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COLLATERAL CONSEQUENCES OF COMMON CRIMES: FEDERAL LAW &  
REGULATION

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Chapter V: Security Clearances

“We must guard against the acquisition of unwarranted influence,  
whether sought or unsought by the military-industrial complex.”  
—President Dwight D. Eisenhower, *Farwell Address to the Nation*, January 17, 1961

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## **5.1 Introduction**

Over 4.5 million American government and private workers currently hold security clearances to access federally “classified information.”<sup>1</sup> Of those, 2.9 million currently utilize active access, including more than 800,000 private contractors.<sup>2</sup> Moreover, of the 5 million eligible holders about 1.4 million hold top secret clearance.<sup>3</sup> Of those top secret clearance holders almost a third work for private companies, rather than the federal government.

Federal security clearances may be denied or revoked for a large array of comparatively low-level misconduct, including arrests, citations, or admissions to conduct in the distant past. This is particularly true for drug use, alcohol abuse, domestic abuse, and most directly, almost any dishonesty.<sup>4</sup>

Moreover, the clearance denial and revocation adjudications processes, now handled largely by two executive agencies, DISCO & DOHA, remain largely unreviewable, accorded judicial deference as an exercise of the executive’s independent foreign affairs and national security powers.

## **5.2 Background and Source of Law**

The federal government has acted preemptively to limit the disclosure of information deemed sensitive to national security almost since the country’s founding.<sup>5</sup> The current system of security classification and clearance originated in World War I when the executive began grading documents according to sensitivity, but largely developed following World War II when the role of civilian intelligence agencies expanded.<sup>6</sup>

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<sup>1</sup> Office of the Director of National Intelligence, 2014 Report on Security Clearance Determinations, (April 2015) at 5, <https://www.dni.gov/files/documents/2015-4-21%20Annual%20Report%20on%20Security%20Clearance%20Determinations.pdf> [hereinafter 2014 Report]. The number of clearance holders was reduced by 635,803 from the previous year (2013), a reduction of 12.3 percent. *Id.* at 4. This was due to a renewed effort promulgated by the Director of the National Intelligence to reduce the number of clearance holders who do not actually need access to classified information. *See* Memorandum from James R. Clapper on Validation of Personnel with Eligibility for Access to Classified Information (Oct. 31, 2013), <http://www.fas.org/sgp/othergov/intel/valId.pdf>.

<sup>2</sup> *See* 2014 Report, *supra* note 1 at 5.

<sup>3</sup> *See Id.*; *see also*, John Bacon and William Welch, “Security Clearance Held by Millions of Americans,” USA Today, June 10, 2013. Of those, about half a million are held by civilian contractors. *Id.*

<sup>4</sup> *See generally* 32 C.F.R § 147.2

<sup>5</sup> David C. Mayer, Reviewing National Security Clearance Decisions: The Clash Between Title VII and Bivens Claims, 85 Corn.L.Rev. 786, 794, n.41 (2000) (discussing secret information President Washington submitted to Senate and marking of documents as “private” or “secret” by early 19th Century).

<sup>6</sup> *See* Department of Navy v. Egan, 484 U.S. 518, 527-28 (1988).

Largely instituted through a series of executive orders issued by the president “to protect sensitive information and to ensure its proper classification throughout the Executive Branch by delegating this responsibility to the heads of agencies,” the source of federal security clearance law remains, with certain post-911 exceptions, still largely within the sphere executive privilege, as opposed legislative mandate.<sup>7</sup>

### **5.3 Agency Alignment**

Agencies created various “industrial clearance programs” to restrict access to sensitive information by the employees of private contractors.<sup>8</sup> Each agency was charged with establishing and maintaining a security clearance program.<sup>9</sup> Agencies promulgated their own regulations to govern their individual programs.<sup>10</sup>

However, in reaction to the terrorist attacks of Sept 11, Congress enacted The Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), requiring that a single umbrella agency shall, “to the maximum extent practicable,” be responsible for conducting security clearance investigations.<sup>11</sup> The Office of Personnel Management (OPM) now has the primary responsibility for the majority of security clearance investigations.<sup>12</sup> OPM is also

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<sup>7</sup> *Id.* at 528. Classified information is divided into the following three categories in increasing order of sensitivity: confidential, secret and top secret. Exec. Order No. 13,526, § 1.2(a) (2009).

Confidential information is defined as “information, the unauthorized disclosure of which reasonably could be expected to cause damage to the national security[.]” *Id.* at § 1.2(a)(3). Secret information is that “which reasonably could be expected to cause serious damage to the national security.” *Id.* at § 1.2(a)(2). Top secret information is that “which reasonably could be expected to cause exceptionally grave damage to the national security.” *Id.* at § 1.2(a)(1). The president, vice president, agency heads and other US government officials who have been properly delegated authority may exercise the classification power. *Id.* at § 1.3(a), (c).

The information must pertain to one of the following categories: (a) military information; (b) foreign government information; (c) intelligence information; (d) foreign relations or foreign activities of the United States; (e) scientific, technological, or economic matters relating to the national security; (f) US Government nuclear programs; (g) vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to the national security; or (h) the development, production, or use of weapons of mass destruction. *Id.* at § 1.4.

Classified information is not supposed to remain classified indefinitely, but may remain classified for periods up to 25 years under the Executive Order currently in effect. *Id.* at § 1.5.

<sup>8</sup> *See* *Greene v. McElroy*, 360 U.S. 474, 494-95, 79 S.Ct. 1400 (1959)

<sup>9</sup> Exec. Order. 12968, 60 FR 40245 (1995) at §§1.2(b), 6.1.

<sup>10</sup> *See, e.g., El Ganayni v. U.S. Dept. of Energy*, 591 F.3d 176 (3d Cir. 2010) (discussing DOE’s implementing regulations).

<sup>11</sup> 50 USC § 3341(b)(1).

<sup>12</sup> DEFENSE SECURITY SERVICES, U.S. DEPT. OF DEFENSE, FREQUENTLY ASKED QUESTIONS (Sept. 2013), [http://www.dss.mil/about\\_dss/news/20130919.html](http://www.dss.mil/about_dss/news/20130919.html) (“In most cases, the Office of

required to integrate security clearance applications, investigations, and determinations into a unified database.<sup>13</sup> In 2008, another executive order reformed the process to ensure consistency and reciprocity among the disparate agencies.<sup>14</sup>

Further, the order established a Performance Accountability Council to oversee and ensure investigative and adjudication procedures for suitability and security clearance.<sup>15</sup> The order designated the Director of National Intelligence as Security Executive Agent,<sup>16</sup> who is responsible for developing uniform procedures for determinations of security clearance eligibility;<sup>17</sup> however, as of 2012, the Director has given agency no such guidance.<sup>18</sup> Additional proposed legislation would further reform and tighten security clearance oversight.<sup>19</sup>

Although OPM handles the investigations, the Department of Defense (DoD), within its Defense Security Services division, makes the actual determinations of security clearance eligibility. The Defense Industrial Security Clearance Office (DISCO) makes the initial determination, and the Defense Office of Administrative Appeals (DOHA) administers any appeals of those determinations.<sup>20</sup> DoD makes such determinations on behalf of 31 different government agencies.<sup>21</sup>

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Personnel Management (OPM) is responsible for conducting the [personal security investigation].”).

<sup>13</sup> 50 USC § 3341(e)(1).

<sup>14</sup> Executive Order 13467, 73 FR 38103, § 2.1 (2008).

<sup>15</sup> *Id.* at § 2.2.

<sup>16</sup> *Id.* at § 2.3(c).

<sup>17</sup> *Id.* at § 2.3(c)(ii).

<sup>18</sup> GOVERNMENT ACCOUNTABILITY OFFICE, GAO-12-800, AGENCIES NEED CLEARLY DEFINED POLICY FOR DETERMINING CIVILIAN POSITION REQUIREMENTS (Jul 12, 2012), <http://www.gao.gov/assets/600/592371.pdf> (“Although agency heads retain the flexibility to make determinations regarding which positions in their agency require a security clearance, the DNI is well positioned, by virtue of its role as the Security Executive Agent, to provide guidance to help align the process from agency to agency. The DNI, however, has not provided agencies with clearly defined policy or instructions.”)

<sup>19</sup> See S.434, 114th congress (2015-16) (Tester, Jon [D-MT]). The Security Clearance Accountability, Reform and Enhancement Act of 2015 (acronymed as “S.C.A.R.E.”) would further tighten restrictions and would require the President to report to Congress annually on the number of individuals deemed to be unfit for federal employment due to misconduct, and the details of such misconduct. See also Security Clearance Reform Act of 2014, H.R. 4022 (which would have required the President to submit to Congress a plan to improve security clearance background investigations and require continuous evaluations.).

<sup>20</sup> See generally 32 C.F.R. Pt. 154, App. B(J); 32 CFR § 155.5; see also 32 CFR § 155.2(c); 32 CFR Pt. 155, App. A (“When the DISCO cannot affirmatively find that it is clearly consistent with the national interest to grant or continue a security clearance for an applicant, the case will be promptly referred to the DOHA.”).

<sup>21</sup> Department of Defense, Defense Security Services, Industrial Security Letter (Mar. 24, 2016), <http://www.dss.mil/documents/isp/ISL2016-01.pdf> (announcing intergovernmental agreement

#### 5.4 Contract Employees

Executive Order 12829 (amending Executive Order 10865) establishes the National Industrial Security Program (NISP) to regulate security clearance of a federal government contractors and their employees.<sup>22</sup> Procedures for safeguarding of classified information is promulgated in the National Industrial Security Program Operation Manual (NISPOM).<sup>23</sup> Contractor employees are held to the same standard as government civilian employees, where such a person cannot access classified material unless it is determined that she is (a) eligible following a favorable background investigation; (b) has a demonstrated “need-to-know[;]” and (c) signs a non-disclosure agreement.<sup>24</sup>

NISP authorizes the head of designated agencies to grant security clearances to contractors, but designates the Defense Secretary as the “operative agent” for the overall Industrial Security Program.<sup>25</sup> As the operative agent, the Defense Department acts on behalf of all federal agencies in “determining the eligibility for access to classified information of contractors, licensees, and grantees and their respective employees.”<sup>26</sup> Just as with government employees, the initial determination is made by DISCO, and when DISCO cannot grant a

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with United State Postal Service, as the 31st agency for which the DoD will make security clearance determinations).

<sup>22</sup> See Ex.order 10865 (1960); Executive Order 12829 (1993)

<sup>23</sup> 32 C.F.R. § 2004.21; Department of Defense, DoD 5220.22-M, National Industrial Security Program Operation Manual (May 18, 2016), <http://www.dtic.mil/whs/directives/corres/pdf/522022M.pdf> [hereinafter *NISPOM*].

<sup>24</sup> Executive Order 12968, ' 1.2(b) (1995). Eligible persons are those:

who are United States citizens for whom an appropriate investigation has been completed and whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information.

*Id.* at § 3.1. Further, a person is eligible only when consistent with national security. *Id.* (“[e]ligibility shall be granted only where facts and circumstances indicate access to classified information is clearly consistent with the national security interests of the United States, and any doubt shall be resolved in favor of the national security.”). If granted, security clearances are limited to, “and relate directly, to the level of classified information for which there is a need for access.” *Id.* at § 2.2(a). While persons with a higher level of access are permitted to access lower levels of classified information, persons with a lesser security clearance may not access more sensitive material without temporary authorization from the relevant agency. *Id.* at §§ 2.2, 2.3.

<sup>25</sup> Exec. Order 12829 at § 202(a).

<sup>26</sup> *Id.*

clearance, additional procedure and final decisions are handled by DOHA.<sup>27</sup> Although generally, the DoD is required to use “the standards applicable to agencies as the basis for the requirements, restrictions, and safeguards contained in the NISPOM” in making security clearance determinations, the NISPOM is designed to accommodate the unique circumstances of a given industry.<sup>28</sup>

## **5.5 Security Clearance Adjudication**

As stated above, the investigation is carried by the OPM who delivers a security clearance package to DISCO, where an initial determination is made. The determination is made under what is known as the “whole person concept,”<sup>29</sup> where various factors<sup>30</sup> are weighed against the alleged conduct. The determination of whether granting security clearance is clearly consistent with interests of national security must be “an overall common sense judgment” based upon thirteen designated guidelines<sup>31</sup> “evaluated in the context of the whole person.”<sup>32</sup> Additionally, the adjudicator should consider the person’s actions following the alleged misconduct that may mitigate the security concern arising from the conduct.<sup>33</sup> This process does

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<sup>27</sup> See 32 CFR § 155.2(c); 32 CFR Pt. 155, App. A (“When the DISCO cannot affirmatively find that it is clearly consistent with the national interest to grant or continue a security clearance for an applicant, the case will be promptly referred to the DOHA.”).

<sup>28</sup> 32 C.F.R. § 2004.21 (“the NISPOM requirements may be designed to accommodate as necessary the unique circumstances of industry. Any issue pertaining to deviation of industry requirements in the NISPOM from the standards applicable to agencies shall be addressed through the NISPOM coordination process.”)

<sup>29</sup> 32 C.F.R. Pt. 154, App. H §2(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. [...] The adjudication process is the careful weighing of a number of variables known as the whole-person concept.”)

<sup>30</sup> “(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[.]” 32 C.F.R. Pt. 154, App. H §2(a)(1)-(9).

<sup>31</sup> Guideline A: Allegiance to the United States; Guideline B: Foreign Influence; Guideline C: Foreign Preference; Guideline D: Sexual Behavior; Guideline E: Personal Conduct; Guideline F: Financial Considerations; Guideline G: Alcohol Consumption; Guideline H: Drug Involvement; Guideline I: Psychological Conditions; Guideline J: Criminal Conduct; Guideline K: Handling Protected Information; Guideline L: Outside Activities; Guideline M: Use of Information Technology Systems. 32 C.F.R. Pt. 154, App. H §2(c)(1)-(13).

<sup>32</sup> 32 C.F.R. Pt. 154, App. H §2(c).

<sup>33</sup> 32 C.F.R. Pt. 154, App. H §2(e) (“(1) Voluntarily reported the information; (2) Was truthful and complete in responding to questions; (3) Sought assistance and followed professional



not only pertain to those seeking security clearance for the first time; current clearance holders are subject to reinvestigation in one of two ways: (1) conduct by the clearance holder that gives rise to national security concerns was reported to DoD, or (2) periodic reinvestigation based on the level of security clearance.<sup>34</sup>

If DISCO cannot determine whether security clearance should be granted or retained, the case is automatically referred to DOHA.<sup>35</sup> If DOHA determines the security clearance should be denied or revoked, adjudicators are required to issue a written statement of reasons (SOR).<sup>36</sup> The applicant has a right to answer the SOR within 20 days of its receipt,<sup>37</sup> where the applicant must specifically request a hearing if she desires one.<sup>38</sup> If the applicant does not request a hearing, the case is assigned to an Administrative Judge and the Department Counsel is required to provide the applicant with “a copy of all relevant and material information that could be adduced at a hearing;” after which the applicant has thirty days to submit a documentary response setting forth objections, mitigation, etc.<sup>39</sup> However, discovery by the applicant is limited to non-privileged documents.<sup>40</sup> If a hearing is required, the applicant is responsible for presenting witnesses and other evidence to rebut or mitigate facts prove by Department Counsel; moreover, the applicant carries the burden of persuasion.<sup>41</sup> Although the Federal Rules of Evidence serve as a guide, they may be relaxed by the Administrative Judge to develop a full and complete record.<sup>42</sup>

Within 15 days of the Administrative Judge’s clearance decision,<sup>43</sup> both the applicant and

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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.”).

<sup>34</sup> Exec. Order 12968 § 3.4; Reinvestigation is required “every 5 years in the case of a top secret clearance or access to a highly sensitive program; every 10 years in the case of a secret clearance; every 15 years in the case of a Confidential Clearance.” 50 U.S.C.A. § 3341(a)(7)(A)-(C) (West)

<sup>35</sup> 32 C.F.R. Pt. 155, App. A § 1 (“When the DISCO cannot affirmatively find that it is clearly consistent with the national interest to grant or continue a security clearance for an applicant, the case will be promptly referred to the DOHA.”).

<sup>36</sup> *Id.* at §§ 2, 3

<sup>37</sup> *Id.* at § 4 (“The applicant must submit a detailed written answer to the SOR under oath or affirmation that shall admit or deny each listed allegation. A general denial or other similar answer is insufficient [...]. The answer must be received by the DOHA within 20 days from receipt of the SOR.”)

<sup>38</sup> *Id.* (“To be entitled to a hearing, the applicant must specifically request a hearing in his or her answer.”)

<sup>39</sup> *Id.* at § 7

<sup>40</sup> *Id.* at § 11.

<sup>41</sup> *Id.* at § 15.

<sup>42</sup> *Id.* at § 19. In addition, these and other elements of procedure may be withdrawn if the agency head or principal deputy “personally certifies” that providing such process would damage national security by revealing classified information.

<sup>43</sup> 32 C.F.R. Pt. 155, App. A § 28.

the Department Counsel may appeal to the Appeal Board, who will weigh no new evidence and reach a final determination in 45 days.<sup>44</sup> The appealing party has a heavy burden on appeal,<sup>45</sup> particularly because there is a rebuttable presumption that the Administrative Judge considered all the evidence.<sup>46</sup> A judge's decision is not arbitrary and capricious when it considers all relevant factors and is consistent with the record of evidence.<sup>47</sup> Even in cases where the appealing party demonstrates the judge made legal and factual errors, it may not be enough to demonstrate that the judge failed consider the record as a whole.<sup>48</sup> The DISCO & DOHA decisions are conclusive.<sup>49</sup>

## **5.6 Judicial Review**

The Supreme Court has indicated that the decision to grant or deny a security clearance is due a great degree of deference as an exercise of the executive's independent foreign affairs and national security powers.<sup>50</sup> Thus, the Court explained that the reasoned judgment regarding a person's prospective impact on national security belongs to the "Art. II duties the courts have traditionally shown the utmost deference to[.]"<sup>51</sup> Consequently, the Court has insisted that no person has a right to a security clearance,<sup>52</sup> nor is there a cognizable property or liberty interest

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<sup>44</sup> *Id.* at §§ 29-30.

<sup>45</sup> ISCR Case No. 02-24254 (App. Bd. June 29, 2004) ("Although a Judge's credibility determination is not immune from review, the party challenging a Judge's credibility determination has a heavy burden on appeal.")

<sup>46</sup> ISCR Case No. 00-0628 (App. Bd. Feb. 24, 2003) ("There is a rebuttable presumption that an Administrative Judge considered all the record evidence unless the Judge specifically states otherwise.")

<sup>47</sup> ISCR Case No. 97-0435 (App. Bd. July 14, 1998) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

<sup>48</sup> ISCR Case No. 00-0628 (App. Bd. Feb. 24, 2003) ("Even if an appealing party persuasively argues that a Judge made factual or legal errors, it does not necessarily follow that those errors were the result of the Judge failing to consider record evidence.")

<sup>49</sup> 32 C.F.R. § 155.6 ("Such a determination shall be conclusive.")

<sup>50</sup> *Dep't of Navy v. Egan*, 484 U.S. 518, 529 (1988) ("the protection of classified information must be committed to the broad discretion of the agency responsible, and this must include broad discretion to determine who may have access to it. Certainly, it is not reasonably possible for an outside nonexpert body to review the substance of such a judgment and to decide whether the agency should have been able to make the necessary affirmative prediction with confidence. Nor can such a body determine what constitutes an acceptable margin of error in assessing the potential risk.")

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 528 ("It should be obvious that no one has a "right" to a security clearance.").

in employment predicated on such security clearance.<sup>53</sup>

In light of the Supreme Court's reasoning in *Egan*, the courts have often held that the judiciary (and administrative courts) cannot review a security clearance denial.<sup>54</sup> The *Egan* rule of non-reviewability has been extended to adverse actions taken against persons occupying "sensitive"<sup>55</sup> positions, regardless of whether the position actually requires access to classified information.<sup>56</sup> The Third Circuit noted that "[t]hese decisions are based on grounds of institutional competence, separation of powers and deference to the Executive on national security matters. Thus, the federal courts may not 'second guess' the lawful decision of an agency like NSA to terminate a person's access to classified information."<sup>57</sup>

Consequently, an applicant is limited to the procedural guarantees found in Executive Orders, regulations and any applicable statutes. However, if an agency departs from its own prescribed procedures, such actions, even in the case of security clearance, may be reviewed by Article III courts.<sup>58</sup> However, the basis of such review is predicated on whether statute or regulation promulgates a meaningful standard.<sup>59</sup> The only other opportunity for an Article III court to review a ruling on security clearance is when the petition present a colorable constitutional claim.<sup>60</sup> However, when a plaintiff raises constitutional claims that require review of the merits of a denial, the courts are reluctant to intervene.<sup>61</sup>

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<sup>53</sup> *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990) ("If there is no protected interest in a security clearance, there is no liberty interest in employment requiring such clearance.")

<sup>54</sup> *Egan*, 484 U.S. at 518 (Administrative merits board had no jurisdiction to review); *Dorfmont v. Brown*, 913 F.2d at 1399 (no judicial review); *Brazil v. U.S. Dept. of Navy*, 66 F.3d 193 (9th Cir. 1995) (no review for discrimination under Title VII). Further, while the Courts have indicated that a colorable constitutional claim is subject to review, *Webster v. Doe*, 486 U.S. 592 (1988), the Due Process Clause does not apply because no cognizable property interest exists for the law to protect. *Robinson v. Department of Homeland Sec.*, 498 F.3d 1361 (Fed. Cir. 2007).

<sup>55</sup> 5 C.F.R. § 732.201 (enabling agencies to designate positions based on potential material adverse effect on national security). The designations are: Special-Sensitive, Critical-Sensitive, and Noncritical-Sensitive. *Id.*; *see also* 32 C.F.R. § 154.13.

<sup>56</sup> *Kaplan v. Conyers*, 733 F.3d 1148 (Fed. Cir. 2013) (holding that MSPB was prohibited from reviewing Department of Defense's determinations concerning eligibility of employee to occupy "sensitive" position, regardless of whether position required access to classified information).

<sup>57</sup> *Stehney v. Perry*, 101 F.3d 925, 932 (3d Cir. 1996).

<sup>58</sup> *Id.* ("The courts also have power to review whether an agency followed its own regulations and procedures during the revocation process.")

<sup>59</sup> *See Webster*, 486 U.S. at 592 (finding that "the court would have no meaningful standard against which to judge the agency's exercise of discretion").

<sup>60</sup> *Id.* at 593 (holding that the reviewability constitutional claims are only precluded upon "the heightened showing of clear congressional intent" for such preclusion).

<sup>61</sup> *El Ganayni v. U.S. Dept. of Energy*, 591 F.3d 176 (3d Cir. 2010) (denying First Amendment claim for retaliatory discharge which would require disclosure and review of merits to determine reason for revocation).

For these reasons care must be taken in analyzing the collateral consequences of suspected or charged criminal conduct for those holding or applying for security clearances.

## **5.7 Reporting Requirements**

The reporting requirements under the NISP are quite pervasive, which obligates government contractors to report any “Adverse Information,” which could affect an employee’s status as a clearance holder.<sup>62</sup> These reporting requirements extend to the contract employees themselves, who are obligated to report on one another, as well as self-report.<sup>63</sup> The NISPOM obligates contractors to designate one of their employees as the Facility Security Officer (FSO) to oversee security clearance and manages the reporting of adverse information.<sup>64</sup> Employees report to the FSO who then uses the Joint Personnel Adjudication System (JPAS) to report to the DoD.<sup>65</sup>

Compliance with Adverse Information Reporting includes reporting on various kinds of information that may affect an individual’s judgment, reliability, or suitability as security clearance holder, including (but not limited to): foreign travel and contact, personal life changes, psychological counseling, financial concerns, alcohol-related issues, drug use, and criminal conduct.<sup>66</sup>

Failure to self-report can constitute separate and distinct grounds for the revocation of security clearance,<sup>67</sup> even if the underlying conduct by itself would not have constituted grounds

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<sup>62</sup> NISPOM, *supra* note 23 at § 1-302(a) (“Contractors shall report adverse information coming to their attention concerning any of their cleared employees. Reports based on rumor or innuendo should not be made. The subsequent termination of employment of an employee does not obviate the requirement to submit this report. If the individual is employed on a Federal installation, the contractor shall furnish a copy of the report and its final disposition to the commander or head of the installation.”)

<sup>63</sup> *Id.* at § 3-107(d); *see also* Defense Security, Services, Center for Development of Security Excellence, Facility Security Officer Toolkit, Reporting Requirements, (July, 16 2005) [www.cdse.edu/documents/toolkits-fsos/reporting-requirements.doc](http://www.cdse.edu/documents/toolkits-fsos/reporting-requirements.doc) [hereinafter *Reporting Requirements*].

<sup>64</sup> NIPSOM, *supra* note 23 at 1-201, 1-300(a).

<sup>65</sup> *See generally* Defense Manpower Data Center, Joint Personnel Adjudication System Frequently Asked Questions (Oct. 9, 2014) <http://www.cdse.edu/documents/cdse/jpas-faqs.pdf>.

<sup>66</sup> Reporting Requirements, *supra* note 61.

<sup>67</sup> *See e.g.* ISCR Case No. 13-01281 at 6 (App. Bd. Apr. 29, 2014), <http://www.dod.mil/dodgc/doha/industrial/13-01281.h1.pdf> (“Applicant has repeatedly chosen to protect his selfinterest, preserving his reputation and job status, over his duty to report adverse information. Willingness to self-report adverse information, even at the risk of detriment to reputation and career, are essential. Applicant’s behavior raises doubts about his ability to willingly self-report information that could lead to personal consequences.”).

for revocation.<sup>68</sup> Conversely, self-reporting can serve to mitigate conduct that might otherwise lead to revocation of security clearance.<sup>69</sup>

Beyond the reporting obligation, contractors are also required to self-inspect on a continual basis, and certify that self-inspection to the DoD on an annual basis.<sup>70</sup> DoD, through DSS and Center for Development of Security Excellence, provides contractors with a Self-Inspection Handbook, which provides checklists and extensive questionnaires for both security clearance and security education.<sup>71</sup> Contractors are not only obligated to assess their employee's status for holding security clearance on a continual basis, but also ensure that their employees understand their own reporting obligations.<sup>72</sup>

## **5.8 Security Clearance Determinations and the Adjudicative Guidelines**

**The Adjudicative Guidelines provide the basis for security clearance determinations;<sup>73</sup> the DoD provides adjudicators in DISCO and DOHA with the Adjudication Desk Reference (ADR) to aid in making security clearance determinations.<sup>74</sup> Although the ADR provides valuable insight into the decision-making process of security clearance determinations, the ADR is not binding authority.<sup>75</sup> Nonetheless, the ADR provides the government's own principled analysis of each of the Adjudicative Guidelines used in making security clearance**

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<sup>68</sup> See e.g. ISCR Case No. 10-02716 (App. Bd. May, 30 2012) (“Applicant has mitigated the Criminal Conduct security concerns [...] However, he failed to mitigate the Personal Conduct concern that arose out of his false answers on his Electronic Questionnaires for Investigations Processing (e-QIP) or in his adopted summary of his interview with an investigator for the Department of Defense.”); ISCR Case No. 01-26137 (App. Bd. Apr. 30, 2002) (finding that failure to disclose DUI arrest constituted a disqualifying condition for security clearance); ISCR Case No. 12-01995 (App. Bd. Mar. 11, 2014) (finding that failure to disclose financial delinquencies was factor in security clearance revocation); ISCR Case No. 13-01139 (App. Bd. Apr. 30, 2014) (finding that failure to disclose marijuana use raised doubts about suitability and eligibility to hold security clearance)

<sup>69</sup> See e.g. ISCR 14-02373 (App. Bd. Oct. 7, 2015) (finding that self-reporting of nine security infractions did not bar applicant from security clearance.)

<sup>70</sup> NIPSOM, *supra* note 23 at 1-207(3)(b).

<sup>71</sup> DoD, DSS, CDSE, Self-Inspection Handbook for NISP Contractors (Nov. 2013), [http://www.cdse.edu/documents/cdse/self\\_inspect\\_handbook\\_nisp.pdf](http://www.cdse.edu/documents/cdse/self_inspect_handbook_nisp.pdf)

<sup>72</sup> *Id.*; see also NIPSOM, *supra* note 23 at 3-107(d).

<sup>73</sup> 32 CFR § 147.1.

<sup>74</sup> Department of Defense, Defense Personnel and Security Research Center, Defense Manpower Data Center, Adjudicative Desk Reference (Mar. 2014), [http://www.dhra.mil/perserec/adr/ADR\\_Version\\_4.pdf](http://www.dhra.mil/perserec/adr/ADR_Version_4.pdf) [hereinafter *ADR*].

<sup>75</sup> *Id.* at 2 (“[The ADR] is not U.S. Government policy and may not be cited as authority for denial or revocation of access. It is background information obtained largely through library research.”).

**determinations.**<sup>76</sup> **5.8.1 Drug Involvement – Guideline H**

Guideline H broadly countenances security clearance denials or revocations predicated upon almost any illicit drug or even medical marijuana use, de minimus or isolated, contemporary or in the distant past. The current policy justification reads as follows: “Improper or illegal involvement with drugs raises questions regarding an individual’s willingness or ability to protect classified information.”<sup>77</sup>

Moreover, under Guideline H, almost any “use” constitutes “abuse.” The guideline provides that the “conditions that raise a security concern and may be disqualifying include any *drug abuse*.”<sup>78</sup> (emphasis added). But “drug abuse” is therein broadly defined as “the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.”<sup>79</sup> Therefore, almost any illicit drug use can by itself disqualifying.<sup>80</sup>

Although DISCO and DOHA have broad discretion in using Guideline H as grounds for revoking or denying security clearance, drug use itself does not provide the basis of that determination, rather it is the underlying security clearance concerns created by drug abuse that ultimately provides the basis for security clearance revocations and denials. The ADR explains that drugs use may indicate “an unwillingness or inability to abide by the law,” “weaken judgment,” “reflect a tendency toward irresponsible or high-risk behavior,” cause its users to “be susceptible to blackmail,” “indicate the presence of broad or emotional personality problems,” and “cause financial problems, leading to criminal activity to finance a drug habit.”<sup>81</sup>

Therefore, security clearance adjudication turns not on drug use *per se*, but on the presence of the underlying security concerns.<sup>82</sup> Further, the ADR acknowledges the “dilemma” facing adjudicators: “If standards are too lax, security may not be protected. If standards are too strict, many well-adjusted, adventuresome, and creative individuals who have experimented with drugs in the past may be screened out even though they have no intention of using drugs in the future.”<sup>83</sup>

ADR explicates several factors for consideration of whether reported drug use constitutes

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<sup>76</sup> *Id.* (“The ADR was developed by the Department of Defense Personnel and Security Research Center Division of the Defense Manpower Data Center for use by the U.S. Government security community.”).

<sup>77</sup> 32 CFR § 147.10(a)(1)

<sup>78</sup> 32 CFR § 147.10(b)(1)

<sup>79</sup> 32 CFR § 147.10(b)(1)

<sup>80</sup> A list of other conditions may trigger disqualification, including a diagnosis or evaluation of “drug dependence.” *See* 32 CFR § 147.10 (b)(1)-(5). “Possession” even without use is of course a disqualifying condition. *Id.*

<sup>81</sup> ADR, *supra* note 74 at 82.

<sup>82</sup> ADR, *supra* note 74 at 84 (“Adjudication of drug issues must be based on assessment of *security risk*, not whether the adjudicator personally approves or disapproves of the behavior being adjudicated”) (emphasis added).

<sup>83</sup> ADR, *supra* note 74 at 83.

a security risk: which drug was used,<sup>84</sup> frequency of drug use,<sup>85</sup> recency of drug use,<sup>86</sup> and circumstances of drug use.<sup>87</sup>

### 5.8.2 Mitigation of Drug Use

Guideline H also supplies factors which can mitigate the security risks created by drug use: the drug use was not recent, the drug involvement was an isolated or aberration event, a demonstrated intent not to abuse drugs in the future, completion of drug treatment programs.<sup>88</sup>

The ADR also suggests other mitigating factors;<sup>89</sup> however reliance on the ADR has proven ineffective in DOHA appeals proceedings.<sup>90</sup> In evaluating mitigating conditions, the most important factor is to what extent is the person likely to use drugs in the future.<sup>91</sup> Whether a person is attesting to the mitigation conditions in the application or after an initial security clearance determination has been made, such mitigation should be framed in a way that targets the underlying security risks, such that the drug use “does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment.”<sup>92</sup>

### 5.8.3 Drug Involvement Cases

Below is a summary of a handful of reported cases concerning denial or revocation of security clearances based on drug use:

<b>Drug Involvement Case Table</b>						
Case No.	Type of drug	Length,	Reporting	While	Mitigation	Result

<sup>84</sup> See ADR, *supra* note 74 at 84-86. Discussion highlights the risks posed by methamphetamine, cocaine, and heroine, and to a lesser extent, marijuana, LSD, and prescription drugs. *Id.*

<sup>85</sup> See ADR *supra* note 74 at 87.

<sup>86</sup> See ADR *supra* note 74 at 87-88.

<sup>87</sup> See ADR *supra* note 74 at 88-89. The ADR further highlights circumstances which bear consideration: age at first use, solitary drug use, means of acquiring drugs, motivation for drug use, and behavior while under the influence of drugs. *Id.*

<sup>88</sup> 32 CFR § 147.10(c).

<sup>89</sup> ADR *supra* note 74 at 93. Outlining that abuse of prescription drugs after a severe illness for which such drugs were prescribed can constitute a mitigating circumstance.

<sup>90</sup> See *e.g.* ISCR Case No. 08-01583 (App. Bd. Dec. 4, 2009) (“Applicant’s reliance on portions of the Adjudicative Desk Reference (ADR) is misplaced. DOHA judges are required to decide cases by using the Adjudicative Guidelines, not the ADR. The ADR itself contains language indicating that it may not be cited as authority for denial or suspension of access. Given that language, Applicant cannot reasonably contend that the portions of the ADR cited by him constituted official U.S. government policy that the Judge was required to follow.”)

<sup>91</sup> See ADR *supra* note 74 at 94-95. The ADR lays out time-frame conditions, combined with type of drug and frequency of use to create a framework for determining whether future drug use is unlikely. *Id.*

<sup>92</sup> ADR *supra* note 74 at 93.

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		frequency, recency	problem?	holding?		
14-03734 11/24/15	Marijuana	6 years, habitual,  3 years ago	No problem	Yes	For pain relief after motorcycle accident. Cannot take narcotics due to brain injury.	Revoked
14-02889 02/17/15	Marijuana	4 times in 2009	No Problem	Yes	Testified, signed sworn personal statement committing to non- use.	Granted
14-00199 12/21/15	Marijuana & Mushrooms	4 or 5 times until 2013; three times until 2010	Self- reported	No	Committed to non- use and passage of time.	Granted
15-00207 3/28/16	Marijuana	Three times during 2013-2014	Self- reported	Yes	Signed statement committing to non- use. Did not terminate friendship with person who supplied drugs.	Revoked
14-00255 2/23/16	Marijuana	Once every four months from 2008-2013	Initially failed to disclose	No	None	Revoked
14-03591 11/20/15	Marijuana Cocaine Hydrocodone	Infrequent use from 2007-2011	Self- reported	Yes	Committed to non- use; dissociated with drug-using friends. Infrequent, and four years ago.	Granted
08-10008 12/29/09	Meth- amphetamine	10 times from 2005-2007	No problem	No	Committed to non- use.	Denied
10-01073 8/31/11	Heroin	Arrest in 2009.	No problem	Yes	Committed to non- use.	Revoked



12-07214 6/28/13	Painkillers, Adderall	Infrequent use from 2008-2011	Initially failed to disclose	Yes	Committed to non- use; sought counseling; credibly misunderstood illegality of spouse's medication	Granted
09-01986 2/10/11	Oxycotin, Valium, Codeine	Frequent from 2002 to 2008	No problem	Yes	Committed to non- use.	Revoked

### **5.9 Alcohol Consumption – Guideline G**

Guideline G enunciates the alcohol consumption policy concern: “Excessive alcohol consumption often leads to the exercise of questionable judgment, unreliability, failure to control impulses, and increases the risk of unauthorized disclosure of classified information due to carelessness.”<sup>93</sup> Just as the determinations under Guideline H for drug abuse, Guideline G is premised not on specific incidents or arrests barring security clearance, but on the extent to which those incidents or arrests raise concerns about holding security clearance.

Guideline G provides six conditions which could lead to disqualifying security concerns: (1) alcohol-related incidents away from work,<sup>94</sup> (2) alcohol-related incidents at work,<sup>95</sup> (3) diagnosis of alcohol abuse or dependence by a medical professional,<sup>96</sup> (4) evaluation of such abuse or dependency by a licensed clinical social worker,<sup>97</sup> (5) alcohol consumption subsequent such diagnosis or evaluation,<sup>98</sup> and (6) habitual or binge drinking.<sup>99</sup> These disqualifying conditions provide a broad basis for adjudicators’ denial or revocation of security clearance. These disqualifying conditions fall into two general categories: behavior resulting from alcohol consumption and medical diagnoses based upon alcohol consumption. The security concerns arising from behavior and diagnosis differ in terms of adjudication.

#### **5.9.1 Alcohol-related Behavior**

On behavior, the ADR suggests that adjudicators, much as the analysis required for Guideline H under drug use, ask how a given alcohol-related incident reflects on a person’s

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<sup>93</sup> 32 CFR § 147.9(a)

<sup>94</sup> 32 CFR § 147.9(b)(1). Guideline further explains that such incidents include, “driving while under the influence, fighting, child or spouse abuse, or other criminal incidents related to alcohol use.” *Id.*

<sup>95</sup> 32 CFR § 147.9(b)(2)

<sup>96</sup> 32 CFR § 147.9(b)(3)

<sup>97</sup> 32 CFR § 147.9(b)(4)

<sup>98</sup> 32 CFR § 147.9(b)(6)

<sup>99</sup> 32 CFR § 147.9(b)(7)

judgment, reliability, and trustworthiness.<sup>100</sup> In general the ADR suggests that incidents at work are more serious and more indicative of security concerns than incidents occurring away from work.<sup>101</sup> Beyond overt indices of alcohol use such as breath, hangovers, and absenteeism, the ADR suggests that “excessive talkativeness”<sup>102</sup> and “loss of physical control”<sup>103</sup> demonstrate particular risks to the security of classified information.

## **5.9.2 DUI and Alcohol-related arrests**

Alcohol-related incidents occurring away from work may also give rise to significant security concerns especially if they give rise to violence or arrest.<sup>104</sup> The ADR also explicates the connection between alcohol and domestic violence, especially among men. (Domestic violence is covered separately, please see below). Guideline G specifically lists driving as while intoxicated as one of the disqualifying conditions for security clearance.<sup>105</sup> The ADR explains that a single DUI arrest is an “important indicator of alcohol abuse,”<sup>106</sup> and further, that “investigators should intensify their search for other indications of alcohol-related problems” on the basis of a single DUI arrest. However, in practice, a single DUI arrest or conviction is usually not enough to constitute grounds for denial or revocation of security clearance.<sup>107</sup>

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<sup>100</sup> See ADR, *supra* note 74 at 12 (“Do the subject’s actions indicate poor judgment, unreliability, untrustworthiness, or carelessness? How imminent is the security risk?”).

<sup>101</sup> ADR *supra* note 74 at 13 (“Incidents at work are generally more serious than if the same type of behavior occurs away from work. If a subject allows alcohol use to affect any aspect of work performance, it may affect other aspects of work performance including control over classified information.”)

<sup>102</sup> ADR *supra* note 74 at 13 (“An individual who becomes excessively talkative while intoxicated may say things that are regretted or not remembered later. Such a person may be unable to exercise the care and discretion needed to protect classified information. The risk is greatest for personnel whose job requires meeting and discussing sensitive topics with others, often over lunch where drinks may be served, without making inappropriate revelations regarding classified information.”)

<sup>103</sup> ADR *supra* note 74 at 13 (“An individual who occasionally becomes intoxicated to the point of passing out may lose physical control over sensitive materials. This is a particular concern among personnel who must carry a weapon or classified materials outside a secure area.”)

<sup>104</sup> See generally ADR *supra* note 74 at 13-16.

<sup>105</sup> 32 CFR § 147.9(b)(1)

<sup>106</sup> ADR *supra* note 74 at 14. The ADR continues, “Most of those who are arrested do not just happen to be caught during an unusual lapse in judgment.” *Id.* Additionally, the ADR suggests that “driving while impaired is often part of a more general behavioral syndrome typified by high-risk behaviors and irresponsible attitudes.” *Id.* at 15-16.

<sup>107</sup> See e.g. ISCR Case No. 14-05542 (App. Bd. Dec. 21, 2015) (“Applicant’s driving under the influence conviction was an isolated alcohol-related criminal offense. There is no other evidence of alcohol-related or criminal conduct. [...] Clearance is granted.”); ISCR Case No. 14-04383 (App. Bd. Dec. 30, 2015) (“Applicant’s August 2013 alcohol-related arrest is mitigated as an isolated incident that does not negatively affect his ongoing security worthiness. Clearance is granted.”).

Indeed, adjudicators are looking for a “pattern of impulsive, irresponsible or sociopathic behavior,” not at a single, isolated incidents.<sup>108</sup>

### **5.9.3 Medical Diagnoses: Alcohol Abuse and Alcohol Dependence**

Even without detrimental alcohol-related behavior, medical evaluations of alcohol abuse and dependence provide the basis for adverse security clearance adjudication.<sup>109</sup> Alcohol abuse and alcohol dependence are clinical diagnoses born out of the DSM-V. The ADR generally defines alcohol abusers as persons who “are not physically addicted to alcohol, but develop problems as a result of their alcohol consumption and poor judgment, failure to understand the risks, or lack of concern about damage to themselves or others.”<sup>110</sup> The diagnosis is predicated upon “a pattern of drinking” that has led to one or of a set of behaviors over a 12 month period.<sup>111</sup> Alcohol dependence, on the other hand, is an illness composed of four main features.<sup>112</sup> These diagnoses provide adjudicators with a baseline which can put an applicant’s present otherwise innocuous behavior in context. Specifically, the ADR enumerates an extensive list of indicators that adjudicators should flag as potential security risks.<sup>113</sup> Additionally, the ADR highlights that failure to recognize that one has problem seriously weighs against an applicant, especially in the face of a medical diagnosis.<sup>114</sup>

### **5.9.4 Mitigation of Alcohol Consumption**

Like under Guideline H for drug use, alcohol consumption security concerns can be mitigated. The Guideline G offers four conditions that could mitigate such concerns: (1) the

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<sup>108</sup> See ADR *supra* note 74 at 16.

<sup>109</sup> See ADR *supra* note 74 at 19-22.

<sup>110</sup> ADR *supra* note 74 at 19-20.

<sup>111</sup> ADR *supra* note 74 at 20. These behaviors include: the inability to fulfill major responsibilities at work, school or home; use of alcohol under dangerous circumstances (such as driving while intoxicated; continued drinking despite broken relationship in other consequences of resulting from alcohol use; inability to meet financial obligations because of drinking; the recurrence of alcohol related legal problems; and continued drinking in the face of exacerbated health problems. *Id.*

<sup>112</sup> ADR *supra* note 74 at 20. These four features are: physical tolerance to alcohol; difficulty controlling alcohol consumption; physical dependence characterized by withdrawal symptoms which are relieved by alcohol; craving for alcohol during periods of abstinence. *Id.*

<sup>113</sup> See ADR *supra* note 74 at 20-21. The indicators include: subject’s drinking causing or exacerbating social, work, school, financial, legal or health problems; subject has unsuccessfully tried to cut down drinking; subject drinks alone; subject drinks prior to social events; subject drinks first thing in the morning; subject claims high tolerance; subject uses alcohol as a means of coping with life’s problems; a recent increase in subject’s drinking; subject becomes annoyed or angry when criticized about drinking; subject feels guilty about drinking. *Id.* at 20-21.

<sup>114</sup> ADR *supra* note 74 at 16 (“Refusal or failure to accept counseling or to follow medical advice relating to alcohol abuse or dependence is a serious concern.”).

alcohol-related incidents do not form a pattern, (2) the problem occurred long ago, (3) positive changes in behavior indicating sobriety, or (4) following a medical diagnosis, the individual has successfully completed a rehabilitation program, demonstrated sobriety for 12 months, and received a favorable prognosis from a medical professional or licensed clinical social worker.<sup>115</sup> The ADR explains the mitigation rationale: “Drinking is a problem only if it leads to adverse consequences.”<sup>116</sup> Again, adjudicators make determinations based on how alcohol-related incidents or diagnoses bear out on security concerns. The ADR suggests that adjudicators should ask: “Does the subject’s behavior demonstrate reliability, trustworthiness, good judgment, and discretion? If the subject meets that test, access is ‘clearly consistent with the interests of national security.’ If not, access may be denied.”<sup>117</sup>

Further, the ADR suggests that any alcohol consumption concerns must be weighed against the whole person, so that “the adjudicator considers everything that is known about [the] subject’s maturity, sense of responsibility, self-control, honesty, willingness to follow the rules, and commitment to the organization.”<sup>118</sup> Therefore applicants can mitigate the alcohol concerns emerging under Guideline G in one of two ways, by mitigating the alcohol concerns themselves, or by mitigating the underlying security concerns that the alcohol consumption gives rise to. DOHA case law reveals that mitigation often turns on to what extent has the person acknowledged and completed treatment for alcohol-related problems, and where applicants fail to acknowledge or complete treatment even in the face of relatively minor alcohol-related incidents security clearance is commonly denied.<sup>119</sup>

### 5.9.5 Alcohol Related Cases

What follows is a synopsis of a smattering of cases selected from the DOHA archives which illustrate DoD’s treatment of DUI and alcohol-related criminal offenses.

<b>Alcohol Consumption Case Table</b>						
Case No.	Incident	While Holding ?	Sobriety	Medical Diagnosis	Mitigation	Result
14-04614 1/20/16	DUI and Public Fighting in 2002; Public Intox. in 2008	No	Sober since 2013	Alcohol Dependence	Treatment program in 2013; supplied character reference and job	Granted

<sup>115</sup> 32 CFR § 147.9(c)(1)-(4).

<sup>116</sup> ADR *supra* note 74 at 21.

<sup>117</sup> ADR *supra* note 74 at 23.

<sup>118</sup> ADR *supra* note 74 at 23.

<sup>119</sup> See “Alcohol Consumption Cases” and table, *infra*.

					evaluations.	
12-11795 3/4/16	Accidents in 2005 and 2012 involving alcohol but no convictions.	No	Not Sober	Alcohol Dependence	Attended Treatment program but did not finish.	Denied
10-06586 10/27/15	4 DUIs from 1997 to 2007	No	Sober since 2010	Cleared of alcohol dependence	Attended treatment programs in 2008; references and work awards demonstrated sobriety.	Granted
14-02380 7/7/15	Underage drinking in 2005; DUIs in 2008 and 2012.	No	Drinks on occasion	No diagnosis	References from supervisors.	Denied
14-04383 12/20/15	DUI in 2013	Yes, Self-reported	Abstained during court required period; drinks on occasion	No diagnosis	Counseling sessions and AA meetings	Granted
14-05542 12/21/15	DUI in 2014	No	Drinks on occasion	No diagnosis	Counseling sessions and AA meetings	Granted

**5.10. Criminal Conduct – Guideline J**

Guideline J provides independent and broad authority to deny or revoke clearances “regardless of whether a person was formally charged.”<sup>120</sup> The disqualifying conditions include either “allegations or admissions of criminal conduct” or “a single serious crime or multiple lesser offenses.”<sup>121</sup> This means allegations, admissions, or arrests without convictions to multiple petty offenses, or a single felony, may independently suffice to trigger denial or revocation.<sup>122</sup> Further, the ADR specifically provides that a “clean criminal record does not

<sup>120</sup> 32 CFR § 147.12(b)(1).

<sup>121</sup> 32 CFR § 147.12(b)(1)-(2).

<sup>122</sup> *Id.*

mean the absence of criminal behavior.”<sup>123</sup>

Although Guideline J does not define what constitutes a ‘serious crime’ and under what conditions ‘multiple lesser offenses’ constitute grounds for security clearance denial or revocation, the ADR asserts that a ‘serious crime’ is often defined as a felony,<sup>124</sup> and, further, that if the underlying conduct would constitute a felony but applicant plea-bargained down to a misdemeanor the conduct should be treated as a serious crime for security clearance purposes.<sup>125</sup> The ADR also supplies a list of conduct that should be considered a serious crime regardless of whether they are graded as a felony within a given jurisdiction.<sup>126</sup> The ADR clarifies that a series of multiple lesser offenses becomes a disqualifying condition when those offenses forms a pattern of illegal or responsible behavior.<sup>127</sup> The ADR avers: “A pattern of disregard of the law is just as significant as the monetary value or penalty ascribed to a given crime.”<sup>128</sup> Additionally, although juvenile records are not normally considered for security clearances purposes, juvenile records become relevant to the extent that they corroborate an adult pattern of disregard of the law.<sup>129</sup>

Moreover, it is important to note that conduct which fails to constitute a disqualifying condition under Guideline J for Criminal Conduct may still trigger adverse action under the other guidelines, such as Guideline G for alcohol, Guideline H for drugs, Guideline D for sexual behavior, and Guideline E for personal conduct.<sup>130</sup> Likewise, conduct not rising to the level of adverse action under such guidelines may constitute a pattern of disregard of the law, and thus serve as a disqualifying condition under Guideline J.

### **5.10.1 Domestic Violence**

The ADR addresses domestic violence, separately and at length as grounds for revocation or denial, citing extensively the Lautenberg Amendment to the Gun Control Act of 1968.

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<sup>123</sup> ADR *supra* note 74 at 53. The ADR explains that criminal records cannot serve as positive evidence of non-criminality because most crimes are not reported, most reported crimes do not lead to arrest, many arrested persons are not prosecuted or convicted, and criminal records are often incomplete. *Id.* at 53-56.

<sup>124</sup> ADR *supra* note 74 at 51.

<sup>125</sup> ADR *supra* note 74 at 51 (“If there is good reason to believe the person committed a felony, but the crime was plea-bargained down to a misdemeanor, it should be treated as a felony.”).

<sup>126</sup> ADR *supra* note 74 at 51. Serious crimes include: any crime punishable by sentencing of more than one year, any crime involving the use of force, coercion, intimidation, violence against a person, firearms or explosives, violations of parole, probation or court-mandated rehabilitation, any offense involving breach of trust or fiduciary duty, discharge from the Armed Forces under dishonorable conditions, obstruction or corruption of government functions or deprivation of civil rights. *Id.*

<sup>127</sup> ADR *supra* note 74 at 51.

<sup>128</sup> ADR *supra* note 74 at 51.

<sup>129</sup> ADR *supra* note 74 at 49-50.

<sup>130</sup> See ADR *supra* note 74 at 50.

Codified at 18 USC § 922, and treated separately in this volume, the Lautenberg Amendment prohibits those convicted of a qualifying “misdemeanor crime of domestic violence” from possessing a firearm.<sup>131</sup> The ADR defines crime of domestic violence as a misdemeanor (at State or Federal level) crime that “involves the use or attempted use of physical force or the threatened use of a deadly weapon against a person with whom the offender has a family or family-like relationship.”<sup>132</sup> The effect of the Lautenberg Amendment’s mandate of prohibiting the possession of firearms for those guilty of domestic violence is that such offenders are barred from employment that requires access, possession or use of a firearm.<sup>133</sup> **Unlike disqualifying conditions under the guidelines, the prohibited possessor bar cannot be overcome by a showing of mitigation.**<sup>134</sup>

### **5.10.2 Minor Traffic Offenses**

Traffic violations are considerations under both criminal conduct guideline and under the personal conduct guideline.<sup>135</sup> Such traffic violations when coupled together or combined with other derogatory information can supply the basis for security clearance denial or revocation. For instance, although a single misdemeanor DUI is not by itself usually grounds for denial or revocation, the ADR asserts that multiple moving violations are suspect: “It is often said that the way people drive is a reflection of their personalities [...] A record of two or more moving violations in the past three years [...] suggests the possible existence of relevant derogatory information in other issue areas.”<sup>136</sup> Indeed, although not mentioned in Guideline E Personal Conduct, the ADR specifically treats “multiple traffic citations for reckless or high speed driving, including driving with a suspended license [...] raise concerns about a person’s attitude toward authority and responsibility.”<sup>137</sup> The extent to which such traffic offenses constitute grounds for adverse actions often turns on whether the applicant has been forthright about such traffic offenses and has taken steps to reform their behavior.<sup>138</sup>

### **5.10.3 Shoplifting and Employee Theft**

Not surprisingly, the ADR separately treats shoplifting, whether convicted or not, as follows: “Although it is a minor offense, shoplifting by an adult not in desperate need reveals important information about an individual’s trustworthiness and reliability.”<sup>139</sup> *Therefore, a single misdemeanor shoplifting charge or conviction, especially when combined with other conduct may serve to trigger denial or revocation.* Moreover, the ADR suggests that shoplifting

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<sup>131</sup> ADR *supra* note 74 at 58.

<sup>132</sup> ADR *supra* note 74 at 59; *see also* 18 USC § 16.

<sup>133</sup> ADR *supra* note 74 at 60.

<sup>134</sup> *See* ADR *supra* note 74 at 60.

<sup>135</sup> *See* ADR *supra* note 74 at 58, 226-27.

<sup>136</sup> ADR *supra* note 74 at 58.

<sup>137</sup> ADR *supra* note 74 at 226-27.

<sup>138</sup> *See* Criminal Conduct Chart *infra*.

<sup>139</sup> ADR *supra* note 74 at 57.

is underreported and prosecuted as retail firms tend to either handle such incidents themselves, or fail to offer their employees as witnesses during litigation.<sup>140</sup> Additionally, the ADR notes that shoplifting is rarely a crime committed out of need as “shoplifters are from the middle class, not from the lowest socioeconomic groups.”<sup>141</sup> Thus mitigating recent shoplifting, however minor, is especially difficult, as it reveals “important information about an individual’s trustworthiness and reliability.”<sup>142</sup>

Employment theft is also treated separately by the ADR because, like shoplifting, criminal records are an imperfect source for information about employee theft as employers are more likely to terminate such employees rather than prosecute them.<sup>143</sup> The ADR cites to staggering figures that suggest between 50-75% of retailer workers steal from their employers, although the ADR does note that this figure includes misuse of employee discount, the reporting of incorrect hours, and other innocuous offenses regarding security clearance concerns.<sup>144</sup>

#### **5.10.4 Mitigation of Criminal Conduct**

Admitted, alleged or documented criminal conduct<sup>145</sup> may be overcome for security clearance purposes by way of showing one or more of the mitigating conditions provided by Guideline J: the criminal behavior was not recent, the crime was an isolated incident, the person was coerced into committing the act, the person committed the act under unique circumstance, acquittal, or clear evidence of successful rehabilitation.<sup>146</sup> On this last mitigating condition, the ADR clarifies that “as a general rule adjudicators should require positive evidence of change, not simply the passage of time.”<sup>147</sup> In practice, where adjudicators are presented with positive evidence – letters of reference, witnesses testimony, continuing education, volunteering, receiving counseling, etc. – they are more likely to apply one of the mitigating conditions and grant security clearance.<sup>148</sup>

Therefore, persons seeking to overcome the security concerns arising from criminal conduct may either (1) mitigate the actual conduct or (2) mitigate the security concerns arising from such conduct. In practice, however, without positive proof, refuting the actual conduct may curtail an adjudicative finding of rehabilitation, as the person may appear remorseless.

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<sup>140</sup> ADR *supra* note 74 at 56-57.

<sup>141</sup> ADR *supra* note 74 at 57.

<sup>142</sup> ADR *supra* note 74 at 57.

<sup>143</sup> ADR *supra* note 74 at 57.

<sup>144</sup> ADR *supra* note 74 at 57-58.

<sup>145</sup> With the exception for prohibited possession resulting from criminal misdemeanor of domestic violence, if an applicant would fill a job requiring access to firearm. *See* ADR *supra* note 74 at 60.

<sup>146</sup> 32 CFR § 147.12(c)(1)-(6).

<sup>147</sup> ADR *supra* note 74 at 61. The ADR explicates that evidence of rehabilitation “might be a change in associates and lifestyle, repayment or remorse, a pattern of responsible behavior, or results of detailed psychological evaluation.” *Id.*

<sup>148</sup> *See* Criminal Conduct Table *infra*.



### 5.10.5 Criminal Conduct Cases

What follows below is a selection of cases explicating the adjudication of Guideline J pursuant our discussion above.

<b>Criminal Conduct Case Table</b>				
Case No. Date	Criminal Incidents	Reporting Problems	Mitigation	Decision
	<b>Shoplifting</b>			
10-04220 1/20/12	Shoplifting in 1983, 1989, 2005, 2007, 2009.	Failed to disclose	None	Denied
06-21986 3/28/07	Shoplifting in 2001	Failed to disclose	Relied on security employee when failed to disclose; paid restitution.	Granted
07-12461 7/25/08	Shoplifting in 2002, Unregistered vehicle x2 in 2004, Driving on suspended license x3 in 2004-05.	Failed to disclose shoplifting charge.	No evidence of rehabilitation.	Denied
06-16853 4/27/2007	Switched price tags 15 to 20 times in 1994-99; shoplifting arrest in 2000.	Self-reported	“Pillar of the community” “Highly regarded at work”	Granted
	<b>Employee Theft</b>			
03-18279 10/19/04	Plead guilty to embezzlement in 2002	No problems	Complying with terms of probation.	Denied
09-03135 7/10/10	Two incidents of employee theft in 1994-1997.	Failed to initially disclose, but then self-reported	Dissociated with former friends and neighborhood. Current law student. Acts as mentor for troubled youth.	Granted
	<b>Domestic Violence</b>			
06-18408 8/30/07	Four DV arrests form 1999-2004; all charges dismissed.	No problems	Credibly refuted the basis of DV arrests.	Granted
09-02668 3/25/10	DV convictions in 2003 and 2008.	No problems	Completed counseling and DV courses.	Granted

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14-01763 8/31/15	8 DV arrests from 1987-2013, including cruelty to children, battery, assault, false imprisonment; all dismissed.	No problems	Completed anger management course; victim of child abuse.	Denied.
14-01845 3/31/15	Arrested 9 times from 2001-09; DV x 2, DUI, trafficking cocaine, drug conspiracy, and running a stop sign. Convicted for one DV, DUI, and running stop sign. Acquitted on trafficking; conspiracy conviction overturned.	No problem	Pastor as reference; volunteers through church; pursuing Master's degree.	Granted.
	<b>Traffic</b>			
14-00719 6/30/15	Five arrests for driving on a suspended license from 2010-2013; one arrest for a failure to appear on a warrant. Fines remain outstanding.	No problem	Fines not paid due to period of unemployment	Denied
14-01995 11/21/15	Eight speeding infractions from 2007-2013; misdemeanors for Reckless driving in 2007 and Open Container in 2012. Fines paid.	Self-disclosed	"Acknowledged behavior, but has not taken steps to change it."	Denied
10-00182 5/13/14	Numerous traffic offenses from 1998-2010 including reckless driving, careless driving, speeding, open container-alcohol, failure to pay traffic fine, failure to have insurance, failure to appear, and repeatedly driving on a suspended license. Fines paid.	No problems.	Admits mistakes. Positive steps to reinstate license.	Denied.
11-09285 6/19/13	DUI in 2003; OWI in 2004; driving on suspended license 2004, 2008; speeding in 2006, 2008.	Negligent failure to disclose.	Express remorse. Letters of reference from many people. Moved out of old neighborhood.	Granted

**5.11 Sexual Behavior – Guideline D**

An applicant's sexual behavior not rising to the level of criminal conduct is treated separately for security clearance purposes, within Guideline D.<sup>149</sup> Guideline D lists four conditions in which sexual behavior rises to the level of a security concern: (1) the sexual behavior is of a criminal nature, whether or not it has been prosecuted, (2) compulsive or addictive sexual behavior demonstrates a pattern of self-destructive or high-risk behavior, (3) sexual behavior that causes an individual to be vulnerable to coercion, and (4) public sexual behavior that reflects lack of discretion or lack of judgment.<sup>150</sup>

Although the security concerns arising from sexual behavior are grounds for revocation and denial of security clearance, adjudication of sexual behavior necessarily complicates notions of privacy and personal liberty. In this vein, the ADR notes that “[n]o adverse inference concerning the standards in this guideline may be made solely on the basis of the sexual orientation of the individual.”<sup>151</sup> Further the ADR avers that “adjudication of sexual behavior needs to be based on demonstrable security concerns, not on commonly accepted myths or the personal moral values of individual adjudicators.” Additionally, and as quoted in the ADR, the DC Circuit noted, “The notion that it could be an appropriate function of the federal bureaucracy to enforce the majority’s conventional codes of conduct in the private lives of its employees is at war with elementary concepts of liberty, privacy and diversity.”<sup>152</sup>

The ADR explicates the seriousness of some conduct that is not necessarily illegal such as Sex Tourism and Mail-Order Brides that can affect the suitability for clearance holding;<sup>153</sup> however, the ADR focuses its discussion on illegal sexual behavior that may not rise to the level of prosecution, but nonetheless pose serious security risks.<sup>154</sup> The ADR’s treatment of Rape or Sexual Assault highlights the wide variety of standards from state to state where force and consent requirements differ.<sup>155</sup> Additionally the ADR notes that universities often adjudicate sexual assault on campus without the aid of law enforcement; the ADR further offers an affirmative consent standard in full from University of California.<sup>156</sup> Here, the ADR is giving adjudicators a wide variety of legal tools with which to find sexual behavior rising to the level of security concerns whether that conduct resulted in arrest or conviction.

The ADR also treats incest and child pornography separately. The ADR suggests that incest is a security concern not only because it is illegal but also “it usually indicates the perpetrator’s sexual behavior is out of control.”<sup>157</sup> The ADR dispositively asserts that a “[c]onviction for possessions of child pornography will, under most circumstances be

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<sup>149</sup> 32 CFR § 147.6.

<sup>150</sup> 32 CFR § 147.6(b)(1)-(4).

<sup>151</sup> ADR *supra* note 74 at 300.

<sup>152</sup> Norton v. Macy, 417 F.2d 1161, 1165 (D.C. Cir. 1969).

<sup>153</sup> ADR *supra* note 74 at 301.

<sup>154</sup> See ADR *supra* note 74 at 302-309.

<sup>155</sup> See ADR *supra* note 74 at 303-04.

<sup>156</sup> ADR *supra* note 74 at 304.

<sup>157</sup> ADR *supra* note 74 at 306.

disqualifying.”<sup>158</sup> The ADR also separately treats pornography in the workplace, averring that continued use of pornography during work hours at the work place premises “suggests a need to consider the possibility of sexual addiction.”<sup>159</sup>

The ADR suggests that sexual harassment becomes a security concern when: (1) it leads to criminal prosecution, (2) it persists after due warning, or (3) it is part of a broader pattern of unreliability, untrustworthiness or poor judgment.<sup>160</sup> Further, the ADR asserts: “At least one recent study shows that a proclivity for sexual harassment is strongly related to personal dishonesty.”<sup>161</sup>

The chief security concern arising from sexual behavior is the extent to which such behavior makes a person emotionally unsound and vulnerable to coercion. The ADR explicates the history of this concern as it relates to espionage,<sup>162</sup> and further explains the connection between some sexual behavior and vulnerability to coercion.<sup>163</sup> Security concerns arise when a person’s secrets can be leveraged against revealing classified information.<sup>164</sup> Conversely, a lack of sexual discretion may indicate a security risk when that indiscretion “occurs at inappropriate time or place[,] is public or offensive to others or becomes notorious[, or] involves high risk.”<sup>165</sup>

Compulsive and addictive sexual behavior also create security concerns “because [the behavior] may indicate emotional problems, poor judgment, make one vulnerable to exploitation [...] and attract the attention of hostile intelligence or security services.”<sup>166</sup> Further, the ADR indicates that sexual addiction is associated with high risk behavior taken regardless of the potential for dangerous or negative consequences.<sup>167</sup> The ADR also specifically mentions that connection between sexual addiction and the internet, demonstrating the scope of investigation undertaken for security clearance purposes.<sup>168</sup>

### **5.11.1 Mitigation of Sexual Behavior**

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<sup>158</sup> ADR *supra* note 74 at 307.

<sup>159</sup> ADR *supra* note 74 at 307.

<sup>160</sup> ADR *supra* note 74 at 307.

<sup>161</sup> ADR *supra* note 74 at 310 (citing to Lee, K., Gizzarone, J., & Ashton, M.C., PERSONALITY AND THE LIKELIHOOD TO HARASS SEXUALLY. SEX ROLES, 49, 59-69 (2003).).

<sup>162</sup> See ADR *supra* note 74 at 300-01.

<sup>163</sup> See ADR *supra* note 74 at 315-16.

<sup>164</sup> The ADR explicates that the vulnerability to coercion depends on the following circumstances: how ashamed one is of the behavior, the lengths the person has gone to keep it secret, the magnitude of potential loss if the behavior were exposed, and the person’s moral standards. ADR *supra* note 74 at 315.

<sup>165</sup> ADR *supra* note 74 at 314.

<sup>166</sup> ADR *supra* note 74 at 311.

<sup>167</sup> ADR *supra* note 74 at 312. The ADR is also careful to caution adjudicators that, “[d]eviation from an assumed normal *type* or *frequency* of sexual activity is not an appropriate indicator of addiction.” *Id.*

<sup>168</sup> ADR *supra* note 74 at 313.

Sexual behavior not rising to the level of criminal conduct must be mitigated separately. Guideline D lists conditions that could mitigate security concerns: (1) The behavior occurred during adolescence and no evidence exists of similar conduct; (2) The behavior was not recent and no evidence exists of similar conduct; (3) There is no other evidence of questionable judgment, irresponsibility, or emotional instability; and/or (4) The behavior no longer serves as a basis for coercion, exploitation, or duress.<sup>169</sup> These conditions reveal that sexual behavior can be mitigated by either demonstrating the behavior happened long ago or that the behavior is not indicative of underlying security concerns. The ADR suggests that if the sexual behavior is “strictly private, consensual, and discreet,” such behavior should be mitigated;<sup>170</sup> and, even though Guideline D, the binding source of law, does not explicate such a condition, the extent to which the behavior is private, consensual and discreet may serve to mitigate under the codified conditions listed above. Additionally, the ADR explicates various sexual addiction treatments that may serve as a basis for mitigation.<sup>171</sup>

### 5.11.2 Sexual Behavior Cases

What follows below is a selection of cases that demonstrate the range of decision-making based on security concerns arising about of sexual behavior.

<b>Sexual Behavior Cases</b>				
Case No. Date	Conduct	Reporting Problem	Mitigation	Decision
10-01021 6/22/11	Sexual Assault in 2009; allegedly forcible fondling; plea bargain to avoid publicity.	None	None. Victim blaming undercut mitigation.	Denied
11-00211 7/10/12	Unlawful sexual contact with a minor (5 year old niece) in 1988 at 17 year old. Assault in 2004, involving 5-6 instances criminal sexual contact with 14-year niece. In 2007, he was fined for failure to register as a sex offender.	Initial failure to report.	First instance was as a juvenile; second instance was eight years ago. No professional counseling or treatment. Questions about forthrightness with spouse and previous employers.	Denied
15-00266 12/4/15	Terminated from job in 2009 after coworker observed him viewing child pornography.	Falsified facts about viewing	None. Minimized seriousness of misconduct. No	Denied

<sup>169</sup> 32 CFR § 147.6(c).

<sup>170</sup> ADR *supra* note 74 at 316, 317.

<sup>171</sup> ADR *supra* note 74 at 317-19.

	Admitted to trading child pornography with other internet users during 2010.	pornography.	professional counseling or treatment.	
14-05391 12/24/15	Solicitation of prostitution in 2014.	Self-reported to FSO immediately.	One-time isolated incident. Prompt disclosure. Guilty plea. Evidence of good character.	Granted
14-04441 1/14/16	From 2012 to 2014, applicant engaged in extramarital sexual acts with at least four foreign nationals, including one woman who was married to a Japanese military officer.	Disclosed some relationships initially, but not others.	None. Conduct was recent and frequent. Has not disclosed to his wife, thus remains vulnerable to coercion.	Denied
14-03838 2/25/16	Convicted of contributing to the delinquency of a minor in 2013 as result of relationship with 15-year-old minor.	Self-reported to the FSO.	None. Recent.	Denied

### 5.12 Guideline E – Personal Conduct

Guideline E provides for security clearance denials on the basis dishonesty and other conduct not rising to the level of denial within the other guidelines but which, nonetheless, demonstrates a pattern of behavior that reflects security concerns. Guideline E lays out the concern: “Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.”<sup>172</sup> Indeed, myriad conduct, both legal and illegal, fall under the guideline for personal conduct.

Guideline E lists two conditions which will “normally result in an unfavorable clearance action”: (1) Refusal to cooperate with the required security process, or (2) refusal to complete required security forms, release or provide frank and truthful answers to investigators.<sup>173</sup> The Guideline further provides conditions which may be disqualifying: (1) Reliable, unfavorable information provided by people who know the applicant; (2) deliberate omission or falsification of relevant and material facts from any part of the security process or (3) to any investigator; (4) personal conduct that may increase a person’s vulnerability to coercion; (5) a pattern of dishonesty or rule violation; or (6) association with persons involved in criminal activity.<sup>174</sup>

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<sup>172</sup> 32 CFR § 147.7(a).

<sup>173</sup> 32 CFR § 147.7(a)(1)-(2).

<sup>174</sup> 32 CFR § 147.7(b).

It is under Guideline E where conduct related to past employment,<sup>175</sup> civil litigation,<sup>176</sup> anger management issues,<sup>177</sup> and associations with persons posing security risks<sup>178</sup> can become the basis for security clearance revocation and denial. Furthermore, the ADR specifically highlights the vulnerability to coercion as a significant security risk.<sup>179</sup> Here, conduct which did not rise to the level of disqualification among the other guidelines, may be the basis for such if the applicant or holder desires to keep such information secret.<sup>180</sup>

### **5.12.1 Dishonesty**

Most importantly, Guideline E for Personal Conduct treats seriously any investigative “omission” of “relevant and material facts from any personnel security questionnaire” as well as a “pattern of dishonesty or rule violations.”<sup>181</sup> In fact the ADR devotes an entire chapter to Falsification under Guideline E.<sup>182</sup> The ADR lays out three general factors that adjudicators should balance against an omission or falsification: (1) whether the omission or falsification was material, (2) motivation for the omission or falsification, and (3) whether information is omitted or a false story is fabricated.<sup>183</sup> Among the common omissions and falsifications are failure to report criminal records,<sup>184</sup> fabricated experience,<sup>185</sup> falsified drug test,<sup>186</sup> and misrepresenting educational qualifications.<sup>187</sup>

### **5.12.2 General Discharge from Military**

Although not mentioned in the CFR version of Guideline E Personal Conduct, the ADR commentary specifically treats a general discharge under honorable conditions: “Applicants often claim ‘honorable discharge’ from military service when, in fact, they were given a ‘general discharge under honorable conditions.’ The latter means the individual was discharged for cause [...] such as drug, alcohol, criminal, or emotional/mental problem.”<sup>188</sup> We treat Military

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<sup>175</sup> ADR *supra* note 74 at 226.

<sup>176</sup> ADR *supra* note 74 at 227.

<sup>177</sup> ADR *supra* note 74 at 227.

<sup>178</sup> ADR *supra* note 74 at 227, 230.

<sup>179</sup> ADR *supra* note 74 at 228-229.

<sup>180</sup> ADR *supra* note 74 at 228-229. The ADR outlines factors adjudicators should consider when assessing the vulnerability to coercion; including whether the person’s family knows about the conduct, whether the applicant is ashamed, whether the conduct will continue, and the magnitude of the potential loss. *Id.*

<sup>181</sup> 32 CFR § 147.7(b)(2),(5).

<sup>182</sup> ADR *supra* note 74 at 239-253.

<sup>183</sup> ADR *supra* note 74 at 242.

<sup>184</sup> ADR *supra* note 74 at 243.

<sup>185</sup> ADR *supra* note 74 at 243-44.

<sup>186</sup> ADR *supra* note 74 at 244.

<sup>187</sup> ADR *supra* note 74 at 244-48.

<sup>188</sup> ADR *supra* note 74 at 226.

Discharges separately in this treatise.

Thus, misdemeanor offenses such as DUI, drug use, or domestic violence which resulted in separation from the military with a General Discharge Under Honorable Conditions, and loss of certain veteran's benefits such as the GI Bill, may also have the indirect consequences of affecting a security clearance application years later. In this way, as well, distant misdemeanor and minor offenses, may have specific long-lasting negative impact on careers.

### **5.12.3 Online Behavior**

Although not listed in Guideline E, investigation of online behavior and social media presence is an emerging phenomenon that bears attention. Just this year (2016), the Director of National Intelligence announced its policy to allow such investigations:

Agencies may choose to collect publicly available social media information in the personnel security background investigation process, which pertains to the covered individual's associations, behavior and conduct, as long as the information pertains to the adjudicative guidelines for making determinations of initial or continued eligibility for access to classified information or eligibility to hold a sensitive position.<sup>189</sup>

Essentially, if one's online behavior falls under the scope of one of the guidelines, it can be used in the determination of a person's security clearance.

The ADR, perhaps anticipating the announcement of such an inevitable policy, already treats online behavior separately.<sup>190</sup> The ADR lists online behavior that could result in security risks: engaging in unprofessional communication with subordinates; posting unprofessional content on public pages and private pages to which professional contacts have access; using professional credentials for personal gain; engaging in cyber bullying; behavior that violates the Uniform Code of Military Justice, if applicable; over-sharing sensitive information through social media.<sup>191</sup> This list does not include online behavior that could be disqualifying under the other various guidelines. For instance, social media posts that celebrate alcohol use or show pictures of the applicant intoxicated certainly would fall under Guideline G for Alcohol Consumption.

Those seeking or wishing to maintain security clearance must be conscious of their social media presence, especially to the extent that it corroborates security risks created by other conduct falling under the Guidelines. Online behavior is but one more source where adjudicators can find conduct that forms a pattern of unreliability and

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<sup>189</sup> James R. Clapper, Director of National Intelligence, SECURITY EXECUTIVE AGENT DIRECTIVE 5, *Collection, Use, and Retention of Publicly Available Social Media Information in Personnel Security Background Investigations and Adjudications* (May, 5 2016) <http://www.fas.org/sgp/othergov/intel/sead-5.pdf>

<sup>190</sup> ADR *supra* note 74 at 227-28.

<sup>191</sup> ADR *supra* note 74 at 228.



untrustworthiness.

#### **5.12.4 Mitigation of Personal Conduct**

Like all of the Guidelines, security risks for personal conduct under Guideline E can be mitigated. Guideline E provides the following possible mitigating conditions: (1) The adverse information was unsubstantiated or irrelevant; (2) the falsification was an isolated incident, not recent, and correct information has been provided voluntarily; (3) the individual made prompt, good faith efforts to correct the falsification before being confronted; (4) omission was significantly contributed to by inadequate or improper advice of authorized personnel, and that omission has been remedied; (5) the individual has taken positive steps to reduce or eliminate vulnerability to coercion; (6) a refusal to cooperate was based on legal advice from counsel and upon being made aware of the requirement, the individual cooperated; and (7) association with persons involved in crime has ceased.<sup>192</sup> Threaded throughout the mitigating condition is the significance of person's voluntary and prompt correction of any falsifications, omissions, or conduct predicated on bad advice. A person wishing to mitigate must demonstrate that the conduct does not constitute a pattern of dishonesty, disobedience, or unreliability. Indeed, such security determinations often turn on a person's candor, either through promptly correcting the record or self-reporting the infraction in the first place.

Additionally, the ADR also specifically considers that in some jurisdictions, persons receiving an expungement for criminal conduct may have been instructed as part of that expungement that they need not reveal the underlying crime during a criminal background investigation.<sup>193</sup> If an applicant can establish through positive evidence that this is the case, the person "can reasonably justify having withheld the information."<sup>194</sup> Likewise, if person receives legal advice or advice from an FSO that leads to omission or fabrication, such circumstances can lead to mitigation, but only so far as reliance on that advice was reasonable and that the person has promptly corrected the record.<sup>195</sup>

#### **5.12.5 Personal Conduct Cases**

<b>Personal Conduct Cases</b>			
<b>Case No. Date</b>	<b>Conduct</b>	<b>Mitigation</b>	<b>Result</b>
	<b>Falsification or omission during security clearance investigation</b>		
12-10141	Deliberated omitted delinquent mortgage loan.	None. Applicant believed he should not have to disclose	Denied

<sup>192</sup> 32 CFR § 147.7(c).

<sup>193</sup> ADR *supra* note 74 at 241.

<sup>194</sup> ADR *supra* note 74 at 241.

<sup>195</sup> ADR *supra* note 74 at 241.

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3/28/16		personal information.	
14-02522 3/18/16	Falsified answers to hide convictions, which included DUI and knowingly making false representation to a federally licensed firearms dealer.	None. He claimed he falsified answers to not jeopardize his job security, which is not a mitigating condition.	Denied
12-08830 3/15/16	Failed to disclose in his most recent application that his security clearance had been revoked in 2005 due to financial considerations.	Omission was not deliberate, but was due to mistake or oversight. "His explanation [was] not fanciful, disingenuous, or incredible on its face."	Granted
14-04324 3/9/16	Did not reveal drug use when enlisting in the army. False rape allegation against applicant was predicated on dishonest about fidelity. While married, applicant maintained a six year relationship with a coworker that was only terminated upon discovery. In 2011, he was fired for sending inappropriate text messages.	Received marital and pastoral counseling, but ALJ was "not that similar behavior is unlikely to recur."	Denied.
14-01888 8/31/15	Applicant falsely stated on his 2001, 2012, and 2013 security clearance application that he had earned a college degree, when in fact had not.	Claimed he intended to finish degree in 2001, but failed to. Felt compelled to reproduce falsehood for reinvestigation applications to align with previous application. In 2013, informed wife and superior about falsification.	Denied
	<b>Dishonesty and Lack of Judgment</b>		
14-02981 2/22/16	From 2012-2013, continued pattern of leaving work early, yet recording a full day on his time sheet, which led to his termination.	Self-reported. Left early due to child-care reasons. Alleged harassment by former supervisor.	Denied.
14-03997 2/03/16	Applicant was terminated from previous employment due to supervisor's belief that applicant showed poor judgment in asserting that a coworker was under the influence of foreign nationals. However, his security clearance application stated he was terminated as part of	Reason for termination could not be objectively evaluated. Applicant made an incorrect assumption about the reason for termination, but it was not unreasonable, and thus did not deliberately falsify his	Granted

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	restructuring.	application.	
14-04592 1/12/16	Applicant is a dual citizen of US and Brazil. Upon gaining security clearance in 2008, she relinquished her passport. However in 2009, she reapplied for the passport and continued to use it. She failed to notify her FSO until the reinvestigation for security clearance.	Applicant claimed that she was required to obtain a Brazilian passport because of her dual citizenship status in order to travel to Brazil to visit family. However, she could have renounced her citizenship, and used a US passport.	Denied
14-02604 11/15/15	Applicant failed to timely file her federal and state taxes in 2009, 2010, and 2011; eventually filing some years later.	Applicant claimed that family problems, unexpected death, and lack of information led to late filing of taxes.	Denied
14-01262 10/30/15	Associated with persons involved in criminal activity; her boyfriend was a convicted drug dealer, her brother is a convicted felon.	Cohabitation with boyfriend happened 17 years after his conviction; relationship ended two years ago. Brother has shown rehabilitation.	Granted
	<b>Military Discharge</b>		
14-06244 8/26/15	Applicant received a general discharge under honorable conditions from the Air Force in 2009 for various misconduct. Between 2005 and 2014, cited for eight traffic infractions.	Diagnosed with PTSD in 2007 resulting from Iraq War. Now takes medication. Uses smart phone app to alert him when he is speeding.	Granted
14-01888 8/21/15	In 2008, Applicant received another than honorable discharge on the basis of failing a drug test for marijuana. On his 2012 security clearance application, he failed to disclose the offense, and alleged that he was honorably discharged.	Applicant claimed he sped through application and thought he would have additional opportunities to reveal drug charge. Applicant claimed discharge error was inadvertent or computer error. (Drug Use was mitigated, however).	Denied
14-04053 6/16/15	In 2004 (while holding security clearance) applicant was discharged from the military under other than honorable conditions for possession of marijuana.	Revealed discharge on security application.	Granted
09-04546 2/8/11	In 2000, received a general discharge under honorable conditions as part of plea stemming from larceny charges.	Applicant claimed he overlooked the military discharge question. Further,	Denied

	On his security clearance application, applicant noted that he received an 'honorable' discharge.	applicant attributed the conduct underlying his discharge to someone else.	
08-05890 8/26/09	In 2006, as part of plea deal, applicant was discharged from the Navy under other than honorable conditions stemming from marijuana plants found in his home on base housing. Applicant made contradictory statements about whether he knew his wife had been cultivating marijuana.	Applicant mitigated criminal conduct.	Denied
11-04499 1/30/13	In 1996, applicant upon learning she was pregnant, requested and was denied leave by the Navy. She went AWOL, but returned on her own in 1997, where she was discharged under other than honorable conditions. Applicant failed to list this discharge on her security clearance app. Applicant was also fired in 2001 for being late by two minutes, due to her sickly child.	Applicant prioritized her child's welfare. Applicant relied on staff members at her place of employment who told her to only report incidents that happened within ten years.	Granted
10-09384 4/26/13	In 2003, applicant was discharged from the Marine Corps under other than honorable conditions for cocaine use.	In 2006, upon learning that he would be a father, stopped using drugs. "Contrite and straightforward with the facts."	Granted

### 5.13 Conclusion

Security clearance revocations and denials are a unique and pervasive collateral consequence for an array of conduct both legal and illegal. However, security clearance determinations often do not turn necessarily on the conduct itself, rather on the security risks that arise out of that conduct. Adjudicators evaluate the 'whole person' in terms of their reliability and trustworthiness; they look for patterns of behavior, not discrete, isolated incidents. So while Judicial Review is limited, security adjudication provides process for persons to put unfavorable conduct into contexts which may mitigate security concerns.

Successful security determinations often focus on a person's honesty, to what extent he or she volunteers unfavorable information. If person's conduct falls within one of the guidelines, a favorable determination is far more likely for those persons who have promptly self-reported than those whose conduct is revealed through investigation. Where appropriate persons should take early and full responsibility for their conduct, and attempt to mitigate the security concern, and not necessarily the behavior itself.

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Successful mitigation often depends on the presence of positive evidence of rehabilitation, not mere distance in time from the conduct. Persons wishing to mitigate their conduct should begin the process early and begin accruing mitigating evidence, whether it be testimonial or documentary. It is important that a person takes advantage of the right to a hearing and a right to appeal; knowing the mechanics of the adjudicative process is essential to achieve a successful security determination.

Additionally, those who have plea-bargained down to lesser charges or had their records expunged due to diversion should realize that security clearance determinations examine the conduct itself, and not the disposition on the record. Thus, plea-bargain and diversion do not insulate a person from the collateral consequence of security clearance denial or revocation.

*Appendix A: Security Clearance Guidelines*

Guideline	Conditions raising security concerns.	Mitigating conditions.
<p><b>Guideline A –Allegiance to the United States</b> 32 CFR § 147.3</p> <p><b>The concern:</b> 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</p>	<p>(1) Involvement in any act of sabotage, espionage, treason, terrorism, sedition, or other act whose aim is to overthrow the Government of the United States or alter the form of government by unconstitutional means;</p> <p>(2) Association or sympathy with persons who are attempting to commit, or who are committing, any of the above acts;</p> <p>(3) Association or sympathy with persons or organizations that advocate the overthrow of the United States Government, or any state or subdivision, by force or violence or by other unconstitutional means;</p> <p>(4) Involvement in activities which unlawfully advocate or practice the commission of acts of force or violence to prevent others from exercising their rights under the Constitution or laws of the United States or of any state.</p>	<p>(1) The individual was unaware of the unlawful aims of the individual or organization and severed ties upon learning of these;</p> <p>(2) The individual's involvement was only with the lawful or humanitarian aspects of such an organization;</p> <p>(3) Involvement in the above activities occurred for only a short period of time and was attributable to curiosity or academic interest;</p> <p>(4) The person has had no recent involvement or association with such activities.</p>
<p><b>Guideline B – Foreign Influence</b> 32 CFR § 147.4</p> <p><b>The concern:</b> A security risk may exist when an individual's immediate family, including cohabitants and other persons to</p>	<p>(1) An immediate family member, or a person to whom the individual has close ties of affection or obligation, is a citizen of, or resident or present in, a foreign country;</p>	<p>(1) A determination that the immediate family member(s) (spouse, father, mother, sons, daughters, brothers, sisters), cohabitant, or associate(s) in question are not agents of a foreign power or in a</p>

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<p>whom he or she may be bound by affection, influence, or obligation are not citizens of the United States or may be subject to duress. These situations could create the potential for foreign influence that could result in the compromise of classified information. Contacts with citizens of other countries or financial interests in other countries are also relevant to security determinations if they make an individual potentially vulnerable to coercion, exploitation, or pressure</p>	<p>(2) Sharing living quarters with a person or persons, regardless of their citizenship status, if the potential for adverse foreign influence or duress exists;</p> <p>(3) Relatives, cohabitants, or associates who are connected with any foreign government;</p> <p>(4) Failing to report, where required, associations with foreign nationals;</p> <p>(5) Unauthorized association with a suspected or known collaborator or employee of a foreign intelligence service;</p> <p>(6) Conduct which may make the individual vulnerable to coercion, exploitation, or pressure by a foreign government;</p> <p>(7) Indications that representatives or nationals from a foreign country are acting to increase the vulnerability of the individual to possible future exploitation, coercion or pressure;</p> <p>(8) A substantial financial interest in a country, or in any foreign owned or operated business that could make the individual vulnerable to foreign influence.</p>	<p>position to be exploited by a foreign power in a way that could force the individual to choose between loyalty to the person(s) involved and the United States;</p> <p>(2) Contacts with foreign citizens are the result of official United States Government business;</p> <p>(3) Contact and correspondence with foreign citizens are casual and infrequent;</p> <p>(4) The individual has promptly complied with existing agency requirements regarding the reporting of contacts, requests, or threats from persons or organizations from a foreign country;</p>
<p><b>Guideline C – Foreign Preference</b> 32 CFR § 147.5</p>	<p>(1) The exercise of dual citizenship;</p> <p>(2) Possession and/or use of a foreign</p>	<p>(1) Dual citizenship is based solely on parents' citizenship or birth in a foreign</p>

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<p><b>The concern:</b> 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.</p>	<p>passport;</p> <p>(3) Military service or a willingness to bear arms for a foreign country;</p> <p>(4) Accepting educational, medical, or other benefits, such as retirement and social welfare, from a foreign country;</p> <p>(5) Residence in a foreign country to meet citizenship requirements;</p> <p>(6) Using foreign citizenship to protect financial or business interests in another country;</p> <p>(7) Seeking or holding political office in the foreign country;</p> <p>(8) Voting in foreign elections;</p> <p>(9) Performing or attempting to perform duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.</p>	<p>country;</p> <p>(2) Indicators of possible foreign preference (e.g., foreign military service) occurred before obtaining United States citizenship;</p> <p>(3) Activity is sanctioned by the United States;</p> <p>(4) Individual has expressed a willingness to renounce dual citizenship.</p>
<p><b>Guideline D – Sexual Behavior</b> 32 CFR § 147.6</p>	<p>(1) Sexual behavior of a criminal nature, whether or not the individual has been prosecuted;</p>	<p>(1) The behavior occurred during or prior to adolescence and there is no evidence of subsequent conduct of a similar nature;</p>
<p><b>The concern:</b> Sexual behavior is a security concern if it involves a criminal offense, indicates a personality or emotional disorder, may subject the individual to coercion, exploitation, or duress, or reflects lack of judgment or</p>	<p>(2) Compulsive or addictive sexual behavior when the person is unable to stop a pattern or self-destructive or high-risk behavior or that which is symptomatic of a personally disorder;</p>	<p>(2) The behavior was not recent and there is no evidence of subsequent conduct of a similar nature;</p> <p>(3) There is no other evidence of questionable judgment, irresponsibility, or</p>



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<p>discretion. Sexual orientation or preference may not be used as a basis for or a disqualifying factor in determining a person's eligibility for a security clearance.</p>	<p>(3) Sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress;  (4) Sexual behavior of a public nature and/or that which reflects lack of discretion or judgment.</p>	<p>emotional instability;  (4) The behavior no longer serves as a basis for coercion, exploitation, or duress.</p>
<p><b>Guideline E – Personal Conduct</b> 32 CFR § 147.7</p>	<p><b>The following will normally result in an unfavorable clearance action:</b></p>	<p>(1) The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability;</p>
<p><b>The concern:</b> Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.</p>	<p>(1) Refusal to undergo or cooperate with required security processing, including medical and psychological testing;  (2) Refusal to complete required security forms, releases, or provide full, frank and truthful answers to lawful questions of investigators, security officials or other representatives in connection with a personnel security or trustworthiness determination.</p> <p><b>Conditions that could raise a security concern:</b></p> <p>(1) Reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances;  (2) The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security</p>	<p>(2) The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily;  (3) The individual made prompt, good faith efforts to correct the falsification before being confronted with the facts;  (4) Omission of material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided;  (5) The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress;  (6) A refusal to cooperate was based on advice from legal counsel or other officials</p>

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	<p>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;</p> <p>(3) Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other representative in connection with a personnel security or trustworthiness determination;</p> <p>(4) Personal conduct or concealment of information that may increase an individual's vulnerability to coercion, exploitation, or duties, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail;</p> <p>(5) A pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency;</p> <p>(6) Association with persons involved in criminal activity.</p>	<p>that the individual was not required to comply with security processing requirements and, upon being made aware of the requirement, fully and truthfully provided the requested information;</p> <p>(7) Association with persons involved in criminal activities has ceased</p>
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<p><b>Guideline F – Financial Considerations</b> 32 CFR § 147.8</p>	<p>(1) A history of not meeting financial obligations;</p> <p>(2) 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;</p> <p>(3) Inability or unwillingness to satisfy debts;</p> <p>(4) Unexplained affluence;</p> <p>(5) Financial problems that are linked to gambling, drug abuse, alcoholism, or other issues of security concern.</p>	<p>(1) The behavior was not recent;</p> <p>(2) It was an isolated incident;</p> <p>(3) The conditions that resulted in the behavior were largely beyond the person's control (e.g., loss of employment, a business downtrun, unexpected medical emergency, or a death, divorce or separation);</p> <p>(4) The person has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or is under control;</p> <p>(5) The affluence resulted from a legal source;</p> <p>(6) The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.</p>
<p><b>The concern:</b> An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. Unexplained affluence is often linked to proceeds from financially profitable criminal acts.</p>		
<p><b>Guideline G – Alcohol Consumption</b> 32 CFR § 147.9</p>	<p>(1) Alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, or other criminal incidents related to alcohol use;</p> <p>(2) Alcohol-related incidents at work, such as reporting for work or duty in an intoxicated or impaired condition, or drinking on the job;</p> <p>(3) Diagnosis by a credentialed medical professional (e.g., physician, clinical</p>	<p>(1) The alcohol related incidents do not indicate a pattern;</p> <p>(2) The problem occurred a number of years ago and there is no indication of a recent problem;</p> <p>(3) Positive changes in behavior supportive of sobriety;</p> <p>(4) Following diagnosis of alcohol abuse or alcohol dependence, the individual has successfully completed impatient or</p>
<p><b>The concern:</b> Excessive alcohol consumption often leads to the exercise of questionable judgment, unreliability, failure to control impulses, and increases the risk of unauthorized disclosure of classified information due to carelessness</p>		

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	<p>psychologist, or psychiatrist) of alcohol abuse or alcohol dependence;</p> <p>(4) Evaluation of alcohol abuse or alcohol dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program;</p> <p>(5) Habitual or binge consumption of alcohol to the point of impaired judgment;</p> <p>(6) Consumption of alcohol, subsequent to a diagnosis of alcoholism by a credentialed medical professional and following completion of an alcohol rehabilitation program.</p>	<p>outpatient rehabilitation along with aftercare requirements, participates frequently in meetings of Alcoholics Anonymous or a similar organization, has abstained from alcohol for a period of at least 12 months, and received a favorable prognosis by a credentialed medical professional or a licensed clinical social worker who is a staff member of a recognized alcohol treatment program</p>
<p><b>Guideline H – Drug Involvement</b> 32 CFR § 147.10</p>	<p>(1) Any drug abuse (see definition [in left column]);</p>	<p>(1) The drug involvement was not recent;</p>
<p><b>The concern:</b></p> <p>(1) Improper or illegal involvement with drugs raises questions regarding an individual's willingness or ability to protect classified information. Drug abuse or dependence may impair social or occupational functioning, increasing the risk of an unauthorized disclosure of classified information.</p> <p>(2) Drugs are defined as mood and behavior altering substances, and include:</p> <p>(i) Drugs, materials, and other chemical</p>	<p>(2) Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution;</p> <p>(3) Diagnosis by a credentialed medical professional (e.g., physician, clinical psychologist, or psychiatrist) of drug abuse or drug dependence;</p> <p>(4) Evaluation of drug abuse or drug dependence by a licensed clinical social worker who is a staff member of a recognized drug treatment program;</p> <p>(5) Failure to successfully complete a drug treatment program prescribed by a</p>	<p>(2) The drug involvement was an isolated or aberration event;</p> <p>(3) A demonstrated intent not to abuse any drugs in the future;</p> <p>(4) Satisfactory completion of a prescribed drug treatment program, including rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a credentialed medical professional.</p>

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<p>compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens),</p> <p>(ii) Inhalants and other similar substances.</p> <p>(3) Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.</p>	<p>credentialed medical professional. Recent drug involvement, especially following the granting of a security clearance, or an expressed intent not to discontinue use, will almost invariably result in an unfavorable determination</p>	
<p><b>Guideline I – Emotional, Mental, and Personality Disorders.</b></p> <p>32 CFR § 147.11</p>	<p>(1) An opinion by a credentialed mental health professional that the individual has a condition or treatment that may indicate a defect in judgment, reliability, or stability;</p> <p>(2) Information that suggests that an individual has failed to follow appropriate medical advice relating to treatment of a condition, e.g., failure to take prescribed medication;</p> <p>(3) A pattern of high-risk, irresponsible, aggressive, anti-social or emotionally unstable behavior;</p> <p>(4) Information that suggests that the individual's current behavior indicates a defect in his or her judgment or reliability.</p>	<p>(1) There is no indication of a current problem;</p> <p>(2) Recent opinion by a credentialed mental health professional that an individual's previous emotional, mental, or personality disorder is cured, under control or in remission and has a low probability of recurrence or exacerbation;</p> <p>(3) 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 is no longer emotionally unstable.</p>
<p><b>The concern:</b> Emotional, mental, and personality disorders can cause a significant deficit in an individual's psychological, social and occupation functioning. These disorders are of security concern because they may indicate a defect in judgment, reliability, or stability. A credentialed mental health professional (e.g., clinical psychologist or psychiatrist), employed by, acceptable to or approved by the government, should be utilized in evaluating potentially disqualifying and mitigating information fully and properly, and particularly for consultation with the individual's mental health care provider.</p>		

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<p><b>Guideline J – Criminal Conduct</b> 32 CFR § 147.12</p>	<p>(1) Allegations or admissions of criminal conduct, regardless of whether the person was formally charged;</p>	<p>(1) The criminal behavior was not recent;</p>
<p><b>The concern:</b> A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.</p>	<p>(2) A single serious crime or multiple lesser offenses.</p>	<p>(2) The crime was an isolated incident;</p> <p>(3) The person was pressured or coerced into committing the act and those pressures are no longer present in that person's life;</p> <p>(4) The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur;</p> <p>(5) Acquittal;</p> <p>(6) There is clear evidence of successful rehabilitation.</p>
<p><b>Guideline K – Security Violations</b> 32 CFR § 147.13</p>	<p>(1) Unauthorized disclosure of classified information;</p>	<p>(1) Were inadvertent;</p>
<p><b>The concern:</b> Noncompliance with security regulations raises doubt about an individual's trustworthiness, willingness, and ability to safeguard classified information.</p>	<p>(2) Violations that are deliberate or multiple or due to negligence.</p>	<p>(2) Were isolated or infrequent;</p> <p>(3) Were due to improper or inadequate training;</p> <p>(4) Demonstrate a positive attitude towards the discharge of security responsibilities.</p>
<p><b>Guideline L – Outside Activities</b> 32 CFR § 147.14</p>	<p>(1) A foreign country;</p> <p>(2) Any foreign national;</p>	<p>(1) Evaluation of the outside employment or activity indicates that it does not pose a conflict with an individual's security responsibilities;</p>
<p><b>The concern:</b> Involvement in certain types of outside employment or activities is of security concern if it poses a conflict with an individual's security responsibilities and could create an</p>	<p>(3) A representative of any foreign interest;</p> <p>(4) Any foreign, domestic, or international organization or person engaged in analysis, discussion, or publication of</p>	<p>(2) The individual terminates the employment or discontinues the activity upon being notified that it is in conflict</p>

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<p>increased risk of unauthorized disclosure of classified information.</p>	<p>material on intelligence, defense, foreign affairs, or protected technology.</p>	<p>with his or her security responsibilities.</p>
<p><b>Guideline M – Misuse of Information Technology Systems</b> 32 CFR § 147.15</p>	<p>(1) Illegal or unauthorized entry into any information technology system;</p> <p>(2) Illegal or unauthorized modification, destruction, manipulation or denial of access to information residing on an information technology system;</p> <p>(3) Removal (or use) of hardware, software, or media from any information technology system without authorization, when specifically prohibited by rules, procedures, guidelines or regulations;</p> <p>(4) Introduction of hardware, software, or media into any information technology system without authorization, when specifically prohibited by rules, procedures, guidelines or regulations.</p>	<p>(1) The misuse was not recent or significant;</p> <p>(2) The conduct was unintentional or inadvertent;</p> <p>(3) The introduction or removal of media was authorized;</p> <p>(4) The misuse was an isolated event;</p> <p>(5) The misuse was followed by a prompt, good faith effort to correct the situation.</p>
<p><b>The concern:</b> Noncompliance with rules, procedures, guidelines, or regulations pertaining to information technology systems may raise security concerns about an individual's trustworthiness, willingness, and ability to properly protect classified systems, networks, and information. Information Technology Systems include all related equipment used for the communication, transmission, processing, manipulation, and storage of classified or sensitive information.</p>		