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To: Evangeline Ngbea  
Date: Tue, May 4, 2004 11:02 AM  
Subject: Comments on Draft Rule Language - Fitness for Duty

Attached for docketing are three comments on the above noted draft rule language from James Davis, NEI, that I received via the Rulemaking website on 5/3/04.

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Carol

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RULEMAKINGS AND  
ADJUDICATIONS STAFF

CC: Garmon West; Rebecca Karas

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**Fitness for Duty Comment Number 12**  
**Suitable Inquiry**  
**October 8, 2002**

**Purpose:** The completion of suitable inquiry has been a complex issue. FFD Comments Number 4 provided inputs. This paper reviews the revisions that have been made to ensure the SI process is clear.

**Issue:**

1. Under access authorization, an individual is required to report all arrests since his 18<sup>th</sup> birthday. If the individual has previously been in the program, and access was terminated favorably, a licensee only needs the information from the last access since any potentially disqualifying information was reviewed and found to not be disqualifying by a licensee. The same concept should be applied to the FFD self-disclosure. If new potentially disqualifying information is developed, it needs to be addressed in light of the five year history which would be self-disclosed and obtained from the previous licensee who granted access. This would also make it consistent with "Enforcement Discretion."
2. In several places "since authorization was last terminated" needs to be changed to terminated favorably.
3. 26.49(a) states "verify the self-disclosure information". The concept makes sense, to ensure that self-disclosed problems reflect the true magnitude of the issue. But what happens if you cannot verify the disclosed information? Does that mean you cannot use an arrest or employment issue in making a FFD determination? **Should this be on a best effort basis? A change has been recommended**
4. The issue on how many employers to check during the SI period has been discussed extensively. Currently, the draft access authorization guidance allows only checking one employment per 30 day period for reinstatements. A similar change is needed for the FFD text. **The two processes must be consistent! A change has been recommended.**
5. In 26.49(h)(1) the term "all" is used, yet the preceding sections clearly indicate "all" is not the intent. The focus seems to be on what to do with a claimed employment period, not the sum of the parts. Thus, a change has been recommended.
6. Section 26.51(a) is the base case for authorization, the one you must conduct if you do not meet any of the reduced criteria. Thus, the term has not held access in the past three years is not needed. If fact, it is wrong for someone who has been terminated unfavorably, except for a first FFD violation. A change has been recommended.

**Proposed Text:** with line-in line-out from October draft FFD rule.

**26.5 Definitions**

*Potentially disqualifying FFD information* means information demonstrating that an individual has --

- (1) Violated a licensee or licensee-approved C/V FFD policy;
- (2) Had authorization denied or terminated unfavorably under 26.X here, and 26.X,

- 26.X in Subpart D - insert sections numbers when final] of this part;
- (3) Used, sold, or possessed illegal drugs;
  - (4) Abused legal drugs;
  - (5) Subverted or attempted to subvert a drug or alcohol testing program;
  - (6) Refused to take a drug or alcohol test;
  - (7) Been subjected to a plan for substance abuse treatment (except for self-referral); or
  - (8) Had legal action or employment action, as defined herein, taken for alcohol or drug use.

*Reviewing official* means the designated licensee or C/V employee who is responsible for reviewing and evaluating any potentially disqualifying FFD information obtained about an individual, including but not limited to the results of a determination of fitness, as defined in §26.XX of this part, in order to determine whether the individual may be granted and maintain authorization to perform activities within the scope of this part.

#### **26.47 Self-disclosure.**

(a) Before granting authorization, except as described in §26.45(a) of this section, the licensee shall obtain a written self-disclosure from the individual.

(b) The written self-disclosure must state whether the individual has, since his or her eighteenth birthday or since last authorization if terminated favorably within the last three years, --

- (1) violated a licensee's or C/V's FFD policy;
- (2) had authorization denied or terminated unfavorably under 26.XX of this subpart;
- (3) used, sold, or possessed illegal drugs;
- (4) abused legal drugs;
- (5) subverted or attempted to subvert a drug or alcohol testing program;
- (6) refused to take a drug or alcohol test;
- (7) been subject to a plan for substance abuse treatment (except for self-referral); or
- (8) had legal or employment action taken for alcohol or drug use.

(c) The self-disclosure statement must also address the specific type, duration, and resolution of any matter disclosed.

(d) The individual must provide a list of all employers, with dates of employment, for the shortest of the following periods --

- (1) the past three years;
- (2) since the individual's eighteenth birthday; or
- (3) since last authorization if terminated favorably within the last three years.

(e) Falsification of the self-disclosure statement or failure by an individual to disclose and list reasons in the self-disclosure for a denial or unfavorable termination of authorization under this part is sufficient cause for denial of authorization to perform activities within the scope of this

part.

**§ 26.49 Suitable Inquiry.**

(a) A suitable inquiry shall be conducted to verify, on a best effort basis, the self-disclosed information and to determine if any potentially disqualifying FFD information is available.

(b) For candidates for initial authorization, who have either never held authorization or have not held authorization within the past three years, the period of the suitable inquiry shall be the past three years, or since the individual's eighteenth birthday, whichever is shorter.

(1) For the one-year period immediately preceding the application for authorization, the licensee or C/V shall conduct the suitable inquiry with every employer regardless of the length of employment.

(2) For the remaining two-year period, the licensee or C/V shall conduct a suitable inquiry with the employer by whom the individual claimed to have been employed the longest within each calendar month, if the individual claimed employment during that month.

(c) For candidates for an authorization update, whose authorization has been terminated favorably for more than 365 days but less than three years, the period of the suitable inquiry shall be the period since authorization was terminated favorably.

(1) For the one-year period immediately preceding the application for updated authorization, the licensee or C/V shall conduct the suitable inquiry with every employer regardless of the length of employment.

(2) For the remaining period since authorization was terminated, the licensee or C/V shall conduct a suitable inquiry with the employer by whom the individual claimed to have been employed the longest within each calendar month, if the individual claimed employment during that month.

(d) For candidates for an authorization reinstatement, whose authorization has been terminated favorably for more than 30 days but not more than 365 days, the period of the suitable inquiry shall be the period since authorization was terminated favorably. The licensee or C/V shall conduct the suitable inquiry with the employer by whom the individual claimed to have been employed the longest within each calendar month, if the individual claimed employment during that month..

(e) For candidates for an authorization reinstatement, whose authorization has been terminated favorably for 30 days or less, no suitable inquiry is required if review of the self-disclosure indicates no potentially disqualifying FFD information exists for the period since authorization was terminated.

(f) If potentially disqualifying FFD information within the past five years is obtained through the

self-disclosure, suitable inquiry, or other means, including, but not limited to, the background investigation and criminal history check conducted under part 73, and the information was not addressed and resolved by a previous licensee or C/V, the granting of authorization must be based upon a review of the circumstances associated with the information, as specified in §26.57 of this subpart. To support this review, the following additional suitable inquiry will be conducted –

(1) The licensee or C/V shall conduct the suitable inquiry with all claimed employers within the applicable suitable inquiry period specified in paragraph (b), (c), (d), or (e) of this section,; and

(2) For candidates for updated or reinstated authorization, the licensee or C/V shall review any potentially disqualifying FFD information developed within the past five years during previous authorizations.

(g) To meet the suitable inquiry requirement, licensees and C/Vs may rely upon the information gathered by licensees and C/Vs for previous periods of authorization and the results of the determinations of fitness made by the previous licensees and C/Vs.

(h) The suitable inquiry shall be conducted by questioning present and former employers.

(1) For a claimed employment period, the suitable inquiry will ascertain, on a best-effort basis, the reason for termination, eligibility for rehire, and other information that could reflect on the individual's fitness to perform activities within the scope of this part.

(2) If the claimed employment was military service, the suitable inquiry will request a characterization of service[Note: not available by phone.], reason for separation, and any disciplinary actions related to potentially disqualifying FFD information.

(3) For claimed periods of education in lieu of employment or periods of self-employment, potentially disqualifying FFD information must be ascertained through any reasonable method, including contacts with relatives or references.

(i) When presented with a signed release authorizing disclosure of information, licensees and C/Vs shall disclose whether or not the subject individual's authorization was denied or terminated unfavorably due to a violation of a FFD policy. The circumstances for the denial or unfavorable termination, including test results, must be made available in response to a licensee's or C/V's inquiry. Failure by an individual to authorize the release of information for the suitable inquiry is sufficient cause for the denial of authorization to perform activities within the scope of this part.

(j) In conducting a suitable inquiry, the licensee or C/V may use –

(1) information received over the telephone if a record of the contents of the telephone call is made and retained; and

(2) information received by electronic means, including, but not limited to, facsimile or e-mail, if the document or electronic file is retained.

#### **§ 26.51 Initial authorization.**

(a) This section defines requirements for granting authorization.

(b)(2) Complete a suitable inquiry;

(c) If potentially disqualifying FFD information is disclosed or discovered, authorization shall not be granted, except in accordance with §26.57 of this subpart.

#### **§ 26.53 Authorization updates.**

(a) This section defines requirements for updating authorization for individuals whose authorization has been terminated favorably more than 365 days but less than 3 years.

(b)(2) Complete a suitable inquiry;

(c) If potentially disqualifying FFD information is disclosed or discovered, authorization shall not be granted, except in accordance with §26.57 of this subpart.

#### **§ 26.55 Authorization reinstatements.**

(a) This section defines requirements for reinstating authorization for individuals whose authorization has been terminated favorably for 365 days or less.

(b) For an individual whose authorization has been terminated favorably for 30 days or less, before reinstating authorization, the licensee shall obtain a self-disclosure. No self-disclosure is required if the individual was subject to a licensee-approved behavioral observation and arrest-reporting program throughout the period of interruption;

(c) For an individual whose authorization has been terminated favorably for more than 30 days but not more than 365 days, in order to reinstate authorization, the licensee shall –

(2) Within 5 business days of reinstating authorization, complete a suitable inquiry. No suitable inquiry is required if the individual was subject to a licensee-approved behavioral observation and arrest-reporting program throughout the period of interruption. If the suitable inquiry is not completed within 5 business days and the licensee is aware of no potentially disqualifying information regarding the individual from the past five years, then the individual's authorization may be maintained until the suitable inquiry is completed or until the licensee determines that a best effort has been achieved.

(d) If potentially disqualifying FFD information is disclosed or discovered, authorization shall not be granted, except in accordance with §26.57 of this subpart.

**§26.57 Authorization with potentially disqualifying FFD information.**

(a) This section defines management actions to be taken before an individual is granted authorization when potentially disqualifying FFD information has been identified by any means, including, but not limited to, the individual's self-disclosure, the suitable inquiry, the administration of the FFD program, a self-report of a legal action, or other sources of information, including, but not limited to, the background investigation and criminal history check conducted under 10 CFR 73.

(b) Authorization with new potentially disqualifying FFD information. If potentially disqualifying FFD information within the period of the past five years is disclosed or discovered regarding a candidate for authorization or a currently authorized individual, and the information was not addressed and resolved by a previous licensee or C/V, the granting and maintaining of authorization must be based upon a review of the circumstances associated with the information. This review must be completed by the designated reviewing official and must take into account, as a minimum, the information obtained from the suitable inquiry required in §26.49(f) of this subpart, and the recommendations from a determination of fitness performed in accordance with §26.177 of this part. If the reviewing official determines that authorization is warranted, the licensee or C/V must implement the recommendations for treatment and follow-up testing, if any, from the determination of fitness.