



INTELLIGENCE

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MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
GENERAL COUNSEL OF THE DEPARTMENT
OF DEFENSE
DIRECTOR, ADMINISTRATION AND MANAGEMENT
DIRECTORS OF THE DEFENSE AGENCIES

SUBJECT: Interim Guidance for the Implementation of Public Law 110-181, Section 3002 (the Bond Amendment) Regarding Adjudication of Security Clearances

Effective immediately, DoD personnel security adjudicators, Personnel Security Appeals Board (PSAB) members, Defense Office of Hearings and Appeals (DOHA) Department Counsel and Administrative Judges, and the Department and Agency Counsels will follow the guidance in Public Law 110-181, Section 3002 (the Bond Amendment). On January 1, 2008, The Bond Amendment, which applies to all Federal government agencies, repealed Title 10 U.S.C. § 986 (the Smith Amendment) and provided an amendment to the Intelligence Reform and Terrorism Prevention Act.

On August 30, 2006, the Department implemented the 2005 Adjudicative Guidelines for Determining Eligibility For Access to Classified Information. The footnotes to Guidelines H, I, and J referenced the Smith Amendment and should now be disregarded. With the exception of those footnotes the 2005 Adjudicative Guidelines remain in effect.

The Bond Amendment contains disqualification provisions which apply only to those applicants seeking clearances that provide access to Special Access Programs (SAP), Restricted Data (RD), or Sensitive Compartmented Information (SCI). The head of a Federal agency may not grant or renew a security clearance to individuals who:

- have been convicted of crimes and incarcerated for not less than one year;
- have been discharged or dismissed from the Armed Forces under dishonorable conditions; or
- are determined to be mentally incompetent; an individual is "mentally incompetent" when he or she has been declared mentally incompetent as determined by competency proceedings conducted in a court or administrative agency with proper jurisdiction.



The Bond Amendment also prohibits all Federal agencies from granting or renewing a security clearance for any covered person who is an unlawful user of a controlled substance or is an addict; this prohibition applies to all clearances. For purposes of this prohibition:

- an “unlawful user of a controlled substance” is a person who uses a controlled substance and has lost the power of self-control with reference to the use of the controlled substance, and
- any person who is a current user of the controlled substance in a manner other than as prescribed by a licensed physician.

Such use is not limited to the use of drugs on a particular day, or within a matter of days or weeks before, but rather that the unlawful use has occurred recently enough to indicate that the individual is actively engaged in such conduct.

- An “addict” of a controlled substance is any individual who habitually uses any narcotic drug so as to endanger the public morals, health, safety, or welfare; or
- is so far addicted to the use of narcotic drugs as to have lost the power of self-control with reference to his addiction.

If a DoD Central Adjudication Facility (CAF), PSAB or DOHA has a case pending review that involves a current unlawful user of a controlled substance or a current addict, the new statutory language must be used and the individual will receive the Department's established administrative review procedures (Statement of Reasons (SOR), hearings, and appeals).

The DoD CAFs, PSABs, and DOHA handle cases which involve decisions regarding the granting, denial or revocation of eligibility for access to SCI. However, these organizations currently have no ability to predict whether the individuals for whom eligibility determinations are being made will also require access to RD or SAPs. Accordingly, the following interim guidance applies to all DoD national security adjudicative determinations, including decisions regarding National Guard and Reserve Personnel:

- All adjudicators will determine whether any of the Bond Amendment criteria apply to the case being adjudicated.
- If the case involves a subject who is currently an unlawful user of a controlled substance or a current addict, that individual will receive the applicable full

due process before any denial or revocation of a security clearance. A meritorious waiver may not be awarded by an adjudicator with reference to these conditions.

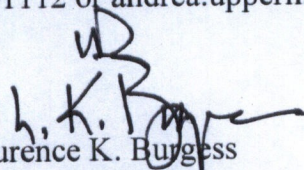
- A meritorious waiver may be granted, if appropriate, in cases involving individuals (1) who have been convicted of crimes and incarcerated for not less than one year, (2) who have been discharged or dismissed from the Armed Forces under dishonorable conditions, and (3) who are determined to be mentally incompetent. When one of these conditions is present in a case, the adjudicator will proceed with the adjudication using the appropriate mitigation conditions as found in the 2005 Adjudicative Guidelines, and DoD procedures for eligibility determinations. If an adjudicator determines a meritorious waiver is appropriate and the adjudicator would have arrived at a favorable decision but for the Bond Amendment disqualification, the adjudicator may grant the meritorious waiver.
- Meritorious waivers will be considered an "Exception" to the 2005 Adjudicative Guidelines and will be annotated as a "Waiver" in Joint Adjudication Management System (JAMS). Adjudicators will provide a detailed justification for the meritorious waiver in JAMS.
- If, after applying the appropriate mitigating factors listed in the 2005 Adjudicative Guidelines, the adjudicator determines that a meritorious waiver is not appropriate, the eligibility will be denied or revoked with a Statement of Reasons (SOR) which cites the Bond Amendment. The Department's established administrative review procedures, including hearing and appeal processes, will be followed in all such cases.
- Under the current delegations of adjudication authorities, a meritorious waiver may be granted during any stage of the adjudication or the applicable due process. If a Letter of Intent or SOR has been issued, the meritorious waiver decision will be made by the Director or Deputy Director of the DoD adjudication facility. If a Letter of Denial or Revocation has been issued by a CAF, the final meritorious waiver decision will be made by the Head of the PSAB of the employing Component, or the Director of DOHA for industry cases serviced by DOHA.

Personnel whose eligibility was previously denied or revoked under the Smith Amendment may only be reconsidered for eligibility under this interim guidance if the original denial or revocation was based on a criminal conviction with incarceration for not less than one year, a discharge or dismissal from the Armed Forces under dishonorable conditions, or a determination of mental incompetence; *and* the individual's employer or government sponsor nominates him/her for a position requiring a security

clearance. Those personnel are not required to wait the mandatory one year for reconsideration.

The rules of reciprocity apply for personnel who transfer from one DoD organization or Federal agency to another. However, for transfer cases where the subject was adjudicated under an exception, re-adjudication for consideration of Bond Amendment disqualifiers is appropriate.

Each DoD CAF will maintain a record of the number and type of meritorious waivers granted, will report this data to the Office of the Under Secretary of Defense for Intelligence (USD(I)), Security Directorate, and enter the rationale for each waiver into JAMS. The Security Directorate will report the number of meritorious waivers granted annually to Congress. For each waiver issued, the annual report will include the Bond Amendment disqualifier and the reasons for the waiver of the disqualifier. My point of contact is Ms. Andrea Upperman at (703) 604-1112 or andrea.upperman@osd.mil.


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(HUMINT, Counterintelligence & Security)