

## Government Contracts Update

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### Clearance: How the SCORE Act and Other Initiatives to Reform the Security Clearance Process May Affect Government Contractors

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In the wake of recent leaks of top secret information and attacks on military installations, Congress and members of the Obama Administration are taking a closer look at the security clearance process. Notably, a bipartisan group of Senators have proposed the SCORE Act, which aims to increase transparency in the security clearance process and revamp applicable policies and guidelines within the government. The Act would also impose significant sanctions on government contractors who perform background investigations, and are found to have engaged in improper conduct during the process. As the effects of the proposed SCORE Act will certainly expand beyond those contractors performing background investigations, the greater contracting community should prepare for potential difficulty in obtaining or renewing contractor personnel security clearances, and the corresponding impact on contractors' business operations.

#### What Is the SCORE Act?

The Security Clearance Oversight and Reform Enforcement (SCORE) Act, introduced in July 2013 by Senators Jon Tester (D-Mont.), Claire McCaskill (D-Mo.), Rob Portman (R-Ohio), and Ron Johnson (R-Wis.), would sanction contractors found to have engaged in improper or fraudulent conduct in performing security clearance background investigations. Among the Act's proposed provisions, the Office of Personnel Management (OPM) would be authorized to audit and investigate contractors performing security clearance investigations. The Director of National Intelligence would also issue guidelines that will allow federal departments and agencies to periodically determine whether certain positions require cleared personnel.

Aside from these provisions, contractors should be aware that the SCORE Act would require termination or debarment of any individual employed or contracted by OPM, if the individual is found to have engaged in misconduct in performing security clearance background investigations. Specifically, Section 3 of the SCORE Act provides that:

*The Office of Personnel Management shall terminate or debar an individual employed or contracted by the Office of Personnel Management if the Office of Personnel Management determines, based upon a preponderance of the evidence, that the individual was involved in misconduct affecting the integrity of the background investigations program of the Office of Personnel Management.*

The legislation goes on to identify examples of misconduct that warrant termination or debarment as follows:

- . falsification of a background investigation report;
- . fraud relating to a background investigation report;
- . failure to review a background investigation report;
- . impersonation of a federal law enforcement officer; or
- . abuse of authority relating to the employment or contract by the Office of Personnel Management.

Given the breadth of conduct that could trigger termination or debarment – most notably the open-ended example referencing “abuse of authority” – it is clear that if the SCORE Act is enacted, those contractors who perform security clearance work for the government will feel the strongest impact. Beyond this direct impact, even those contractors who do not work directly with the OPM must consider possible trickle-down effects that could significantly impact their day-to-day business

operations.

### **How Will the SCORE Act Affect Government Contractors?**

Although the most significant impact of the SCORE Act will be increased scrutiny of the core group of contractors performing security clearance investigations, even those contractors who do not perform security clearance functions for the government will be indirectly impacted by the proposed legislation.

Any government contractor requiring cleared personnel to satisfy contract requirements may be affected by the terms of the SCORE Act and the recent increased scrutiny on the security clearance process. For example, contractor personnel may encounter longer timelines in obtaining or renewing a security clearance, a process which currently can take anywhere from several weeks to over a year, depending on the level of clearance sought as well as the individual's employment position and professional and personal background. Of perhaps even more significance, contractors could also see a greater predilection to deny clearance applications, whether it is a current employee seeking clearance renewal, or an offer of employment that is contingent upon obtaining a security clearance for the first time. Given that many contractors perform services or provide products to the government that are classified or sensitive (thereby requiring a consistent source of cleared personnel), a prolonged review process or increase in clearance denials or revocations could pose serious delays in the performance of contracts requiring personnel with active security clearances.

While it is difficult to predict the extent to which the general contracting community will be affected by the SCORE Act, contractors should nonetheless take steps to avoid any potential impacts resulting from the proposed legislation.

- **Be Proactive**

Contractors should curb the impact of increased delays or denials by proactively analyzing their long-term work projections and inventorying those contracts that require cleared personnel.

- **Anticipate Delays**

To avoid any unanticipated disruption in operations should a current or potential employee's application receive negative treatment, contractors should review and revise their internal operations and business plans to account for potential delays in clearing personnel, and develop contingency plans in the event clearance applications are delayed, revoked, or denied.

- **Review Reporting Requirements**

Contractors should also review their contracts for any terms pertaining to reporting requirements in the event that a cleared individual has lost his or her security clearance.

- **Consider NISPOM Obligations**

Contractors subject to the National Industrial Security Program Operating Manual (NISPOM) should also be mindful of reporting obligations under Section 1-302, for example, concerning adverse information coming to their attention concerning any of their cleared employees.

Considering the potential for security clearance denials and revocations to increase, contractors should also familiarize themselves with the avenues of recourse available to them, as well as the steps their personnel should take if their clearance is subject to negative treatment. As the Defense Office of Hearings and Appeals (DOHA) oversees the process for the majority of federal contractor personnel clearance applications requiring further review or investigation, it is important that contractors be prepared to navigate this adjudication process. For example, if an application reflects a high level of unmitigated concerns, a clearance applicant will receive a tentative decision – known as a "Letter of Intent" – which includes a "Statement of Reasons" identifying the bases for the preliminary decision to deny the applicant's clearance request. Contractors should be prepared to rebut the facts and conclusions within the Statement of Reasons, and consider whether in their particular case it would be more effective to limit such rebuttal to written briefings or, in the alternative, request a hearing before a DOHA administrative judge. Likewise, should the DOHA administrative judge deny or revoke an applicant's clearance application, contractors should be aware of the process for appealing to the DOHA Appeal Board, as well as the procedural limitations during this process.

If enacted, the SCORE Act will bring with it an increased level of government oversight over the security clearance process, which will ultimately impact an individual's ability to maintain or obtain a security clearance. Consequently, government contractors should take proactive steps to prepare for any effects stemming from congressional efforts and to avoid disruption in the continued performance of contracts requiring cleared personnel. Venable's [Government Contracts Group](#) will continue to monitor the SCORE Act and other associated legislation and regulations pertaining to the security clearance process. For more information, please contact [Bill Walsh](#), [Keir Bancroft](#), or [Christina Kube](#).