

representative of the Secretary determines that the violation has been abated.

#### **§ 104.4 Termination of notice.**

(a) Termination of a section 104(e)(1) pattern of violations notice shall occur when an MSHA inspection of the entire mine finds no S&S violations, or if no withdrawal order is issued by MSHA in accordance with section 104(e)(1) of the Act within 90 days of the issuance of the pattern notice.

(b) The mine operator may request an inspection of the entire mine or portion of the mine. No advance notice of the inspection shall be provided, and the scope of inspection shall be determined by MSHA. Partial mine inspections covering the entire mine within 90 days shall constitute an inspection of the entire mine for the purposes of this part.

[FR Doc. 2011-2255 Filed 1-31-11; 8:45 am]

BILLING CODE 4510-43-P

## **DEPARTMENT OF DEFENSE**

### **Office of the Secretary**

#### **32 CFR Part 156**

[DOD-2008-OS-0160; RIN 0790-AI42]

#### **Department of Defense Personnel Security Program (PSP)**

**AGENCY:** Department of Defense.

**ACTION:** Proposed rule.

**SUMMARY:** This rule would update policies and responsibilities for the Department of Defense (DoD) Personnel Security Program (PSP) in accordance with the provisions of current U.S. Code, Public Laws, and Executive Orders (E.O.).

**DATES:** Comments must be received by April 4, 2011.

**ADDRESSES:** You may submit comments, identified by docket number and/or Regulatory Information Number (RIN) number and title, by any of the following methods:

- *Federal Rulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Mail:* Federal Docket Management System Office, 1160 Defense Pentagon, OSD Mailroom 3C843, Washington, DC 20301-1160.

**Instructions:** All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available

for public viewing on the Internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

#### **FOR FURTHER INFORMATION CONTACT:**

Stacey Jefferson, (703) 604-1236.

**SUPPLEMENTARY INFORMATION:** The Department of Defense Directive (DoDD) 5200.2, Personnel Security Program (PSP), codified at 32 CFR 156, was issued April 9, 1999. The Department is reissuing the DoD Directive as a DoD Instruction to update existing policy regarding the DoD Personnel Security Program and also incorporate new policy related to Homeland Security Presidential Directive-12 (HSPD-12).

This rule provides PSP policy fundamental to preventing unauthorized disclosure of sensitive and classified information that could cause irreparable damage to national security. The policy portion relating to HSPD-12 implements investigative and adjudicative policy for the Department's personal identity verification credential.

Updates to the policy reflect Joint Security and Suitability Reform Team efforts to incorporate the foundational policy changes needed to implement reform. The Intelligence Reform and Terrorism Prevention Act of 2004, E.O. 13467, E.O. 12968, E.O. 10865, and HSPD-12 are some of the current Federal laws, directives and statutes that impact the DoD PSP. Since this rule was last published, additional executive orders have been issued directing alignment of security, suitability and reciprocal acceptance of prior investigations and favorable determinations.

The procedural guidance for the DoD PSP is currently being updated and will subsequently be proposed as rule codified at 32 CFR part 154. The investigative and adjudication procedural guidance for the DoD Federal personal identity verification credential pursuant HSPD-12 is undergoing coordination and will also be proposed a separate rule.

#### **E.O. 12866, "Regulatory Planning and Review"**

It has been certified that 32 CFR part 156 does not:

(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy; a section of the economy; productivity; competition; jobs; the environment; public health or safety; or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another Agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this E.O.

#### **Section 202, Public Law 104-4, "Unfunded Mandates Reform Act"**

It has been certified that 32 CFR part 156 does not contain a Federal mandate that may result in the expenditure by State, local and tribal governments, in aggregate, or by the private sector, of \$100 million or more in any one year.

#### **Public Law 96-354, "Regulatory Flexibility Act" (5 U.S.C. 601)**

It has been certified that 32 CFR part 156 is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities.

#### **Public Law 96-511, "Paperwork Reduction Act" (44 U.S.C. Chapter 35)**

It has been certified that 32 CFR part 156 does not impose reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995.

#### **E.O. 13132, "Federalism"**

It has been certified that 32 CFR part 156 does not have federalism implications, as set forth in E.O. 13132. This rule does not have substantial direct effects on:

- (1) The States;
- (2) The relationship between the National Government and the States; or
- (3) The distribution of power and responsibilities among the various levels of Government.

#### **List of Subjects in 32 CFR Part 156**

Government employees; Security measures.

Accordingly, 32 CFR part 156 is revised to read as follows.

#### **PART 156—DEPARTMENT OF DEFENSE PERSONNEL SECURITY PROGRAM (PSP)**

Sec.

- 156.1 Purpose.
- 156.2 Applicability.
- 156.3 Definitions.
- 156.4 Policy.
- 156.5 Responsibilities.
- 156.6 Procedures-sensitive positions, duties, and classified access.
- 156.7 Procedures—common access card investigation and adjudication.

**Authority:** E.O. 12968, as amended; E.O. 10450, as amended; E.O. 10865, as amended; E.O. 13526; E.O. 12829, as amended; E.O. 13467; E.O. 13488; E.O. 12333, as amended; sections 301 and 7532 of 5 U.S.C.; section 1072 of Public Law 110–181, as amended; section 278g–3 of 15 U.S.C.; section 11331 of 40 U.S.C.; title 10 U.S.C.; section 435c. and chapter 23 of 50 U.S.C.; and parts 731, 732 and 736 of 5 CFR.

#### § 156.1 Purpose.

This part updates policies and responsibilities for the Department of Defense (DoD) Personnel Security Program (PSP) consistent with E.O. 12968, as amended; E.O. 10450, as amended; E.O. 10865, as amended; E.O. 13526; E.O. 12829, as amended; E.O. 13467; E.O. 13488; E.O. 12333, as amended; sections 301 and 7532 of 5 U.S.C.; section 1072 of Public Law 110–181, as amended; section 278g–3 of 15 U.S.C.; section 11331 of 40 U.S.C.; title 10 U.S.C.; parts 147, 154 through 156 of 32 CFR; section 435c. and chapter 23 of 50 U.S.C.; and parts 731, 732 and 736 of 5 CFR.

#### § 156.2 Applicability.

This part applies to the Office of the Secretary of Defense, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the Department of Defense (hereafter referred to collectively as the “DoD Components”).

#### § 156.3 Definitions.

These terms and their definitions are for the purposes of this part:

*Continuous evaluation.* Defined in section 1.3(d) of E.O. 13467.

*Fitness.* Defined in E.O. 13488.

*Sensitive position.* Any position so designated under E.O. 10450, as amended.

#### § 156.4 Policy.

It is DoD policy that:

(a) The Department shall establish and maintain a uniform DoD PSP using appropriate standards in accordance with E.O. 12968, as amended; E.O. 10450, as amended; E.O. 10865, as amended; E.O. 13526; E.O. 12829, as amended; E.O. 13467; E.O. 13488; E.O. 12333, as amended; parts 147, 154 through 156 of 32 CFR; parts 731, 732 and 736 of 5 CFR; sections 301 and 7532 of 5 U.S.C.; section 1072 of Public Law 110–181, as amended; section 278g–3 of 15 U.S.C.; section 11331 of 40 U.S.C.; title 10 U.S.C.; section 435c. and chapter 23 of 50 U.S.C.; and the Intelligence

Community Directive Number 704 (ICD 704).<sup>1</sup>

(b) Policies and procedures shall be aligned using consistent standards to the extent possible; provide for reciprocal recognition of existing investigations and favorable adjudications; be cost-effective, timely and provide efficient protection of the national interest; and provide fair treatment of those upon whom the Federal Government relies to conduct the Nation’s business and protect national security.

(c) Discretionary judgments used to determine eligibility for access to classified information, to hold a sensitive position, or perform a sensitive duty are inherently governmental functions, and adjudications supporting these judgments shall be performed by appropriately trained and favorably adjudicated Government personnel or appropriate automated procedures.

(d) No negative inference may be raised solely on the basis of mental health counseling. Such counseling may be a positive factor in rendering eligibility determinations. However, mental health counseling, where relevant to adjudication for classified access or to hold a sensitive position, may justify further inquiry to assess risk factors that may be relevant to the DoD PSP.

(e) The Department of Defense shall not discriminate on the basis of race, color, religion, sex, national origin, disability, or sexual orientation, and no inference may be raised solely on the basis of an individual’s sexual orientation.

(f) Discretionary judgments that determine eligibility for access to classified information, to hold a sensitive position, or perform a sensitive duty shall be clearly consistent with the interests of national security and any doubt shall be resolved in favor of national security.

(g) No person shall be deemed to be eligible for access to classified information, to hold a sensitive position, hold a DoD CAC, or perform a sensitive duty merely by reason of Federal service or contracting, licensee, certificate holder, or grantee status, or as a matter of right or privilege, or as a result of any particular title, rank, position, or affiliation.

(h) Eligibility for access to classified information, hold a sensitive position, or perform a sensitive duty shall be granted only to persons who are United States citizens for whom the

investigative and adjudication process has been completed. However, based on mission needs, temporary eligibility may be granted prior to completion of the investigative and adjudicative process.

(i) As an exception, a non-U.S. citizen, who possesses an expertise that cannot be filled by a cleared or clearable U.S. citizen, may hold a sensitive position or granted a Limited Access Authorization for access to classified information in support of a specific DoD program, project, or contract.

(j) The Department shall establish investigative and adjudicative policy and procedures to determine whether to issue, deny or revoke CACs in accordance with the Homeland Security Presidential Directive (HSPD)–12;<sup>2</sup> Office of Management and Budget Memorandum (OMB) M–05–24;<sup>3</sup> Federal Information Processing Standards Publication 201–1 (FIPS 201–1)<sup>4</sup>; Federal Acquisition Regulation<sup>5</sup>; section 278g–3 of title 15, U.S.C.; section 11331 of title 40, U.S.C., and the Office of Personnel Management (OPM) Memorandum, “Final Credentialing Standards for Issuing Personal Identity Verification Cards under HSPD–12.”<sup>6</sup>

#### § 156.5 Responsibilities.

(a) The Under Secretary of Defense for Intelligence (USD(I)) shall:

(1) Develop, coordinate, and oversee the implementation of policy, programs, and guidance for the DoD PSP. For the DoD intelligence agencies this responsibility shall be exercised in consultation with the Director of National Intelligence.

(2) In coordination with the Under Secretary of Defense for Personnel and Readiness (USD(P&R)) and the General Counsel of the Department of Defense (GC, DoD), establish policy for military and civilians for the CAC personnel security investigation (PSI) and adjudication in accordance with HSPD–12; E.O. 13467; E.O. 13488, section 11331 of title 40, U.S.C.; section 278g–3 of 15 U.S.C.; OMB Memo M–05–24; and OPM Memorandum, “Final Credentialing Standards for Issuing

<sup>2</sup> Copies available on the Internet at <http://georgewbush-whitehouse.archives.gov/news/releases/2004/08/20040827-8.html>.

<sup>3</sup> Copies available on the Internet at <http://www.whitehouse.gov/sites/default/files/omb/memoranda/fy2005/m05-24.pdf>.

<sup>4</sup> Copies available on the Internet at <http://csrc.nist.gov/publications/fips/fips201-1/FIPS-201-1-chng1.pdf>.

<sup>5</sup> Copies available on the Internet at <https://www.acquisition.gov/Far/loadmainre.html>.

<sup>6</sup> Copies available on the Internet at [http://www.opm.gov/investigate/resources/final\\_credentialing\\_standards.pdf](http://www.opm.gov/investigate/resources/final_credentialing_standards.pdf).

<sup>1</sup> Copies available on the Internet at [http://www.dni.gov/electronic\\_reading\\_room/ICD\\_704.pdf](http://www.dni.gov/electronic_reading_room/ICD_704.pdf).

Personal Identity Verification Cards under HSPD-12.”

(3) In coordination with the Under Secretary of Defense for Acquisition, Technology and Logistics and the GC, DoD, establish policy for contractor fitness investigations and CAC adjudication, outside the purview of the National Industrial Security Program, under the terms of applicable contracts of HSPD-12; E.O. 13467; E.O. 13488, section 11331 of title 40, U.S.C.; section 278g-3 of 15 U.S.C.; OMB Memo M-05-24; and OPM Memorandum, “Final Credentialing Standards for Issuing Personal Identity Verification Cards under HSPD-12,” the Federal Acquisition Regulation; and the Defense Federal Acquisition Regulation.

(4) Develop guidance implementing the policy in this part.

(b) The Deputy Under Secretary of Defense (HUMINT, Counterintelligence & Security) DUSD(HCI&S), under the authority, direction, and control of USD(I) shall:

(1) Ensure that the program is consistent, cost-effective, efficient, and balances the rights of individuals with the interests of national security.

(2) Develop and publish revisions to 32 CFR part 154.

(3) Approve, coordinate, and oversee all DoD personnel security research initiatives and activities to improve the efficiency, effectiveness, and fairness of the DoD PSP.

(4) Ensure the Defense Security Service provides education, training, and awareness support to the DoD PSP.

(5) Serve as the primary contact between DoD, the Red Cross, United Service Organizations, and other organizations with direct DoD affiliation for all matters relating to the PSI policy and procedures prescribed herein.

(6) When appropriate, approve requests for exceptions to the DoD PSP for access to classified information except North Atlantic Treaty Organization (NATO) classified information. Requests for exceptions involving access to NATO classified information shall be sent to the Office of the Under Secretary of Defense for Policy.

(7) Issue policy guidance, interpretation, and clarification as needed.

(8) Conduct oversight inspections of the DoD Components for implementation and compliance with DoD personnel security policy and operating procedures.

(9) Develop a framework setting forth an overarching strategy identifying goals, performance measures, roles and responsibilities, a communications strategy, and metrics to measure the

quality of security clearance investigations and adjudications to ensure a sound DoD PSP that will continue to meet the needs of DoD.

(c) The GC, DoD shall:

(1) Provide advice and guidance as to the legal sufficiency of procedures and standards involved in implementing the DoD PSP and exercise oversight of the established administrative due process procedures of the DoD PSP.

(2) Perform functions relating to the DoD PSP including the maintenance and oversight of the Defense Office of Hearings and Appeals.

(d) The Under Secretary of Defense for Policy shall approve requests for exceptions to the DoD PSP involving access to NATO classified information. Requests for exceptions involving access to any other classified information shall be sent to the DUSD(HCI&S).

(e) The Heads of the Office of the Secretary of Defense and DoD Components shall:

(1) Designate a senior agency official who shall direct and administer the DoD PSP consistent with this part.

(2) Comply with the policy and procedures regarding investigation and adjudication for CAC issuance and distribute this part to local and regional organizations.

(3) Provide funding to cover requirements for PSIs, adjudication, and recording of results to comply with the DoD PSP.

(4) Enforce requirements for prompt reporting of significant derogatory information, unfavorable administrative actions or adverse actions to the appropriate personnel security, human resources official(s), or counterintelligence official(s), as appropriate, within their respective Component.

(5) Provide requested information and recommendations, as appropriate, on any aspect of this part and the DoD PSP to the USD(I).

#### **§ 156.6 Procedures—sensitive positions, duties, and classified access.**

(a) *Procedures.* The objective of the personnel security program is to ensure persons deemed eligible for access to classified information, to hold a sensitive position, or perform a sensitive duty are and remain reliable and trustworthy. Duties considered sensitive and critical to national security do not always involve classified activities or classified matters. Personnel security procedures for sensitive positions or duties and classified access are set forth in E.O. 12968, as amended; 32 CFR 154; ICD 704; and DoD Regulation 5220.22-R.

(b) *Sensitive Compartmented Information (SCI) Eligibility.*

Investigative and adjudicative requirements for SCI eligibility shall be executed in accordance with this part and ICD 704. Employees filling SCI designated positions within the IC must maintain eligibility for access to SCI as a mandatory condition of employment.

(c) *Adjudication.* (1) Personnel security criteria and adjudicative standards are described in E.O. 12968, as amended; parts 154 and 155 of 32 CFR; ICD 704, and DoD Regulation 5220.22-R in accordance with 32 CFR part 147.

(2) To ensure consistency and quality in determinations of eligibility for access to classified information and for sensitive positions or duties, adjudicators must successfully complete the full program of professional training provided by the Defense Center for Development of Security Excellence (or equivalent training) and be certified through the DoD Professional Certification Program for Adjudicators within two years of program implementation or, for new hires, within two years of eligibility for certification testing.

(d) *Appeal Procedures-Denial or Revocation of Eligibility.* Individuals may elect to appeal unfavorable personnel security determinations in accordance with the procedures set forth in E.O. 12968, as amended; parts 154 and 155 of 32 CFR; ICD 704, and DoD Regulation 5220.22-R or as otherwise authorized by law. Such procedures shall not be diminished but may be enhanced to achieve a common process to achieve efficiency from consolidation of functions.

(e) *Polygraph.* Under certain conditions, DoD Components are authorized to use polygraph examinations to facilitate national security information access decisions.

(f) *Continuous Evaluation.* All personnel determined to be eligible or who currently have access to classified information shall be subject to continuous evaluation consistent with E.O. 12968, as amended; E.O. 13467; 32 CFR 154; and the ICD 704.

(g) *Financial Disclosure.* DoD Component implementation of the electronic financial disclosure requirement shall be completed by the end of calendar year 2012 as described in E.O. 12968.

(h) *Reciprocal Acceptance of Eligibility Determinations* (1) DoD reciprocally accepts existing national security determinations or clearances from other government agencies in accordance with E.O. 13467, 5 CFR part 731, Office of Management Budget Memorandums “Reciprocal Recognition of Existing Personnel Security

Clearances" dated December 12, 2005<sup>7</sup> and July 17, 2006.<sup>8</sup>

(2) Personnel who have been determined eligible for access to classified information or a sensitive position shall not be subject to additional security reviews or determinations unless potentially disqualifying conditions are present that have not been previously adjudicated. This does not preclude requirements for suitability determinations.

(3) Reciprocity for SCI eligibility shall be executed in accordance with the ICD 704.

(i) *National Security Agency (NSA)/ Central Security Service (CSS)*. Employees, contractors, military assignees, and others with similar affiliations with the NSA/CSS must maintain SCI eligibility for access to sensitive cryptologic information in accordance with chapter 23 of 50 U.S.C.

(j) *Support of the Operation Warfighter Program*. PSIs in support of wounded warriors may be submitted and processed regardless of the time remaining in military service. Investigations will be accelerated through a special program code established by the Office of the USD(I) to ensure expedited service by the investigating and adjudicating agencies.

(1) Category 2 wounded, ill, or injured Uniformed Service personnel who expect to be separated with a medical disability rating of 30% or greater may submit PSIs for Top Secret clearance eligibility prior to medical separation provided they are serving in or have been nominated for a wounded warrior internship program.

(2) The investigations will be funded by the DoD sponsoring agency that is offering the internship. If the sponsoring agency does not have funds available, the owning Military Service may choose to fund the investigation.

#### **§ 156.7 Procedures—common access card investigation and adjudication.**

(a) A favorably adjudicated National Agency Check with Inquiries (NACI) is the minimum investigation required for the CAC.

(b) All final adjudicative determinations must be made by cleared and trained Government personnel. Automated adjudicative processes shall be used to the maximum extent practicable.

(c) Adjudication decisions of CAC investigations shall be incorporated into

Central Adjudication Facility consolidation as directed by the Deputy Secretary of Defense.

(d) CAC applicants or holders may appeal CAC denial or revocation. No separate administrative appeal process is allowed when an individual has been denied a CAC as a result of a negative suitability determination under 5 CFR part 731, an applicable decision to deny or revoke a security clearance, or based on the results of a determination to disqualify the person from an appointment in the excepted service or from working on a contract for reasons other than eligibility for a Federal credential as described in the OPM Memorandum, "Final Credentialing Standards for Issuing Personal Identity Verification Cards under HSPD-12." If a later denial or revocation of a CAC results from an applicable denial or revocation of a security clearance, suitability decision or other action for which administrative process was already provided on grounds that support denial or revocation of a CAC, no separate appeal for CAC denial or revocation is allowed.

(1) Civilian applicants who have been denied a CAC, and for whom an appeal is allowed under this paragraph, may elect to appeal to a three member board containing one security and one human resources representative from the sponsoring activity.

(2) Contractor employees who have had their CAC revoked, and for whom an appeal is allowed under this paragraph, may appeal to the Defense Office of Hearings and Appeals under the established administrative process set out in 32 CFR part 155. Decisions following appeal are final.

(e) Reciprocity of CAC Determinations. (1) The sponsoring activity shall not readjudicate CAC determinations for individuals transferring from another Federal department or agency, provided:

(i) Possession of a valid PIV or CAC can be verified by the individual's former department or agency.

(ii) The individual has undergone the required NACI or other equivalent suitability, public trust, or national security investigation and received favorable adjudication from the former agency.

(2) Reciprocity may be granted as long as there is no break in service greater than 24 months and the individual has no actionable information since the date of the last completed investigation.

(3) Reciprocity shall be based on final adjudication only.

(4) Determinations for CACs issued on an interim basis are not eligible to be transferred.

Dated: January 14, 2011.

**Patricia L. Toppings,**

*OSD Federal Register Liaison Officer,  
Department of Defense.*

[FR Doc. 2011-2214 Filed 2-1-11; 8:45 am]

**BILLING CODE 5001-06-P**

## **DEPARTMENT OF HOMELAND SECURITY**

### **Coast Guard**

#### **33 CFR Part 165**

[Docket No. USCG-2011-0038]

**RIN 1625-AA87**

#### **Security Zones; Cruise Ships, Port of San Diego, CA; Correction**

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of proposed rulemaking; correction.

**SUMMARY:** This document corrects the preamble to a proposed rule published in the **Federal Register** of January 27, 2011 (76 FR 4833), regarding security zones for cruise ships in the Port of San Diego, California. This correction clarifies when a preliminary environmental analysis checklist will be available in the docket.

**DATES:** This correction is effective February 2, 2011.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this document, call or e-mail Commander Michael B. Dolan, Prevention, Coast Guard Sector San Diego, Coast Guard; telephone 619-278-7261, e-mail *Michael.B.Dolan@uscg.mil*. If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202-366-9826.

#### **Correction**

In the notice of proposed rulemaking FR Doc. 2011-1804, beginning on page 4833 in the issue of January 27, 2011, make the following correction in the **SUPPLEMENTARY INFORMATION** section. On page 4835 in the 2nd column, remove the following sentence starting on line 9:

"A preliminary environmental analysis checklist supporting this determination is available in the docket where indicated under **ADDRESSES**." And replace it with the following sentence:

"We intend to prepare a preliminary environmental analysis checklist and make it available in the docket where indicated under **ADDRESSES**."

<sup>7</sup> Copies available on the Internet at <http://www.whitehouse.gov/sites/default/files/omb/assets/omb/memoranda/fy2006/reciprocal121205.pdf>.

<sup>8</sup> Copies available on the Internet at <http://www.whitehouse.gov/sites/default/files/omb/assets/omb/memoranda/fy2006/m06-21.pdf>.