system;
- (d) Downloading, storing, or transmitting classified information on or to any unauthorized software, hardware, or information technology system;
- (e) Unauthorized use of a government or other information technology system;
- (f) Introduction, removal, or duplication of hardware, firmware, software, or media to or from any information technology system without authorization, when prohibited by rules, procedures, guidelines or regulations.
- (g) Negligence or lax security habits in handling information technology that persist despite counseling by management;
- (h) Any misuse of information technology, whether deliberate or negligent, that results in damage to the national security.

41. Conditions that could mitigate security concerns include:

(a) So much time has elapsed since the behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur or does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(b) 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;

(c) The conduct was unintentional or inadvertent and was followed by a prompt, good-faith effort to correct the situation and by notification of supervisor.

[FR Doc. 2016-24469 Filed: 10/14/2016 8:45 am; Publication Date: 10/17/2016]