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# Subtitle A—Department of Defense

# CHAPTER I—OFFICE OF THE SECRETARY OF DEFENSE

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# SUBCHAPTER A—ACQUISITION

## PART 1 [RESERVED]

## PART 2—PILOT PROGRAM POLICY

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AUTHORITY: 10 U.S.C. 2340 note.

SOURCE: 62 FR 17549, Apr. 10, 1997, unless otherwise noted.

### § 2.1 Purpose.

Section 809 of Public Law 101–510, ''National Defense Authorization Act for Fiscal Year 1991,'' as amended by section 811 of Public Law 102–484, ''National Defense Authorization Act for Fiscal Year 1993'' and Public Law 103–160, ''National Defense Authorization Act for Fiscal Year 1994,'' authorizes the Secretary of Defense to conduct the Defense Acquisition Pilot Program. In accordance with section 809 of Public Law 101–510, the Secretary may designate defense acquisition programs for participation in the Defense Acquisition Pilot Program.

(a) The purpose of the pilot programs is to determine the potential for increasing the efficiency and effectiveness of the acquisition process. Pilot programs shall be conducted in accordance with the standard commercial, industrial practices. As used in this policy, the term ''standard commercial, industrial practice'' refers to any acquisition management practice, process, or procedure that is used by commercial companies to produce and sell goods and services in the commercial marketplace. This definition purposely implies a broad range of potential activities to adopt commercial practices, including regulatory and statutory streamlining, to eliminate unique Government requirements and practices such as government-unique contracting policies and practices, government-unique specifications and standards, and reliance on cost determination rather than price analysis.

(b) Standard commercial, industrial practices include, but are not limited to:

(1) Innovative contracting policies and practices;

(2) Performance and commercial specifications and standards;

(3) Innovative budget policies;

(4) Establishing fair and reasonable prices without cost data;

(5) Maintenance of long-term relationships with quality suppliers;

(6) Acquisition of commercial and non-developmental items (including components); and

(7) Other best commercial practices.

### § 2.2 Statutory relief for participating programs.

(a) Within the limitations prescribed, the applicability of any provision of law or any regulation prescribed to implement a statutory requirement may be waived for all programs participating in the Defense Acquisition Pilot Program, or separately for each participating program, if that waiver or limit is specifically authorized to be waived or limited in a law authorizing appropriations for a program designated by statute as a participant in the Defense Acquisition Pilot Program.

(b) Only those laws that prescribe procedures for the procurement of supplies or services; a preference or requirement for acquisition from any source or class of sources; any requirement related to contractor performance; any cost allowability, cost accounting, or auditing requirements; or any requirement for the management of, testing to be performed under, evaluation of, or reporting on a defense acquisition program may be waived.

(c) The requirements in section 809 of Public Law 101–510, as amended by section 811 of Public Law 102–484, the requirements in any law enacted on or after the enactment of Public Law 101–510 (except to the extent that a waiver or limitation is specifically authorized for such a defense acquisition program by statute), and any provision of law that ensures the financial integrity of

the conduct of a Federal Government program or that relates to the authority of the Inspector General of the Department of Defense may not be considered for waiver.

**§ 2.3 Regulatory relief for participating programs.**

(a) A program participating in the Defense Acquisition Pilot Program will not be subject to any regulation, policy, directive, or administrative rule or guideline relating to the acquisition activities of the Department of Defense other than the Federal Acquisition Regulation (FAR)[1], the Defense FAR Supplement (DFARS)[2], or those regulatory requirements added by the Under Secretary of Defense for Acquisition and Technology, the Head of the Component, or the DoD Component Acquisition Executive.

(b) Provisions of the FAR and/or DFARS that do not implement statutory requirements may be waived by the Under Secretary of Defense for Acquisition and Technology using appropriate administrative procedures. Provisions of the FAR and DFARS that implement statutory requirements may be waived or limited in accordance with the procedures for statutory relief previously mentioned.

(c) Regulatory relief includes relief from use of government-unique specifications and standards. Since a major objective of the Defense Acquisition Pilot Program is to promote standard, commercial industrial practices, functional performance and commercial specifications and standards will be used to the maximum extent practical. Federal or military specifications and standards may be used only when no practical alternative exists that meet the user's needs. Defense acquisition officials (other than the Program Manager or Commodity Manager) may only require the use of military specifications and standards with advance approval from the Under Secretary of Defense for Acquisition and Technology, the Head of the DoD Component, or the DoD Component Acquisition Executive.

[1] Copies of this Department of Defense publication may be obtained from the Government Printing Office, Superintendent of Documents, Washington, DC 20402.

[2] See footnote 1 to § 2.3(a).

**§ 2.4 Designation of participating programs.**

(a) Pilot programs may be nominated by a DoD Component Head or Component Acquisition Executive for participation in the Defense Acquisition Pilot Program. The Under Secretary of Defense for Acquisition and Technology shall determine which specific programs will participate in the pilot program and will transmit to the Congressional defense committees a written notification of each defense acquisition program proposed for participation in the pilot program. Programs proposed for participation must be specifically designated as participants in the Defense Acquisition Pilot Program in a law authorizing appropriations for such programs and provisions of law to be waived must be specifically authorized for waiver.

(b) Once included in the Defense Acquisition Pilot Program, decision and approval authority for the participating program shall be delegated to the lowest level allowed in the acquisition regulations consistent with the total cost of the program (e.g., under DoD Directive 5000.1,[3] an acquisition program that is a major defense acquisition program would be delegated to the appropriate Component Acquisition Executive as an acquisition category IC program)

(c) At the time of nomination approval, the Under Secretary of Defense for Acquisition and Technology will establish measures to judge the success of a specific program, and will also establish a means of reporting progress towards the measures.

**§ 2.5 Criteria for designation of participating programs.**

(a) Candidate programs must have an approved requirement, full program funding assured prior to designation, and low risk. Nomination of a candidate program to participate in the Defense Acquisition Pilot Program should occur as early in the program's life-cycle as possible. Developmental programs will only be considered on an exception basis.

[3] Copies may be obtained, at cost, from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161.

(b) Programs in which commercial or non-developmental items can satisfy the military requirement are preferred as candidate programs. A nominated program will address which standard commercial, industrial practices will be used in the pilot program and how those practices will be applied.

(c) Nomination of candidate programs must be accompanied by a list of waivers being requested to Statutes, FAR, DFARS, DoD Directives[4] and Instructions,[5] and where applicable, DoD Component regulations. Waivers being requested must be accompanied by rationale and justification for the waiver. The justification must include:

(1) The provision of law proposed to be waived or limited.

(2) The effects of the provision of law on the acquisition, including specific examples.

(3) The actions taken to ensure that the waiver or limitation will not reduce the efficiency, integrity, and effectiveness of the acquisition process used for the defense acquisition program; and

(4) A discussion of the efficiencies or savings, if any, that will result from the waiver or limitation.

(d) No nominated program shall be accepted until the Under Secretary of Defense has determined that the candidate program is properly planned.

## PART 3—TRANSACTIONS OTHER THAN CONTRACTS, GRANTS, OR COOPERATIVE AGREEMENTS FOR PROTOTYPE PROJECTS

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3.6 Limitations on cost-sharing.
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3.9 Follow-on production contracts.

AUTHORITY: Sec. 845, Pub. L. 103–160, 107 Stat. 1547, as amended.

SOURCE: 66 FR 57383, Nov. 15, 2001, unless otherwise noted.

[4] See footnote 3 to §2.4(b).

[5] See footnote 3 to §2.4(b).

### §3.1 Purpose.

This part consolidates rules that implement section 845 of the National Defense Authorization Act for Fiscal Year 1994, Public Law 103–160, 107 Stat. 1547, as amended, and have a significant impact on the public. Section 845 authorizes the Secretary of a Military Department, the Director of Defense Advanced Research Projects Agency, and any other official designated by the Secretary of Defense, to enter into transactions other than contracts, grants, or cooperative agreements in certain situations for prototype projects that are directly relevant to weapons or weapon systems proposed to be acquired or developed by the Department of Defense.

[67 FR 54956, Aug. 27, 2002]

### §3.2 Background.

''Other transactions'' is the term commonly used to refer to the 10 U.S.C. 2371 authority to enter into transactions other than contracts, grants or cooperative agreements. ''Other transactions'' are generally not subject to the Federal laws and regulations limited in applicability to contracts, grants or cooperative agreements. As such, they are not required to comply with the Federal Acquisition Regulation (FAR) and its supplements (48 CFR).

[67 FR 54956, Aug. 27, 2002]

### §3.3 Applicability.

This part applies to the Secretary of a Military Department, the Directors of the Defense Agencies, and any other official designated by the Secretary of Defense to enter into transactions other than contracts, grants or cooperative agreements for prototype projects that are directly relevant to weapons or weapon systems proposed to be acquired or developed by the Department of Defense, under authority of 10 U.S.C. 2371. Such transactions are commonly referred to as ''other transaction'' agreements and are hereafter referred to as agreements.

[65 FR 35576, June 5, 2000. Redesignated at 67 FR 54956, Aug. 27, 2002]

**§ 3.4 Definitions.**

*Agency point of contact (POC).* The individual identified by the military department or defense agency as its POC for prototype OTs.

*Agreements Officer.* An individual with the authority to enter into, administer, or terminate OTs for prototype projects and make related determinations and findings.

*Approving Official.* The official responsible for approving the OTs acquisition strategy and resulting OT agreement. This official must be at least one level above the Agreements Officer and at no lower level than existing agency thresholds associated with procurement contracts.

*Awardee.* Any business unit that is the direct recipient of an OT agreement.

*Business unit.* Any segment of an organization, or an entire business organization which is not divided into segments.

*Contracting activity.* An element of an agency designated by the agency head and delegated broad authority regarding acquisition functions. It includes elements designated by the Director of a Defense Agency which has been delegated contracting authority through its agency charter.

*Contracting Officer.* A person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings as defined in Chapter 1 of Title 48, CFR, Federal Acquisition Regulation, Section 2.101(b).

*Cost-type OT.* Agreements where payments are based on amounts generated from the awardee's financial or cost records or that require at least one third of the total costs to be provided by non-Federal parties pursuant to statute or require submittal of financial or cost records/reports to determine whether additional effort can be accomplished for the fixed amount.

*Fixed-price type OT.* Agreements where payments are not based on amounts generated from the awardee's financial or cost records.

*Head of the contracting activity (HCA).* The official who has overall responsibility for managing the contracting activity.

*Nontraditional Defense contractor.* A business unit that has not, for a period of at least one year prior to the date of the OT agreement, entered into or performed on (1) any contract that is subject to full coverage under the cost accounting standards prescribed pursuant to section 26 of the Office of Federal Procurement Policy Act (41 U.S.C. 422) and the regulations implementing such section; or (2) any other contract in excess of $500,000 to carry out prototype projects or to perform basic, applied, or advanced research projects for a Federal agency, that is subject to the Federal Acquisition Regulation.

*Procurement contract.* A contract awarded pursuant to the Federal Acquisition Regulation.

*Project Manager.* The government manager for the prototype project.

*Qualified Independent Public Accountant.* An accountant that is licensed or works for a firm that is licensed in the state or other political jurisdiction where they operate their professional practice and comply with the applicable provisions of the public accountancy law and rules of the jurisdiction where the audit is being conducted.

*Segment.* One of two or more divisions, product departments, plants, or other subdivisions of an organization reporting directly to a home office, usually identified with responsibility for profit and/or producing a product or service.

*Senior Procurement Executive.* The following individuals:

(1) Department of the Army—Assistant Secretary of the Army (Acquisition, Logistics and Technology);

(2) Department of the Navy—Assistant Secretary of the Navy (Research, Development and Acquisition);

(3) Department of the Air Force—Assistant Secretary of the Air Force (Acquisition).

(4) The Directors of Defense Agencies who have been delegated authority to act as Senior Procurement Executive for their respective agencies.

*Single Audit Act.* Establishes uniform audit requirements for audits of state and local government, universities, and non-profit organizations that expend Federal awards.

*Subawardee.* Any business unit of a party, entity or subordinate element

performing effort under the OT agreement, other than the awardee.

*Traditional Defense contractor*. Any business unit that does not meet the definition of a nontraditional Defense contractor.

[68 FR 27457, May 20, 2003, as amended at 69 FR 16482, Mar. 30, 2004]

### § 3.5 Appropriate use.

In accordance with statute, this authority may be used only when:

(a) At least one nontraditional Defense contractor is participating to a significant extent in the prototype project; or

(b) No nontraditional Defense contractor is participating to a significant extent in the prototype project, but at least one of the following circumstances exists:

(1) At least one third of the total cost of the prototype project is to be paid out of funds provided by non-Federal parties to the transaction.

(2) The Senior Procurement Executive for the agency determines in writing that exceptional circumstances justify the use of a transaction that provides for innovative business arrangements or structures that would not be feasible or appropriate under a procurement contract.

[67 FR 54956, Aug. 27, 2002]

### § 3.6 Limitations on cost-sharing.

(a) When a nontraditional Defense contractor is not participating to a significant extent in the prototype project and cost-sharing is the reason for using OT authority, then the non-Federal amounts counted as provided, or to be provided, by the business units of an awardee or subawardee participating in the performance of the OT agreement may not include costs that were incurred before the date on which the OT agreement becomes effective. Costs that were incurred for a prototype project by the business units of an awardee or subawardee after the beginning of negotiations, but prior to the date the OT agreement becomes effective, may be counted as non-Federal amounts if and to the extent that the Agreements Officer determines in writing that:

(1) The awardee or subawardee incurred the costs in anticipation of entering into the OT agreement; and

(2) It was appropriate for the awardee or subawardee to incur the costs before the OT agreement became effective in order to ensure the successful implementation of the OT agreement.

(b) As a matter of policy, these limitations on cost-sharing apply any time cost-sharing may be recognized when using OT authority for prototype projects.

[67 FR 54956, Aug. 27, 2002]

### § 3.7 Comptroller General access.

(a) A clause must be included in solicitations and agreements for prototype projects awarded under authority of 10 U.S.C. 2371, that provide for total government payments in excess of $5,000,000 to allow Comptroller General access to records that directly pertain to such agreements.

(b) The clause referenced in paragraph (a) of this section will not apply with respect to a party or entity, or subordinate element of a party or entity, that has not entered into any other contract, grant, cooperative agreement or ''other transaction'' agreement that provides for audit access by a government entity in the year prior to the date of the agreement. The clause must be included in all agreements described in paragraph (a) of this section in order to fully implement the law by covering those participating entities and their subordinate elements which have entered into prior agreements providing for Government audit access, and are therefore not exempt. The presence of the clause in an agreement will not operate to require Comptroller General access to records from any party or participating entity, or subordinate element of a party or participating entity, or subordinate element of a party or participating entity, which is otherwise exempt under the terms of the clause and the law.

(c)(1) The right provided to the Comptroller General in a clause of an agreement under paragraph (a) of this part, is limited as provided by subparagraph (c)(2) of this part in the case of a party to the agreement, an entity that participates in the performance of the agreement, or a subordinate element of

that party or entity, if the only cooperative agreements or ''other transactions'' that the party, entity, or subordinate element entered into with government entities in the year prior to the date of that agreement are cooperative agreements or transactions that were entered into under 10 U.S.C. 2371 or Section 845 of the National Defense Authorization Act for Fiscal Year 1994 (Pub. L. 103–160; 10 U.S.C. 2371 note).

(c)(2) The only records of a party, other entity, or subordinate element referred to in subparagraph (c)(1) of this part that the Comptroller General may examine in the exercise of the right referred to in that subparagraph, are records of the same type as the records that the government has had the right to examine under the audit access clauses of the previous cooperative agreements or transactions referred to in such subparagraph that were entered into by that particular party, entity, or subordinate element.

(d) The head of the contracting activity (HCA) that is carrying out the agreement may waive the applicability of the Comptroller General access requirement if the HCA determines it would not be in the public interest to apply the requirement to the agreement. The waiver will be effective with respect to the agreement only if the HCA transmits a notification of the waiver to the Committees on Armed Services of the Senate and the House of Representatives, the Comptroller General, and the Director, Defense Procurement before entering into the agreement. The notification must include the rationale for the determination.

(e) The HCA must notify the Director, Defense Procurement of situations where there is evidence that the Comptroller General Access requirement caused companies to refuse to participate or otherwise restricted the Department's access to companies that typically do not do business with the Department.

(f) In no case will the requirement to examine records under the clause referenced in paragraph (a) of this section apply to an agreement where more than three years have passed after final payment is made by the government under such an agreement.

(g) The clause referenced in paragraph (a) of this section, must provide for the following:

(1) The Comptroller General of the United States, in the discretion of the Comptroller General, shall have access to and the right to examine records of any party to the agreement or any entity that participates in the performance of this agreement that directly pertain to, and involve transactions relating to, the agreement.

(2) Excepted from the Comptroller General access requirement is any party to this agreement or any entity that participates in the performance of the agreement, or any subordinate element of such party or entity, that, in the year prior to the date of the agreement, has not entered into any other contract, grant, cooperative agreement, or ''other transaction'' agreement that provides for audit access to its records by a government entity.

(3)(A) The right provided to the Comptroller General is limited as provided in subparagraph (B) in the case of a party to the agreement, any entity that participates in the performance of the agreement, or a subordinate element of that party or entity if the only cooperative agreements or ''other transactions'' that the party, entity, or subordinate element entered into with government entities in the year prior to the date of that agreement are cooperative agreements or transactions that were entered into under 10 U.S.C. 2371 or Section 845 of the National Defense Authorization Act for Fiscal Year 1994 (Pub. L. 103–160; 10 U.S.C. 2371 note).

(B) The only records of a party, other entity, or subordinate element referred to in subparagraph (A) that the Comptroller General may examine in the exercise of the right referred to in that subparagraph are records of the same type as the records that the government has had the right to examine under the audit access clauses of the previous agreements or transactions referred to in such subparagraph that were entered into by that particular party, entity, or subordinate element.

(4) This clause shall not be construed to require any party or entity, or any

subordinate element of such party or entity, that participates in the performance of the agreement, to create or maintain any record that is not otherwise maintained in the ordinary course of business or pursuant to a provision of law.

(5) The Comptroller General shall have access to the records described in this clause until three years after the date the final payment is made by the United States under this agreement.

(6) The recipient of the agreement shall flow down this provision to any entity that participates in the performance of the agreement.

[65 FR 35576, June 5, 2000. Redesignated at 67 FR 54956, Aug. 27, 2002]

### § 3.8 DoD access to records policy.

(a) *Applicability*. This section provides policy concerning DoD access to awardee and subawardee records on OT agreements for prototype projects. This access is separate and distinct from Comptroller General access.

(1) *Fixed-price type OT agreements*. (i) *General*—DoD access to records is not generally required for fixed-price type OT agreements. In order for an agreement to be considered a fixed-price type OT agreement, it must adequately specify the effort to be accomplished for a fixed amount and provide for defined payable milestones, with no provision for financial or cost reporting that would be a basis for making adjustment in either the work scope or price of the effort.

(ii) *Termination considerations*. The need to provide for DoD access to records in the case of termination of a fixed-price type OT can be avoided by limiting potential termination settlements to an amount specified in the original agreement or to payment for the last completed milestone. However, if a fixed-price agreement provides that potential termination settlement amounts may be based on amounts generated from cost or financial records and the agreement exceeds the specified threshold, the OT should provide that DoD will have access to records in the event of termination.

(2) *Cost-type OT agreements*. (i) *Single Audit Act*—In accordance with the requirements of Public Law 98–502, as amended by Public Law 104–156, 110 STAT. 1396–1404, when a business unit that will perform the OT agreement, or a subawardee, meets the criteria for an audit pursuant to the Single Audit Act, the DoD must have sufficient access to the entity's records to assure compliance with the provisions of the Act.

(ii) *Traditional Defense contractors*. The DoD shall have access to records on cost-type OT agreements with traditional Defense contractors that provide for total Government payments in excess of $5,000,000. The content of the access to records clause shall be in accordance with paragraph (c) of this section. The value establishing the threshold is the total value of the agreement including all options.

(iii) *Nontraditional Defense contractors*. The DoD should have access to records on cost-type OT agreements with nontraditional Defense contractors that provide for total Government payments in excess of $5,000,000. The content of the access to records clause should be in accordance with paragraph (c) of this section. The value establishing the threshold is the total value of the agreement including all options.

(iv) *DoD access below threshold*. The Agreements Officer has the discretion to determine whether to include DoD access to records when the OT does not meet any of the requirements in (a)(2)(i) through (a)(2)(iii) of this section. The content of that access to records clause should be tailored to meet the particular circumstances of the agreement.

(v) *Examples of cost-type OT agreements*. (A) An agreement that requires at least one-third cost share pursuant to statute.

(B) An agreement that includes payable milestones, but provides for adjustment of the milestone amounts based on actual costs or reports generated from the awardee's financial or cost records.

(C) An agreement that is for a fixed-Government amount, but the agreement provides for submittal of financial or cost records/reports to determine whether additional effort can be accomplished for the fixed amount.

(3) *Subawardees*. When a DoD access to records provision is included in the OT agreement, the awardee shall use the criteria established in paragraphs

(a)(2)(i) through (a)(2)(iii) of this section to determine whether DoD access to records clauses should be included in subawards.

(b) *Exceptions*—(1) *Nontraditional Defense contractors*—(i) The Agreements Officers may deviate, in part or in whole, from the application of this access to records policy for a nontraditional Defense contractor when application of the policy would adversely impact the government's ability to incorporate commercial technology or execute the prototype project.

(ii) The Agreements Officer will document:

(A) What aspect of the audit policy was not applied;

(B) Why it was problematic;

(C) What means will be used to protect the Government's interest; and

(D) Why the benefits of deviating from the policy outweigh the potential risks.

(iii) This determination will be reviewed by the approving official as part of the pre-award approval of the agreement and submitted to the agency POC within 10 days of award.

(iv) The agency POC will forward all such documentation received in any given fiscal year, to the Director, Defense Procurement by 15 October of each year.

(2) *Traditional Defense contractor*. (i) Any departure from this policy for other than nontraditional Defense contractors must be approved by the Head of the Contracting Activity prior to award and set forth the exceptional circumstances justifying deviation.

(ii) Additionally, the justification will document:

(A) What aspect of the policy was not applied;

(B) Why it was problematic;

(C) What means will be used to protect the Government's interest; and

(D) Why the benefits of deviating from the policy outweigh the potential risks.

(iii) The HCA will forward documentation associated with such waivers in any given fiscal year, to the Director, Defense Procurement by 15 October of each year.

(3) *DoD access below the threshold*. When the Agreements Officer determines that access to records is appropriate for an agreement below the $5,000,000 threshold, the content, length and extent of access may be mutually agreed to by the parties, without documenting reasons for departing from the policy of this section.

(4) *Flow down provisions*. The awardee shall submit justification for any exception to the DoD access to records policy to the Agreements Officer for subawardees. The Agreements Officer will review and obtain appropriate approval, as set forth in paragraphs (b)(1) and (b)(2) of this section.

(c) *Content of DoD access to records clause*. When a DoD access to records clause is included as part of the OT agreement, address the following areas during the negotiation of the clause:

(1) *Frequency of audits*. Audits will be performed when the Agreements Officer determines it is necessary to verify statutory cost share or to verify amounts generated from financial or cost records that will be used as the basis for payment or adjustment of payment.

(2) *Means of accomplishing audits*. (i) *Business units subject to the Single Audit Act*—When the awardee or subawardee is a state government, local government, or nonprofit organization whose Federal cost reimbursement contracts and financial assistance agreements are subject to the Single Audit Act (Public Law 98–502, as amended by Public Law 104–156, 110 STAT. 1396–1404), the clause must apply the provisions of that Act for purposes of performing audits of the awardee or subawardee under the agreement.

(ii) *Business units not subject to the Single Audit Act currently performing on procurement contracts*. The clause must provide that DCAA will perform any necessary audits if, at the time of agreement award, the awardee or subawardee is not subject to the Single Audit Act and is performing a procurement contract that is subject to the Cost Principles Applicable to Commercial Organizations (48 CFR part 31.2) and/or the Cost Accounting Standards (48 CFR part 99).

(iii) *Other business units*. DCAA or a qualified IPA may perform any necessary audit of a business unit of the awardee or subawardee if, at the time of agreement award, the business unit

does not meet the criteria in (c)(2)(i) or (c)(2)(ii) of this section. The clause must provide for the use of a qualified IPA if such a business unit will not accept the agreement if the Government has access to the business unit's records. The Agreements Officer will include a statement in the file that the business unit is not performing on a procurement contract subject to the Cost Principles or Cost Accounting Standards at the time of agreement award, and will not accept the agreement if the government has access to the business unit's records. The Agreements Officer will also prepare a report (Part III to the annual report submission) for the Director, Defense Procurement that identifies, for each business unit that is permitted to use an IPA: the business unit's name, address and the expected value of its award. When the clause provides for use of an IPA to perform any necessary audits, the clause must state that:

(A) The IPA will perform the audit in accordance with Generally Accepted Government Auditing Standards (GAGAS). Electronic copies of the standards may be accessed at *www.gao.gov*. Printed copies may be purchased from the U.S. Government Printing Office (for ordering information, call (202) 512–1800 or access the Internet Site at *www.gpo.gov*).

(B) The Agreements Officers' authorized representative has the right to examine the IPA's audit report and working papers for 3 years after final payment or three years after issuance of the audit report, whichever is later, unless notified otherwise by the Agreements Officer.

(C) The IPA will send copies of the audit report to the Agreements Officer and the Assistant Inspector General (Audit Policy and Oversight) [AIG(APO)], 400 Army Navy Drive, Suite 737, Arlington, VA 22202.

(D) The IPA will report instances of suspected fraud directly to the DoDIG.

(E) The Government has the right to require corrective action by the awardee or subawardee if the Agreements Officer determines (subject to appeal under the disputes clause of the agreement) that the audit has not been performed or has not been performed in accordance with GAGAS. The Agreements Officer should take action promptly once the Agreements Officer determines that the audit is not being accomplished in a timely manner or the audit is not performed in accordance with GAGAS but generally no later than twelve (12) months of the date requested by the Agreements Officer. The awardee or subawardee may take corrective action by having the IPA correct any deficiencies identified by the Agreements Officer, having another IPA perform the audit, or electing to have the Government perform the audit. If corrective action is not taken, the Agreements Officer has the right to take one or more of the following actions:

(*1*) Withhold or disallow a specified percentage of costs until the audit is completed satisfactorily. The agreement should include a specified percentage that is sufficient to enhance performance of corrective action while also not being unfairly punitive.

(*2*) Suspend performance until the audit is completed satisfactorily; and/or

(*3*) Terminate the agreement if the agreements officer determines that imposition of either (c)(2)(iii)(E)(1) or (c)(2)(iii)(e)(2) of this section is not practical.

(F) If it is found that the awardee or subawardee was performing a procurement contract subject to Cost Principles Applicable to Commercial Organizations (48 CFR part 31.2) and/or Cost Accounting Standards (48 CFR part 99) at the time of agreement award, the Agreements Officer, or an authorized representative, has the right to audit records of the awardee or subawardee to verify the actual costs or reporting information used as the basis for payment or to verify statutorily required cost share under the agreement, and the IPA is to be paid by the awardee or subawardee. The cost of an audit performed in accordance with this policy is reimbursable based on the business unit's established accounting practices and subject to any limitations in the agreement.

(3) *Scope of audit*. The Agreements Officer should coordinate with the auditor regarding the nature of any audit envisioned.

(4) *Length and extent of access.* (i) *Clauses that do not provide for use of an IPA*—The clause must provide for the Agreements Officer's authorized representative to have access to directly pertinent records of those business units of the awardee or subawardee's performing effort under the OT agreement, when needed to verify the actual costs or reporting used as the basis for payment or to verify statutorily required cost share under the agreement.

(ii) *Clauses that provide for use of an IPA to perform the audits.* The clause must:

(A) Provide the Agreements Officer's authorized representative access to the IPA's audit reports and working papers to ensure that the IPA has performed the audit in accordance with GAGAS.

(B) State that the Government will make copies of contractor records contained in the IPA's work papers if needed to demonstrate that the audit was not performed in accordance with GAGAS.

(C) State that the Government has no direct access to any awardee or subawardee records unless it is found that the awardee or subawardee was performing a procurement contract subject to Cost Principles (48 CFR part 31) and/or Cost Accounting Standards (48 CFR part 99) at the time of agreement award.

(iii) *Business Units subject to the Single Audit Act.* The clause must provide access to the extent authorized by the Single Audit Act.

(iv) *Record Retention/Period of Access.* The clause must require that the awardee and subawardee retain, and provide access to, the records referred to in (c)(4)(i) and (c)(4)(ii) of this section for three years after final payment, unless notified of a shorter or longer period by the Agreements Officer.

(5) *Awardee flow down responsibilities.* Agreements must require awardees to include the necessary provisions in subawards that meet the conditions set forth in this DoD access to records policy.

(d) *DoDIG and GAO access.* In accordance with statute, if an agreement gives the Agreements Officer or another DoD component official access to a business unit's records, the DoDIG or GAO are granted the same access to those records.

[68 FR 27457, May 20, 2003]

### § 3.9 Follow-on production contracts.

(a) *Authority.* A competitively awarded OT agreement for a prototype project that satisfies the condition set forth in law that requires non-Federal parties to the OT agreement to provide at least one-third of the costs of the prototype project may provide for the award of a follow-on production contract to the awardee of the OT prototype agreement for a specific number of units at specific target prices, without further competition.

(b) *Conditions.* The Agreements Officer must do the following in the award of the prototype project:

(1) Ensure non-Federal parties to the OT prototype agreement offer at least one-third of the costs of the prototype project pursuant to subsection (d)(1)(B)(i), 10 U.S.C. 2371 note.

(2) Use competition to select parties for participation in the OT prototype agreement and evaluate the proposed quantity and target prices for the follow-on production units as part of that competition.

(3) Determine the production quantity that may be procured without further competition, by balancing of the level of the investment made in the project by the non-Federal parties with the interest of the Federal Government in having competition among sources in the acquisition of the product or products prototyped under the project.

(4) Specify the production quantity and target prices in the OT prototype agreement and stipualte in the agreement that the Contracting Officer for the follow-on contract may award a production contract without further competition if the awardee successfully completes the prototype project and agrees to production quantities and prices that do not exceed those specified in the OT prototype agreement (*see* part 206.001 of the Defense Federal Acquisition Regulation Supplement).

(c) *Limitation.* As a matter of policy, establishing target prices for production units should only be considered when the risk of the prototype project permits realistic production pricing

without placing undue risks on the awardee.

(d) *Documentation*. (1) The Agreements Officer will need to provide information to the Contracting Officer from the agreement and award file that the conditions set forth in paragraph (b) of this section have been satisfied.

(2) The information shall contain, at a minimum:

(i) The competitive procedures used;

(ii) How the production quantities and target prices were evaluated in the competition;

(iii) The percentage of cost-share; and

(iv) The production quantities and target prices set forth in the OT agreement.

(3) The Project Manager will provide evidence of successful completion of the prototype project to the Contracting Officer.

[69 FR 16482, Mar. 30, 2004]

## PARTS 4–8 [RESERVED]

# SUBCHAPTER B—MILITARY COMMISSIONS

## PART 9—PROCEDURES FOR TRIALS BY MILITARY COMMISSIONS OF CERTAIN NON-UNITED STATES CITIZENS IN THE WAR AGAINST TERRORISM

Sec.
9.1 Purpose.
9.2 Establishment of Military Commissions.
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9.7 Regulations.
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9.10 Other.
9.11 Amendment.
9.12 Delegation.

AUTHORITY: 5 U.S.C. 552(1)(a)(1)(C) and (D).

SOURCE: 68 FR 39374, July 1, 2003, unless otherwise noted.

### § 9.1 Purpose.

This part implements policy, assigns responsibilities, and prescribes procedures under the United States Constitution, Article II, section 2 and Military Order of November 13, 2001, ''Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism'' (3 CFR, 2001 comp., p. 918, 66 FR 57833), for trials before military commissions of individuals subject to the President's Military Order. These procedures shall be implemented and construed so as to ensure that any such individual receives a full and fair trial before a military commission, as required by the President's Military Order. Unless otherwise directed by the Secretary of Defense, and except for supplemental procedures established pursuant to the President's Military Order or this part, the procedures prescribed herein and no others shall govern such trials.

### § 9.2 Establishment of Military Commissions.

In accordance with the President's Military Order, the Secretary of Defense or a designee (''Appointing Authority'') may issue orders from time to time appointing one or more military commissions to try individuals subject to the President's Military Order and appointing any other personnel necessary to facilitate such trials.

### § 9.3 Jurisdiction.

(a) *Over persons*. A military commission appointed under this part (''Commission'') shall have jurisdiction over only an individual or individuals (''the Accused''):

(1) Subject to the President's Military Order; and

(2) Alleged to have committed an offense in a charge that has been referred to the Commission by the Appointing Authority.

(b) *Over offenses*. Commissions established hereunder shall have jurisdiction over violations of the laws of war and all other offenses triable by military commission.

(c) *Maintaining integrity of commission proceedings*. The Commission may exercise jurisdiction over participants in its proceedings as necessary to preserve the integrity and order of the proceedings.

### § 9.4 Commission personnel.

(a) *Members*—(1) *Appointment*. The Appointing Authority shall appoint the members and the alternate member or members of each Commission. The alternate member or members shall attend all sessions of the Commission, but the absence of an alternate member shall not preclude the Commission from conducting proceedings. In case of incapacity, resignation, or removal of any member, an alternate member shall take the place of that member. Any vacancy among the members or alternate members occurring after a trial has begun may be filled by the Appointing Authority, but the substance of all prior proceedings and evidence taken in that case shall be made known to that new member or alternate member before the trial proceeds.

(2) *Number of members*. Each Commission shall consist of at least three but

no more than seven members, the number being determined by the Appointing Authority. For each such Commission, there shall also be one or two alternate members, the number being determined by the Appointing Authority.

(3) *Qualifications.* Each member and alternate member shall be a commissioned officer of the United States armed forces (''Military Officer''), including without limitation reserve personnel on active duty, National Guard personnel on active duty in Federal service, and retired personnel recalled to active duty. The Appointing Authority shall appoint members and alternate members determined to be competent to perform the duties involved. The Appointing Authority may remove members and alternate members for good cause.

(4) *Presiding Officer.* From among the members of each Commission, the Appointing Authority shall designate a Presiding Officer to preside over the proceedings of that Commission. The Presiding Officer shall be a Military Officer who is a judge advocate of any United States armed force.

(5) *Duties of the Presiding Officer.* (i) The Presiding Officer shall admit or exclude evidence at trial in accordance with section 6(d) of this part. The Presiding Officer shall have authority to close proceedings or portions of proceedings in accordance with §9.6(b)(3) of this part and for any other reason necessary for the conduct of a full and fair trial.

(ii) The Presiding Officer shall ensure that the discipline, dignity, and decorum of the proceedings are maintained, shall exercise control over the proceedings to ensure proper implementation of the President's Military Order and this part, and shall have authority to act upon any contempt or breach of Commission rules and procedures. Any attorney authorized to appear before a Commission who is thereafter found not to satisfy the requirements for eligibility or who fails to comply with laws, rules, regulations, or other orders applicable to the Commission proceedings or any other individual who violates such laws, rules, regulations, or orders may be disciplined as the Presiding Officer deems appropriate, including but not limited to revocation of eligibility to appear before that Commission. The Appointing Authority may further revoke that attorney's or any other person's eligibility to appear before any other Commission convened under this part.

(iii) The Presiding Officer shall ensure the expeditious conduct of the trial. In no circumstance shall accommodation of counsel be allowed to delay proceedings unreasonably.

(iv) The Presiding Officer shall certify all interlocutory questions, the disposition of which would effect a termination of proceedings with respect to a charge, for decision by the Appointing Authority. The Presiding Officer may certify other interlocutory questions to the Appointing Authority as the Presiding Officer deems appropriate.

(b) *Prosecution*—(1) *Office of the Chief Prosecutor.* The Chief Prosecutor shall be a judge advocate of any United States armed force, shall supervise the overall prosecution efforts under the President's Military Order, and shall ensure proper management of personnel and resources.

(2) *Prosecutors and Assistant Prosecutors.* (i) Consistent with any supplementary regulations or instructions issued under §9.7(a), the Chief Prosecutor shall detail a Prosecutor and, as appropriate, one or more Assistant Prosecutors to prepare charges and conduct the prosecution for each case before a Commission (''Prosecution''). Prosecutors and Assistant Prosecutors shall be:

(A) Military Officers who are judge advocates of any United States armed force, or

(B) Special trial counsel of the Department of Justice who may be made available by the Attorney General of the United States.

(ii) The duties of the Prosecution are:

(A) To prepare charges for approval and referral by the Appointing Authority;

(B) To conduct the prosecution before the Commission of all cases referred for trial; and

(C) To represent the interests of the Prosecution in any review process.

(c) *Defense*—(1) *Office of the Chief Defense Counsel.* The Chief Defense Counsel shall be a judge advocate of any

United States armed force, shall supervise the overall defense efforts under the President's Military Order, shall ensure proper management of personnel and resources, shall preclude conflicts of interest, and shall facilitate proper representation of all Accused.

(2) *Detailed Defense Counsel.* Consistent with any supplementary regulations or instructions issued under § 9.7(a), the Chief Defense Counsel shall detail one or more Military Officers who are judge advocates of any United States armed force to conduct the defense for each case before a Commission (''Detailed Defense Counsel''). The duties of the Detailed Defense Counsel are:

(i) To defend the Accused zealously within the bounds of the law without regard to personal opinion as to the guilt of the Accused; and

(ii) To represent the interests of the Accused in any review process as provided by this part.

(iii) *Choice of Counsel.* (A) The Accused may select a Military Officer who is a judge advocate of any United States armed force to replace the Accused's Detailed Defense Counsel, provided that Military Officer has been determined to be available in accordance with any applicable supplementary regulations or instructions issued under § 9.7(a). After such selection of a new Detailed Defense Counsel, the original Detailed Defense Counsel will be relieved of all duties with respect to that case. If requested by the Accused, however, the Appointing Authority may allow the original Detailed Defense Counsel to continue to assist in representation of the Accused as another Detailed Defense Counsel.

(B) The Accused may also retain the services of a civilian attorney of the Accused's own choosing and at no expense to the United States Government (''Civilian Defense Counsel''), provided that attorney:

(*1*) Is a United States citizen;

(*2*) Is admitted to the practice of law in a State, district, territory, or possession of the United States, or before a Federal court;

(*3*) Has not been the subject of any sanction or disciplinary action by any court, bar, or other competent governmental authority for relevant misconduct;

(*4*) Has been determined to be eligible for access to information classified at the level SECRET or higher under the authority of and in accordance with the procedures prescribed in DoD 5200.2–R[1]; and

(*5*) Has signed a written agreement to comply with all applicable regulations or instructions for counsel, including any rules of court for conduct during the course of proceedings. Civilian attorneys may be pre-qualified as members of the pool of available attorneys if, at the time of application, they meet the relevant criteria, or they may be qualified on an *ad hoc* basis after being requested by an Accused. Representation by Civilian Defense Counsel will not relieve Detailed Defense Counsel of the duties specified in paragraph (c)(2) of this section. The qualification of a Civilian Defense Counsel does not guarantee that person's presence at closed Commission proceedings or that person's access to any information protected under § 9.6(d)(5).

(4) *Continuity of representation.* The Accused must be represented at all relevant times by Detailed Defense Counsel. Detailed Defense Counsel and Civilian Defense Counsel shall be herein referred to collectively as ''Defense Counsel.'' The Accused and Defense Counsel shall be herein referred to collectively as ''the Defense.''

(d) *Other Personnel.* Other personnel, such as court reporters, interpreters, security personnel, bailiffs, and clerks may be detailed or employed by the Appointing Authority, as necessary.

### § 9.5 Procedures accorded the accused.

The following procedures shall apply with respect to the Accused:

(a) The Prosecution shall furnish to the Accused, sufficiently in advance of trial to prepare a defense, a copy of the charges in English and, if appropriate, in another language that the Accused understands.

(b) The Accused shall be presumed innocent until proven guilty.

(c) A Commission member shall vote for a finding of Guilty as to an offense if and only if that member is convinced

[1] Available from *www.ditc.mil/whs/directives.*

beyond a reasonable doubt, based on the evidence admitted at trial, that the Accused is guilty of the offense.

(d) At least one Detailed Defense Counsel shall be made available to the Accused sufficiently in advance of trial to prepare a defense and until any findings and sentence become final in accordance with §9.6(h)(2).

(e) The Prosecution shall provide the Defense with access to evidence the Prosecution intends to introduce at trial and with access to evidence known to the Prosecution that tends to exculpate the Accused. Such access shall be consistent with §9.6(d)(5) and subject to §9.9.

(f) The Accused shall not be required to testify during trial. A Commission shall draw no adverse inference from an Accused's decision not to testify. This subsection shall not preclude admission of evidence of prior statements or conduct of the Accused.

(g) If the Accused so elects, the Accused may testify at trial on the Accused's own behalf and shall then be subject to cross-examination.

(h) The Accused may obtain witnesses and documents for the Accused's defense, to the extent necessary and reasonably available as determined by the Presiding Officer. Such access shall be consistent with the requirements of §9.6(d)(5) and subject to §9.9. The Appointing Authority shall order that such investigative or other resources be made available to the Defense as the Appointing Authority deems necessary for a full and fair trial.

(i) The Accused may have Defense Counsel present evidence at trial in the Accused's defense and cross-examine each witness presented by the Prosecution who appears before the Commission.

(j) The Prosecution shall ensure that the substance of the charges, the proceedings, and any documentary evidence are provided in English and, if appropriate, in another language that the Accused understands. The Appointing Authority may appoint one or more interpreters to assist the Defense, as necessary.

(k) The Accused may be present at every stage of the trial before the Commission, consistent with §9.6(b)(3), unless the Accused engages in disruptive conduct that justifies exclusion by the Presiding Officer. Detailed Defense Counsel may not be excluded from any trial proceeding or portion thereof.

(l) Except by order of the Commission for good cause shown, the Prosecution shall provide the Defense with access before sentencing proceedings to evidence the Prosecution intends to present in such proceedings. Such access shall be consistent with §9.6(d)(5) of this part and subject to §9.9.

(m) The Accused may make a statement during sentencing proceedings.

(n) The Accused may have Defense Counsel submit evidence to the Commission during sentencing proceedings.

(o) The Accused shall be afforded a trial open to the public (except proceedings closed by the Presiding Officer), consistent with §9.6(b).

(p) The Accused shall not again be tried by any Commission for a charge once a Commission's finding on that charge becomes final in accordance with §9.6(h)(2).

### §9.6 Conduct of the trial.

(a) *Pretrial procedures*—(1) Preparation of the Charges. The Prosecution shall prepare charges for approval by the Appointing Authority, as provided in §9.4(b)(2)(i).

(2) *Referral to the Commission*. The Appointing Authority may approve and refer for trial any charge against an individual or individuals within the jurisdiction of a Commission in accordance with §9.3(a) and alleging an offense within the jurisdiction of a Commission in accordance with §9.3(b).

(3) *Notification of the accused*. The Prosecution shall provide copies of the charges approved by the Appointing Authority to the Accused and Defense Counsel. The Prosecution also shall submit the charges approved by the Appointing Authority to the Presiding Officer of the Commission to which they were referred.

(4) *Plea Agreements*. The Accused, through Defense Counsel, and the Prosecution may submit for approval to the Appointing Authority a plea agreement mandating a sentence limitation or any other provision in exchange for an agreement to plead guilty, or any other consideration. Any agreement to plead

guilty must include a written stipulation of fact, signed by the Accused, that confirms the guilt of the Accused and the voluntary and informed nature of the plea of guilty. If the Appointing Authority approves the plea agreement, the Commission will, after determining the voluntary and informed nature of the plea agreement, admit the plea agreement and stipulation into evidence and be bound to adjudge findings and a sentence pursuant to that plea agreement.

(5) *Issuance and service of process; obtaining evidence.* (i) The Commission shall have power to:

(A) Summon witnesses to attend trial and testify;

(B) Administer oaths or affirmations to witnesses and other persons and to question witnesses;

(C) Require the production of documents and other evidentiary material; and

(D) Designate special commissioners to take evidence.

(ii) The Presiding Officer shall exercise these powers on behalf of the Commission at the Presiding Officer's own initiative, or at the request of the Prosecution or the Defense, as necessary to ensure a full and fair trial in accordance with the President's Military Order and this part. The Commission shall issue its process in the name of the Department of Defense over the signature of the Presiding Officer. Such process shall be served as directed by the Presiding Officer in a manner calculated to give reasonable notice to persons required to take action in accordance with that process.

(b) *Duties of the Commission during trial.* The Commission shall:

(1) Provide a full and fair trial.

(2) Proceed impartially and expeditiously, strictly confining the proceedings to a full and fair trial of the charges, excluding irrelevant evidence, and preventing any unnecessary interference or delay.

(3) Hold open proceedings except where otherwise decided by the Appointing Authority or the Presiding Officer in accordance with the President's Military Order and this part. Grounds for closure include the protection of information classified or classifiable under Executive Order 12958; information protected by law or rule from unauthorized disclosure; the physical safety of participants in Commission proceedings, including prospective witnesses; intelligence and law enforcement sources, methods, or activities; and other national security interests. The Presiding Officer may decide to close all or part of a proceeding on the Presiding Officer's own initiative or based upon a presentation, including an *ex parte, in camera* presentation by either the Prosecution or the Defense. A decision to close a proceeding or portion thereof may include a decision to exclude the Accused, Civilian Defense Counsel, or any other person, but Detailed Defense Counsel may not be excluded from any trial proceeding or portion thereof. Except with the prior authorization of the Presiding Officer and subject to section 9 of this part, Defense Counsel may not disclose any information presented during a closed session to individuals excluded from such proceeding or part thereof. Open proceedings may include, at the discretion of the Appointing Authority, attendance by the public and accredited press, and public release of transcripts at the appropriate time. Proceedings should be open to the maximum extent practicable. Photography, video, or audio broadcasting, or recording of or at Commission proceedings shall be prohibited, except photography, video, and audio recording by the Commission pursuant to the direction of the Presiding Officer as necessary for preservation of the record of trial.

(4) Hold each session at such time and place as may be directed by the Appointing Authority. Members of the Commission may meet in closed conference at any time.

(5) As soon as practicable at the conclusion of a trial, transmit an authenticated copy of the record of trial to the Appointing Authority.

(c) *Oaths.* (1) Members of a Commission, all Prosecutors, all Defense Counsel, all court reporters, all security personnel, and all interpreters shall take an oath to perform their duties faithfully.

(2) Each witness appearing before a Commission shall be examined under oath, as provided in paragraph (d)(2)(ii) of this section.

(3) An oath includes an affirmation. Any formulation that appeals to the conscience of the person to whom the oath is administered and that binds that person to speak the truth, or, in the case of one other than a witness, properly to perform certain duties, is sufficient.

(d) *Evidence*—(1) *Admissibility*. Evidence shall be admitted if, in the opinion of the Presiding Officer (or instead, if any other member of the Commission so requests at the time the Presiding Officer renders that opinion, the opinion of the Commission rendered at that time by a majority of the Commission), the evidence would have probative value to a reasonable person.

(2) *Witnesses*—(i) *Production of witnesses*. The Prosecution or the Defense may request that the Commission hear the testimony of any person, and such testimony shall be received if found to be admissible and not cumulative. The Commission may also summon and hear witnesses on its own initiative. The Commission may permit the testimony of witnesses by telephone, audiovisual means, or other means; however, the Commission shall consider the ability to test the veracity of that testimony in evaluating the weight to be given to the testimony of the witness.

(ii) *Testimony*. Testimony of witnesses shall be given under oath or affirmation. The Commission may still hear a witness who refuses to swear an oath or make a solemn undertaking; however, the Commission shall consider the refusal to swear an oath or give an affirmation in evaluating the weight to be given to the testimony of the witness.

(iii) *Examination of witnesses*. A witness who testifies before the Commission is subject to both direct examination and cross-examination. The Presiding Officer shall maintain order in the proceedings and shall not permit badgering of witnesses or questions that are not material to the issues before the Commission. Members of the Commission may question witnesses at any time.

(iv) *Protection of witnesses*. The Presiding Officer shall consider the safety of witnesses and others, as well as the safeguarding of Protected Information as defined in paragraph (d)(5)(i) of this section, in determining the appropriate methods of receiving testimony and evidence. The Presiding Officer may hear any presentation by the Prosecution or the Defense, including an *ex parte*, *in camera* presentation, regarding the safety of potential witnesses before determining the ways in which witnesses and evidence will be protected. The Presiding Officer may authorize any methods appropriate for the protection of witnesses and evidence. Such methods may include, but are not limited to: testimony by telephone, audiovisual means, or other electronic means; closure of the proceedings; introduction of prepared declassified summaries of evidence; and the use of pseudonyms.

(3) *Other evidence*. Subject to the requirements of paragraph (d)(1) of this section concerning admissibility, the Commission may consider any other evidence including, but not limited to, testimony from prior trials and proceedings, sworn or unsworn written statements, physical evidence, or scientific or other reports.

(4) *Notice*. The Commission may, after affording the Prosecution and the Defense an opportunity to be heard, take conclusive notice of facts that are not subject to reasonable dispute either because they are generally known or are capable of determination by resort to sources that cannot reasonably be contested.

(5) *Protection of Information*—(i) *Protective Order*. The Presiding Officer may issue protective orders as necessary to carry out the Military Order and this part, including to safeguard ''Protected Information,'' which includes:

(A) Information classified or classifiable pursuant to Executive Order 12958;

(B) Information protected by law or rule from unauthorized disclosure;

(C) Information the disclosure of which may endanger the physical safety of participants in Commission proceedings, including prospective witnesses;

(D) Information concerning intelligence and law enforcement sources, methods, or activities; or

(E) Information concerning other national security interests. As soon as practicable, counsel for either side will

notify the Presiding Officer of any intent to offer evidence involving Protected Information.

(ii) *Limited disclosure.* The Presiding Officer, upon motion of the Prosecution or *sua sponte*, shall, as necessary to protect the interests of the United States and consistent with § 9.9, direct:

(A) The deletion of specified items of Protected Information from documents to be made available to the Accused, Detailed Defense Counsel, or Civilian Defense Counsel;

(B) The substitution of a portion or summary of the information for such Protected Information; or

(C) The substitution of a statement of the relevant facts that the Protected Information would tend to prove. The Prosecution's motion and any materials submitted in support thereof or in response thereto shall, upon request of the Prosecution, be considered by the Presiding Officer *ex parte, in camera,* but no Protected Information shall be admitted into evidence for consideration by the Commission if not presented to Detailed Defense Counsel.

(iii) *Closure of proceedings.* The Presiding Officer may direct the closure of proceedings in accordance with paragraph (b)(3) of this section.

(iv) *Protected information as part of the record of trial.* All exhibits admitted as evidence but containing Protected Information shall be sealed and annexed to the record of trial. Additionally, any Protected Information not admitted as evidence but reviewed *in camera* and subsequently withheld from the Defense over Defense objection shall, with the associated motions and responses and any materials submitted in support thereof, be sealed and annexed to the record of trial as additional exhibits. Such sealed material shall be made available to reviewing authorities in closed proceedings.

(e) *Proceedings during trial.* The proceedings at each trial will be conducted substantially as follows, unless modified by the Presiding Officer to suit the particular circumstances:

(1) Each charge will be read, or its substance communicated, in the presence of the Accused and the Commission.

(2) The Presiding Officer shall ask each Accused whether the Accused pleads ''Guilty'' or ''Not Guilty.'' Should the Accused refuse to enter a plea, the Presiding Officer shall enter a plea of ''Not Guilty'' on the Accused's behalf. If the plea to an offense is ''Guilty,'' the Presiding Officer shall enter a finding of Guilty on that offense after conducting sufficient inquiry to form an opinion that the plea is voluntary and informed. Any plea of Guilty that is not determined to be voluntary and informed shall be changed to a plea of Not Guilty. Plea proceedings shall then continue as to the remaining charges. If a plea of ''Guilty'' is made on all charges, the Commission shall proceed to sentencing proceedings; if not, the Commission shall proceed to trial as to the charges for which a ''Not Guilty'' plea has been entered.

(3) The Prosecution shall make its opening statement.

(4) The witnesses and other evidence for the Prosecution shall be heard or received.

(5) The Defense may make an opening statement after the Prosecution's opening statement or prior to presenting its case.

(6) The witnesses and other evidence for the Defense shall be heard or received.

(7) Thereafter, the Prosecution and the Defense may introduce evidence in rebuttal and surrebuttal.

(8) The Prosecution shall present argument to the Commission. Defense Counsel shall be permitted to present argument in response, and then the Prosecution may reply in rebuttal.

(9) After the members of the Commission deliberate and vote on findings in closed conference, the Presiding Officer shall announce the Commission's findings in the presence of the Commission, the Prosecution, the Accused, and Defense Counsel. The individual votes of the members of the Commission shall not be disclosed.

(10) In the event a finding of Guilty is entered for an offense, the Prosecution and the Defense may present information to aid the Commission in determining an appropriate sentence. The Accused may testify and shall be subject to cross-examination regarding any such testimony.

(11) The Prosecution and, thereafter, the Defense shall present argument to the Commission regarding sentencing.

(12) After the members of the Commission deliberate and vote on a sentence in closed conference, the Presiding Officer shall announce the Commission's sentence in the presence of the Commission, the Prosecution, the Accused, and Defense Counsel. The individual votes of the members of the Commission shall not be disclosed.

(f) *Voting*. Members of the Commission shall deliberate and vote in closed conference. A Commission member shall vote for a finding of Guilty as to an offense if and only if that member is convinced beyond a reasonable doubt, based on the evidence admitted at trial, that the Accused is guilty of the offense. An affirmative vote of two-thirds of the members is required for a finding of Guilty. When appropriate, the Commission may adjust a charged offense by exceptions and substitutions of language that do not substantially change the nature of the offense or increase its seriousness, or it may vote to convict of a lesser-included offense. An affirmative vote of two-thirds of the members is required to determine a sentence, except that a sentence of death requires a unanimous, affirmative vote of all of the members. Votes on findings and sentences shall be taken by secret, written ballot.

(g) *Sentence*. Upon conviction of an Accused, the Commission shall impose a sentence that is appropriate to the offense or offenses for which there was a finding of Guilty, which sentence may include death, imprisonment for life or for any lesser term, payment of a fine or restitution, or such other lawful punishment or condition of punishment as the Commission shall determine to be proper. Only a Commission of seven members may sentence an Accused to death. A Commission may (subject to rights of third parties) order confiscation of any property of a convicted Accused, deprive that Accused of any stolen property, or order the delivery of such property to the United States for disposition.

(h) *Post-trial procedures*—(1) *Record of Trial*. Each Commission shall make a verbatim transcript of its proceedings, apart from all Commission deliberations, and preserve all evidence admitted in the trial (including any sentencing proceedings) of each case brought before it, which shall constitute the record of trial. The court reporter shall prepare the official record of trial and submit it to the Presiding Officer for authentication upon completion. The Presiding Officer shall transmit the authenticated record of trial to the Appointing Authority. If the Secretary of Defense is serving as the Appointing Authority, the record shall be transmitted to the Review Panel constituted under paragraph (h)(4) of this section.

(2) *Finality of findings and sentence*. A Commission finding as to a charge and any sentence of a Commission becomes final when the President or, if designated by the President, the Secretary of Defense makes a final decision thereon pursuant to section 4(c)(8) of the President's Military Order and in accordance with paragraph (h)(6) of this section. An authenticated finding of Not Guilty as to a charge shall not be changed to a finding of Guilty. Any sentence made final by action of the President or the Secretary of Defense shall be carried out promptly. Adjudged confinement shall begin immediately following the trial.

(3) *Review by the Appointing Authority*. If the Secretary of Defense is not the Appointing Authority, the Appointing Authority shall promptly perform an administrative review of the record of trial. If satisfied that the proceedings of the Commission were administratively complete, the Appointing Authority shall transmit the record of trial to the Review Panel constituted under paragraph (h)(4) of this section. If not so satisfied, the Appointing Authority shall return the case for any necessary supplementary proceedings.

(4) *Review Panel*. The Secretary of Defense shall designate a Review Panel consisting of three Military Officers, which may include civilians commissioned pursuant to section 603 of title 10, United States Code. At least one member of each Review Panel shall have experience as a judge. The Review Panel shall review the record of trial and, in its discretion, any written submissions from the Prosecution and the Defense and shall deliberate in closed

conference. The Review Panel shall disregard any variance from procedures specified in this part or elsewhere that would not materially have affected the outcome of the trial before the Commission. Within thirty days after receipt of the record of trial, the Review Panel shall either:

(i) Forward the case to the Secretary of Defense with a recommendation as to disposition, or

(ii) Return the case to the Appointing Authority for further proceedings, provided that a majority of the Review Panel has formed a definite and firm conviction that a material error of law occurred.

(5) *Review by the Secretary of Defense.* The Secretary of Defense shall review the record of trial and the recommendation of the Review Panel and either return the case for further proceedings or, unless making the final decision pursuant to a Presidential designation under section 4(c)(8) of the President's Military Order, forward it to the President with a recommendation as to disposition.

(6) *Final decision.* After review by the Secretary of Defense, the record of trial and all recommendations will be forwarded to the President for review and final decision (unless the President has designated the Secretary of Defense to perform this function). If the President has so designated the Secretary of Defense, the Secretary may approve or disapprove findings or change a finding of Guilty to a finding of Guilty to a lesser-included offense, or mitigate, commute, defer, or suspend the sentence imposed or any portion thereof. If the Secretary of Defense is authorized to render the final decision, the review of the Secretary of Defense under paragraph (h)(5) of this section shall constitute the final decision.

### § 9.7 Regulations.

(a) *Supplementary regulations and instructions.* The Appointing Authority shall, subject to approval of the General Counsel of the Department of Defense if the Appointing Authority is not the Secretary of Defense, publish such further regulations consistent with the President's Military Order and this part as are necessary or appropriate for the conduct of proceedings by Commissions under the President's Military Order. The General Counsel shall issue such instructions consistent with the President's Military Order and this part as the General Counsel deems necessary to facilitate the conduct of proceedings by such Commissions, including those governing the establishment of Commission-related offices and performance evaluation and reporting relationships.

(b) *Construction.* In the event of any inconsistency between the President's Military Order and this part, including any supplementary regulations or instructions issued under paragraph (a) of this section, the provisions of the President's Military Order shall govern. In the event of any inconsistency between this part and any regulations or instructions issued under paragraph (a) of this section, the provisions of this part shall govern.

### § 9.8 Authority.

Nothing in this part shall be construed to limit in any way the authority of the President as Commander in Chief of the Armed Forces or the power of the President to grant reprieves and pardons. Nothing in this part shall affect the authority to constitute military commissions for a purpose not governed by the President's Military Order.

### § 9.9 Protection of State secrets.

Nothing in this part shall be construed to authorize disclosure of state secrets to any person not authorized to receive them.

### § 9.10 Other.

This part is not intended to and does not create any right, benefit, or privilege, substantive or procedural, enforceable by any party, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person. No provision in this part shall be construed to be a requirement of the United States Constitution. Section and subsection captions in this document are for convenience only and shall not be used in construing the requirements of this part. Failure to meet a time period specified in this

part, or supplementary regulations or instructions issued under § 9.7(a), shall not create a right to relief for the Accused or any other person. DoD Directive 5025.1[2] shall not apply to this part or any supplementary regulations or instructions issued under § 9.7(a).

### § 9.11 Amendment.

The Secretary of Defense may amend this part from time to time.

### § 9.12 Delegation.

The authority of the Secretary of Defense to make requests for assistance under section 5 of the President's Military Order is delegated to the General Counsel of the Department of Defense. The Executive Secretary of the Department of Defense shall provide such assistance to the General Counsel as the General Counsel determines necessary for this purpose.

## PART 10—MILITARY COMMISSION INSTRUCTIONS

Sec.
10.1 Purpose.
10.2 Authority.
10.3 Applicability.
10.4 Policies and procedures.
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10.7 Reservation of authority.
10.8 Amendment.

AUTHORITY: 10 U.S.C. 113Id) and 140(b).

SOURCE: 68 FR 39380, July 1, 2003, unless otherwise noted.

### § 10.1 Purpose.

This part establishes policies for the issuance and interpretation of Military Commission Instructions promulgated pursuant to 32 CFR part 9, and Military Order of November 13, 2001, ''Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,'' (3 CFR, 2001 comp., p. 918, 66 FR 57833).

### § 10.2 Authority.

This part is issued pursuant to 32 CFR 9.7(a) and in accordance with 10 U.S.C. 113(d) and 140(b).

[2] Available from *www.ditc.mil/whs/directives*.

### § 10.3 Applicability.

This part, and, unless stated otherwise, all other Military Commission Instructions apply throughout the Department of Defense, including to the Office of the Secretary of Defense, the Military Departments, the Chairman and Vice 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 Department of Defense Field Activities, and all other organizational entities within the Department of Defense, to any special trial counsel of the Department of Justice who may be made available by the Attorney General of the United States to serve as a prosecutor in trials before military commissions pursuant to 32 CFR 9.4(b)(2), to any civilian attorney who seeks qualification as a member of the pool of qualified Civilian Defense Counsel authorized in 32 CFR 9.4(c)(3)(ii), and to any attorney who has been qualified as a member of that pool.

### § 10.4 Policies and procedures.

(a) *Promulgation*. Military Commission Instructions will be issued by the General Counsel of the Department of Defense (hereinafter General Counsel). Each Instruction will issue over the signature of the General Counsel and, unless otherwise specified therein, shall take effect upon the signature of the General Counsel. Instructions will be numbered in sequence.

(b) *Professional responsibility*. Compliance with these Instructions shall be deemed a professional responsibility obligation for the practice of law within the Department of Defense.

(c) *Compliance breaches*. Failure to adhere to these Instructions or any other failure to comply with any rule, regulation, or Instruction applicable to trials by military commission convened pursuant to 32 CFR part 9, and Military Order of November 13, 2001, ''Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,'' may be subject to appropriate action by the Appointing Authority, the General Counsel of the

Department of Defense, or the Presiding Officer of a military commission. Such action may include permanently barring an individual from participating in any military commission proceeding convened pursuant to 32 CFR part 9, and Military Order of November 13, 2001, ''Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,'' punitive measures imposed under 10 U.S.C. 898, and any other lawful sanction.

### § 10.5 Construction.

Military Commission Instructions shall be construed in a manner consistent with 32 CFR part 9, and Military Order of November 13, 2001, ''Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism.'' Nothing in these Military Commission Instructions applies with respect to the trial of crimes by military commissions convened under other authority. In the event of an inconsistency, the provisions of 32 CFR part 9, and Military Order of November 13, 2001, ''Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,'' shall govern as provided in Section 7(B) of Military Order of November 13, 2001, ''Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism.'' Pronouns referring to the male gender shall be construed as applying to both male and female.

### § 10.6 Non-creation of right.

Neither this part nor any Military Commission Instruction issued hereafter, is intended to and does not create any right, benefit, privilege, substantive or procedural, enforceable by any party, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person. Alleged noncompliance with an Instruction does not, of itself, constitute error, give rise to judicial review, or establish a right to relief for the Accused or any other person.

### § 10.7 Reservation of authority.

Neither this part nor any Military Commission Instruction issued hereafter shall be construed to limit, impair, or otherwise affect any authority granted by the Constitution or laws of the United States or Department of Defense regulation or directive.

### § 10.8 Amendment.

The General Counsel may issue, supplement, amend, or revoke any Military Commission Instruction at any time.

## PART 11—CRIMES AND ELEMENTS FOR TRIALS BY MILITARY COMMISSION

Sec.
11.1 Purpose.
11.2 Authority.
11.3 General.
11.4 Applicable principles of law.
11.5 Definitions.
11.6 Crimes and elements.

AUTHORITY: 10 U.S.C. 821.

SOURCE: 68 FR 39381, July 1, 2003, unless otherwise noted.

### § 11.1 Purpose.

This part provides guidance with respect to crimes that may be tried by military commissions established pursuant to 32 CFR part 9, and Military Order of November 13, 2001, ''Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,'' (3 CFR, 2001 comp., p. 918, 66 FR 57833) and enumerates the elements of those crimes.

### § 11.2 Authority.

This part is issued pursuant to 32 CFR 9.7(a) and in accordance with Military Order of November 13, 2001, ''Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,'' (66 FR 57833) and 10 U.S.C. 113(d), 140(b), and 821. The provisions of 32 CFR part 10 are applicable to this part.

### § 11.3 General.

(a) *Background*. The following crimes and elements thereof are intended for use by military commissions established pursuant to 32 CFR part 9, and Military Order of November 13, 2001, ''Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,'' the jurisdiction of which extends to offenses or offenders that by statute or the law of armed

conflict may be tried by military commission as limited by Military Order of November 13, 2001, ''Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism.'' No offense is cognizable in a trial by military commission if that offense did not exist prior to the conduct in question. These crimes and elements derive from the law of armed conflict, a body of law that is sometimes referred to as the law of war. They constitute violations of the law of armed conflict or offenses that, consistent with that body of law, are triable by military commission. Because this document is declarative of existing law, it does not preclude trial for crimes that occurred prior to its effective date.

(b) *Effect of other laws.* No conclusion regarding the applicability or persuasive authority of other bodies of law should be drawn solely from the presence, absence, or similarity of particular language in this part as compared to other articulations of law.

(c) *Non-exclusivity.* This part does not contain a comprehensive list of crimes triable by military commission. It is intended to be illustrative of applicable principles of the common law of war but not to provide an exclusive enumeration of the punishable acts recognized as such by that law. The absence of a particular offense from the corpus of those enumerated herein does not preclude trial for that offense.

**§ 11.4 Applicable principles of law.**

(a) *General intent.* All actions taken by the Accused that are necessary for completion of a crime must be performed with general intent. This intent is not listed as a separate element. When the mens rea required for culpability to attach involves an intent that a particular consequence occur, or some other specific intent, an intent element is included. The necessary relationship between such intent element and the conduct constituting the actus reus is not articulated for each set of elements, but is presumed; a nexus between the two is necessary.

(b) *The element of wrongfulness and defenses.* Conduct must be wrongful to constitute one of the offenses enumerated herein or any other offense triable by military commission. Conduct is wrongful if it is done without justification or excuse cognizable under applicable law. The element of wrongfulness (or the absence of lawful justification or excuse), which may be required under the customary law of armed conflict, is not repeated in the elements of crimes in § 11.6. Conduct satisfying the elements found herein shall be inferred to be wrongful in the absence of evidence to the contrary. Similarly, this part does not enunciate defenses that may apply for specific offenses, though an Accused is entitled to raise any defense available under the law of armed conflict. Defenses potentially available to an Accused under the law of armed conflict, such as self-defense, mistake of fact, and duress, may be applicable to certain offenses subject to trial by military commission. In the absence of evidence to the contrary, defenses in individual cases shall be presumed not to apply. The burden of going forward with evidence of lawful justification or excuse or any applicable defense shall be upon the Accused. With respect to the issue of combatant immunity raised by the specific enumeration of an element requiring the absence thereof, the prosecution must affirmatively prove that element regardless of whether the issue is raised by the defense. Once an applicable defense or an issue of lawful justification or lawful excuse is fairly raised by the evidence presented, except for the defense of lack of mental responsibility, the burden is on the prosecution to establish beyond a reasonable doubt that the conduct was wrongful or that the defense does not apply. With respect to the defense of lack of mental responsibility, the Accused has the burden of proving by clear and convincing evidence that, as a result of a severe mental disease or defect, the Accused was unable to appreciate the nature and quality of the wrongfulness of the Accused's acts. As provided in 32 CFR 9.5(c), the prosecution bears the burden of establishing the Accused's guilt beyond a reasonable doubt in all cases tried by a military commission. Each element of an offense enumerated herein must be proven beyond a reasonable doubt.

(c) *Statute of limitations*. Violations of the laws of war listed herein are not subject to any statute of limitations.

**§ 11.5 Definitions.**

(a) *Combatant immunity*. Under the law of armed conflict, only a lawful combatant enjoys ''combatant immunity'' or ''belligerent privilege'' for the lawful conduct of hostilities during armed conflict.

(b) *Enemy*. ''Enemy'' includes any entity with which the United States or allied forces may be engaged in armed conflict, or which is preparing to attack the United States. It is not limited to foreign nations, or foreign military organizations or members thereof. ''Enemy'' specifically includes any organization of terrorists with international reach.

(c) *In the context of and was associated with armed conflict*. Elements containing this language require a nexus between the conduct and armed hostilities. Such nexus could involve, but is not limited to, time, location, or purpose of the conduct in relation to the armed hostilities. The existence of such factors, however, may not satisfy the necessary nexus (*e.g.*, murder committed between members of the same armed force for reasons of personal gain unrelated to the conflict, even if temporally and geographically associated with armed conflict, is not ''in the context of'' the armed conflict). The focus of this element is not the nature or characterization of the conflict, but the nexus to it. This element does not require a declaration of war, ongoing mutual hostilities, or confrontation involving a regular national armed force. A single hostile act or attempted act may provide sufficient basis for the nexus so long as its magnitude or severity rises to the level of an ''armed attack'' or an ''act of war,'' or the number, power, stated intent or organization of the force with which the actor is associated is such that the act or attempted act is tantamount to an attack by an armed force. Similarly, conduct undertaken or organized with knowledge or intent that it initiate or contribute to such hostile act or hostilities would satisfy the nexus requirement.

(d) *Military Objective*. ''Military objectives'' are those potential targets during an armed conflict which, by their nature, location, purpose, or use, effectively contribute to the opposing force's war-fighting or war-sustaining capability and whose total or partial destruction, capture, or neutralization would constitute a military advantage to the attacker under the circumstances at the time of the attack.

(e) *Object of the attack*. ''Object of the attack'' refers to the person, place, or thing intentionally targeted. In this regard, the term includes neither collateral damage nor incidental injury or death.

(f) *Protected property*. ''Protected property'' refers to property specifically protected by the law of armed conflict such as buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals, or places where the sick and wounded are collected, provided they are not being used for military purposes or are not otherwise military objectives. Such property would include objects properly identified by one of the distinctive emblems of the Geneva Conventions but does not include all civilian property.

(g) *Protected under the law of war*. The person or object in question is expressly ''protected'' under one or more of the Geneva Conventions of 1949 or, to the extent applicable, customary international law. The term does not refer to all who enjoy some form of protection as a consequence of compliance with international law, but those who are expressly designated as such by the applicable law of armed conflict. For example, persons who either are *hors de combat* or medical or religious personnel taking no active part in hostilities are expressly protected, but other civilians may not be.

(h) *Should have known*. The facts and circumstances were such that a reasonable person in the Accused's position would have had the relevant knowledge or awareness.

**§ 11.6 Crimes and elements.**

(a) *Substantive offenses—war crimes*. The following enumerated offenses, if applicable, should be charged in separate counts. Elements are drafted to

reflect conduct of the perpetrator. Each element need not be specifically charged.

(1) *Willful killing of protected persons*—(i) *Elements*. (A) The accused killed one or more persons;

(B) The accused intended to kill such person or persons;

(C) Such person or persons were protected under the law of war;

(D) The accused knew or should have known of the factual circumstances that established that protected status; and

(E) The killing took place in the context of and was associated with armed conflict.

(ii) *Comments*. The intent required for this offense precludes its applicability with regard to collateral damage or injury incident to a lawful attack.

(2) *Attacking civilians*—(i) *Elements*. (A) The accused engaged in an attack;

(B) The object of the attack was a civilian population as such or individual civilians not taking direct or active part in hostilities;

(C) The accused intended the civilian population as such or individual civilians not taking direct or active part in hostilities to be an object of the attack; and

(D) The attack took place in the context of and was associated with armed conflict.

(ii) *Comments*. The intent required for this offense precludes its applicability with regard to collateral damage or injury incident to a lawful attack.

(3) *Attacking civilian objects*—(i) *Elements*. (A) The accused engaged in an attack;

(B) The object of the attack was civilian property, that is, property that was not a military objective;

(C) The accused intended such property to be an object of the attack;

(D) The accused knew or should have known that such property was not a military objective; and

(E) The attack took place in the context of and was associated with armed conflict.

(ii) *Comments*. The intent required for this offense precludes its applicability with regard to collateral damage or injury incident to a lawful attack.

(4) *Attacking Protected Property*—(i) *Elements*. (A) The accused engaged in an attack;

(B) The object of the attack was protected property;

(C) The accused intended such property to be an object of the attack;

(D) The accused knew or should have known of the factual circumstances that established that protected status; and

(E) The attack took place in the context of and was associated with armed conflict.

(ii) *Comments*. The intent required for this offense precludes its applicability with regard to collateral damage or injury incident to a lawful attack.

(5) *Pillaging*—(i) *Elements*. (A) The accused appropriated or seized certain property;

(B) The accused intended to appropriate or seize such property for private or personal use;

(C) The appropriation or seizure was without the consent of the owner of the property or other person with authority to permit such appropriation or seizure; and

(D) The appropriation or seizure took place in the context of and was associated with armed conflict.

(ii) *Comments*. As indicated by the use of the term ''private or personal use,'' legitimate captures or appropriations, or seizures justified by military necessity, cannot constitute the crime of pillaging.

(6) *Denying quarter*—(i) *Elements*. (A) The accused declared, ordered, or otherwise indicated that there shall be no survivors or surrender accepted;

(B) The accused thereby intended to threaten an adversary or to conduct hostilities such that there would be no survivors or surrender accepted;

(C) It was foreseeable that circumstances would be such that a practicable and reasonable ability to accept surrender would exist;

(D) The accused was in a position of effective command or control over the subordinate forces to which the declaration or order was directed; and

(E) The conduct took place in the context of and was associated with armed conflict.

(ii) *Comments*. Paragraph (a)(6)(i)(C) of this section precludes this offense

from being interpreted as limiting the application of lawful means or methods of warfare against enemy combatants. For example, a remotely delivered attack cannot give rise to this offense.

(7) *Taking Hostages*—(i) *Elements*. (A) The accused seized, detained, or otherwise held hostage one or more persons;

(B) The accused threatened to kill, injure, or continue to detain such person or persons;

(C) The accused intended to compel a State, an international organization, a natural or legal person, or a group of persons to act or refrain from acting as an explicit or implicit condition for the safety or release of such person or persons; and

(D) The conduct took place in the context of and was associated with armed conflict.

(ii) *Comments*. Consistent with §11.4(b), this offense cannot be committed by lawfully detaining enemy combatants or other individuals as authorized by the law of armed conflict.

(8) *Employing poison or analogous weapons*—(i) *Elements*. (A) The accused employed a substance or a weapon that releases a substance as a result of its employment;

(B) The substance was such that exposure thereto causes death or serious damage to health in the ordinary course of events, through its asphyxiating, poisonous, or bacteriological properties;

(C) The accused employed the substance or weapon with the intent of utilizing such asphyxiating, poisonous, or bacteriological properties as a method of warfare;

(D) The accused knew or should have known of the nature of the substance or weapon; and

(E) The conduct took place in the context of and was associated with armed conflict.

(ii) *Comments*. (A) The ''death or serious damage to health'' required by paragraph (a)(8)(i)(B) of this section must be a direct result of the substance's effect or effects on the human body (*e.g.*, asphyxiation caused by the depletion of atmospheric oxygen secondary to a chemical or other reaction would not give rise to this offense).

(B) The clause ''serious damage to health'' does not include temporary incapacitation or sensory irritation.

(C) The use of the ''substance or weapon'' at issue must be proscribed under the law of armed conflict. It may include chemical or biological agents.

(D) The specific intent element for this offense precludes liability for mere knowledge of potential collateral consequences (*e.g.*, mere knowledge of a secondary asphyxiating or toxic effect would be insufficient to complete the offense).

(9) *Using protected persons as shields*—(i) *Elements*. (A) The accused positioned, or took advantage of the location of, one or more civilians or persons protected under the law of war;

(B) The accused intended to use the civilian or protected nature of the person or persons to shield a military objective from attack or to shield, favor, or impede military operations; and

(C) The conduct took place in the context of and was associated with armed conflict.

(ii) [Reserved]

(10) *Using protected property as shields*—(i) *Elements*. (A) The accused positioned, or took advantage of the location of, civilian property or property protected under the law of war;

(B) The accused intended to shield a military objective from attack or to shield, favor, or impede military operations; and

(C) The conduct took place in the context of and was associated with armed conflict.

(ii) [Reserved]

(11) *Torture*—(i) *Elements*. (A) The accused inflicted severe physical or mental pain or suffering upon one or more persons;

(B) The accused intended to inflict such severe physical or mental pain or suffering;

(C) Such person or persons were in the custody or under the control of the accused; and

(D) The conduct took place in the context of and was associated with armed conflict.

(ii) *Comments*. (A) Consistent with §11.4(b), this offense does not include pain or suffering arising only from, inherent in, or incidental to, lawfully imposed punishments. This offense does

not include the incidental infliction of pain or suffering associated with the legitimate conduct of hostilities.

(B) Severe ''mental pain or suffering'' is the prolonged mental harm caused by or resulting from:

(*1*) The intentional infliction or threatened infliction of severe physical pain or suffering;

(*2*) The administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(*3*) The threat of imminent death; or

(*4*) The threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.

(C) ''Prolonged mental harm'' is a harm of some sustained duration, though not necessarily permanent in nature, such as a clinically identifiable mental disorder.

(D) Paragraph (a)(11)(i)(C) of this section does not require a particular formal relationship between the accused and the victim. Rather, it precludes prosecution for pain or suffering consequent to a lawful military attack.

(12) *Causing serious injury*—(i) *Elements*. (A) The accused caused serious injury to the body or health of one or more persons;

(B) The accused intended to inflict such serious injury;

(C) Such person or persons were in the custody or under the control of the accused; and

(D) The conduct took place in the context of and was associated with armed conflict.

(ii) *Comments*. ''Serious injury'' includes fractured or dislocated bones, deep cuts, torn members of the body, and serious damage to internal organs.

(13) *Mutilation or maiming*—(i) *Elements*. (A) The accused subjected one or more persons to mutilation, in particular by permanently disfiguring the person or persons, or by permanently disabling or removing an organ or appendage;

(B) The accused intended to subject such person or persons to such mutilation;

(C) The conduct caused death or seriously damaged or endangered the physical or mental health or appearance of such person or persons.

(D) The conduct was neither justified by the medical treatment of the person or persons concerned nor carried out in the interest of such person or persons;

(E) Such person or persons were in the custody or control of the accused; and

(F) The conduct took place in the context of and was associated with armed conflict.

(ii) [Reserved]

(14) *Use of treachery or perfidy*—(i) *Elements*. (A) The accused invited the confidence or belief of one or more persons that they were entitled to, or were obliged to accord, protection under the law of war;

(B) The accused intended to betray that confidence or belief;

(C) The accused killed, injured, or captured one or more persons;

(D) The accused made use of that confidence or belief in killing, injuring, or capturing such person or persons; and

(E) The conduct took place in the context of and was associated with armed conflict.

(ii) [Reserved]

(15) *Improper use of flag of truce*—(i) *Elements*. (A) The accused used a flag of truce;

(B) The accused made such use in order to feign an intention to negotiate, surrender, or otherwise to suspend hostilities when there was no such intention on the part of the accused; and

(C) The conduct took place in the context of and was associated with armed conflict.

(ii) [Reserved]

(16) *Improper use of protective emblems*—(i) *Elements*. (A) The accused used a protective emblem recognized by the law of armed conflict;

(B) The accused undertook such use for combatant purposes in a manner prohibited by the law of armed conflict;

(C) The accused knew or should have known of the prohibited nature of such use; and

(D) The conduct took place in the context of and was associated with armed conflict.

(ii) *Comments.* ''Combatant purposes,'' as used in paragraph (a)(16)(i)(B) of this section, means purposes directly related to hostilities and does not include medical, religious, or similar activities.

(17) *Degrading treatment of a dead body*—(i) *Elements.* (A) The accused degraded or otherwise violated the dignity of the body of a dead person;

(B) The accused intended to degrade or otherwise violate the dignity of such body;

(C) The severity of the degradation or other violation was of such degree as to be generally recognized as an outrage upon personal dignity; and

(D) The conduct took place in the context of and was associated with armed conflict.

(ii) *Comments.* Paragraph (a)(17)(i)(B) of this section precludes prosecution for actions justified by military necessity.

(18) *Rape*—(i) *Elements.* (A) The accused invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the accused with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body;

(B) The invasion was committed by force, threat of force or coercion, or was committed against a person incapable of giving consent; and

(C) The conduct took place in the context of and was associated with armed conflict.

(ii) *Comments.* (A) Paragraph (a)(18)(i)(B) of this section recognizes that consensual conduct does not give rise to this offense.

(B) It is understood that a person may be incapable of giving consent if affected by natural, induced, or age-related incapacity.

(C) The concept of ''invasion'' is linked to the inherent wrongfulness requirement for all offenses. In this case, for example, a legitimate body cavity search could not give rise to this offense.

(D) The concept of ''invasion'' is gender neutral.

(b) *Substantive offenses—other offenses triable by military commission.* The following enumerated offenses, if applicable, should be charged in separate counts. Elements are drafted to reflect conduct of the perpetrator. Each element need not be specifically charged.

(1) *Hijacking or hazarding a vessel or aircraft*—(i) *Elements.* (A) The accused seized, exercised control over, or endangered the safe navigation of a vessel or aircraft;

(B) The accused intended to so seize, exercise control over, or endanger such vessel or aircraft; and

(C) The conduct took place in the context of and was associated with armed conflict.

(ii) *Comments.* A seizure, exercise of control, or endangerment required by military necessity, or against a lawful military objective undertaken by military forces of a State in the exercise of their official duties, would not satisfy the wrongfulness requirement for this crime.

(2) *Terrorism*—(i) *Elements.* (A) The accused killed or inflicted bodily harm on one or more persons or destroyed property;

(B) The accused:

(*1*) Intended to kill or inflict bodily harm on one or more persons; or

(*2*) Intentionally engaged in an act that is inherently dangerous to another and evinces a wanton disregard of human life;

(C) The killing, harm or destruction was intended to intimidate or coerce a civilian population, or to influence the policy of a government by intimidation or coercion; and

(D) The killing, harm or destruction took place in the context of and was associated with armed conflict.

(ii) *Comments.* (A) Paragraph (b)(2)(i)(A) of this section includes the concept of causing death or bodily harm, even if indirectly.

(B) The requirement that the conduct be wrongful for this crime necessitates that the conduct establishing this offense not constitute an attack against a lawful military objective undertaken by military forces of a State in the exercise of their official duties.

(3) *Murder by an unprivileged belligerent*—(i) *Elements*. (A) The accused killed one or more persons;

(B) The accused:

(*1*) Intended to kill or inflict great bodily harm on such person or persons; or

(*2*) Intentionally engaged in an act that is inherently dangerous to another and evinces a wanton disregard of human life;

(C) The accused did not enjoy combatant immunity; and

(D) The killing took place in the context of and was associated with armed conflict.

(ii) *Comments*. (A) The term ''kill'' includes intentionally causing death, whether directly or indirectly.

(B) Unlike the crimes of willful killing or attacking civilians, in which the victim's status is a prerequisite to criminality, for this offense the victim's status is immaterial. Even an attack on a soldier would be a crime if the attacker did not enjoy ''belligerent privilege'' or ''combatant immunity.''

(4) *Destruction of property by an unprivileged belligerent*—(i) *Elements*. (A) The accused destroyed property;

(B) The property belonged to another person, and the destruction was without that person's consent;

(C) The accused intended to destroy such property;

(D) The accused did not enjoy combatant immunity; and

(E) The destruction took place in the context of and was associated with armed conflict.

(ii) [Reserved]

(5) *Aiding the enemy*—(i) *Elements*. (A) The accused aided the enemy;

(B) The accused intended to aid the enemy; and

(C) The conduct took place in the context of and was associated with armed conflict.

(ii) *Comments*. (A) Means of accomplishing paragraph (b)(5)(i)(A) of this section include, but are not limited to: providing arms, ammunition, supplies, money, other items or services to the enemy; harboring or protecting the enemy; or giving intelligence or other information to the enemy.

(B) The requirement that conduct be wrongful for this crime necessitates that the accused act without proper authority. For example, furnishing enemy combatants detained during hostilities with subsistence or quarters in accordance with applicable orders or policy is not aiding the enemy.

(C) The requirement that conduct be wrongful for this crime may necessitate that, in the case of a lawful belligerent, the accused owe allegiance or some duty to the United States of America or to an ally or coalition partner. For example, citizenship, resident alien status, or a contractual relationship in or with the United States or an ally or coalition partner is sufficient to satisfy this requirement so long as the relationship existed at a time relevant to the offense alleged.

(6) *Spying*—(i) *Elements*. (A) The accused collected or attempted to collect certain information;

(B) The accused intended to convey such information to the enemy;

(C) The accused, in collecting or attempting to collect the information, was lurking or acting clandestinely, while acting under false pretenses; and

(D) The conduct took place in the context of and was associated with armed conflict.

(ii) *Comments*. (A) Members of a military organization not wearing a disguise and others who carry out their missions openly are not spies, if, though they may have resorted to concealment, they have not acted under false pretenses.

(B) Related to the requirement that conduct be wrongful or without justification or excuse in this case is the fact that, consistent with the law of war, a lawful combatant who, after rejoining the armed force to which that combatant belongs, is subsequently captured, can not be punished for previous acts of espionage. His successful rejoining of his armed force constitutes a defense.

(7) *Perjury or false testimony*—(i) *Elements*. (A) The accused testified at a military commission, in proceedings ancillary to a military commission, or provided information in a writing executed under an oath to tell the truth or a declaration acknowledging the applicability of penalties of perjury in connection with such proceedings;

(B) Such testimony or information was material;

(C) Such testimony or information was false; and

(D) The accused knew such testimony or information to be false.

(ii) [Reserved]

(8) *Obstruction of justice related to military commissions*—(i) *Elements.* (A) The accused did an act;

(B) The accused intended to influence, impede, or otherwise obstruct the due administration of justice; and

(C) The accused did such act in the case of a certain person against whom the accused had reason to believe:

(*1*) There were or would be proceedings before a military commission; or

(*2*) There was an ongoing investigation of offenses triable by military commission.

(ii) [Reserved]

(c) *Other forms of liability and related offenses.* A person is criminally liable as a principal for a completed substantive offense if that person commits the offense (perpetrator), aids or abets the commission of the offense, solicits commission of the offense, or is otherwise responsible due to command responsibility. Such a person would be charged as a principal even if another individual more directly perpetrated the offense. In proving culpability, however, the below listed definitions and elements are applicable. Additionally, if a substantive offense was completed, a person may be criminally liable for the separate offense of accessory after the fact. If the substantive offense was not completed, a person may be criminally liable of the lesser-included offense of attempt or the separate offense of solicitation. Finally, regardless of whether the substantive offense was completed, a person may be criminally liable of the separate offense of conspiracy in addition to the substantive offense. Each element need not be specifically charged.

(1) *Aiding or abetting*—(i) *Elements.* (A) The accused committed an act that aided or abetted another person or entity in the commission of a substantive offense triable by military commission;

(B) Such other person or entity committed or attempted to commit the substantive offense; and

(C) The accused intended to or knew that the act would aid or abet such other person or entity in the commission of the substantive offense or an associated criminal purpose or enterprise.

(ii) *Comments.* (A) The term ''aided or abetted'' in paragraph (c)(1)(i)(A) of this section includes: assisting, encouraging, advising, instigating, counseling, ordering, or procuring another to commit a substantive offense; assisting, encouraging, advising, counseling, or ordering another in the commission of a substantive offense; and in any other way facilitating the commission of a substantive offense.

(B) In some circumstances, inaction may render one liable as an aider or abettor. If a person has a legal duty to prevent or thwart the commission of a substantive offense, but does not do so, that person may be considered to have aided or abetted the commission of the offense if such noninterference is intended to and does operate as an aid or encouragement to the actual perpetrator.

(C) An accused charged with aiding or abetting should be charged with the related substantive offense as a principal.

(2) *Solicitation*—(i) *Elements.* (A) The accused solicited, ordered, induced, or advised a certain person or persons to commit one or more substantive offenses triable by military commission; and

(B) The accused intended that the offense actually be committed.

(ii) *Comments.* (A) The offense is complete when a solicitation is made or advice is given with the specific wrongful intent to induce a person or persons to commit any offense triable by military commission. It is not necessary that the person or persons solicited, ordered, induced, advised, or assisted agree to or act upon the solicitation or advice. If the offense solicited is actually committed, however, the accused is liable under the law of armed conflict for the substantive offense. An accused should not be convicted of both solicitation and the substantive offense solicited if criminal liability for the substantive offense is based upon the solicitation.

(B) Solicitation may be by means other than speech or writing. Any act or conduct that reasonably may be

construed as a serious request, order, inducement, advice, or offer of assistance to commit any offense triable by military commission may constitute solicitation. It is not necessary that the accused act alone in the solicitation, order, inducement, advising, or assistance. The accused may act through other persons in committing this offense.

(C) An accused charged with solicitation of a completed substantive offense should be charged for the substantive offense as a principal. An accused charged with solicitation of an uncompleted offense should be charged for the separate offense of solicitation. Solicitation is not a lesser-included offense of the related substantive offense.

(3) *Command/superior responsibility—perpetrating*—(i) *Elements*. (A) The accused had command and control, or effective authority and control, over one or more subordinates;

(B) One or more of the accused's subordinates committed, attempted to commit, conspired to commit, solicited to commit, or aided or abetted the commission of one or more substantive offenses triable by military commission;

(C) The accused either knew or should have known that the subordinate or subordinates were committing, attempting to commit, conspiring to commit, soliciting, or aiding or abetting such offense or offenses; and

(D) The accused failed to take all necessary and reasonable measures within his power to prevent or repress the commission of the offense or offenses.

(ii) *Comments*. (A) The phrase ''effective authority and control'' in paragraph (c)(3)(i)(A) of this section includes the concept of relative authority over the subject matter or activities associated with the perpetrator's conduct. This may be relevant to a civilian superior who should not be held responsible for the behavior of subordinates involved in activities that have no relationship to such superior's sphere of authority. Subject matter authority need not be demonstrated for command responsibility as it applies to a military commander.

(B) A commander or other military or civilian superior, not in command, charged with failing adequately to prevent or repress a substantive offense triable by military commission should be charged for the related substantive offense as a principal.

(4) *Command/superior responsibility—misprision*—(i) *Elements*. (A) The accused had command and control, or effective authority and control, over one or more subordinates;

(B) One or more of the accused's subordinates had committed, attempted to commit, conspired to commit, solicited to commit, or aided or abetted the commission of one or more substantive offenses triable by military commission;

(C) The accused knew or should have known that the subordinate or subordinates had committed, attempted to commit, conspired to commit, solicited, or aided or abetted such offense or offenses; and

(D) The accused failed to submit the matter to competent authorities for investigation or prosecution as appropriate.

(ii) *Comments*. (A) The phrase, ''effective authority and control'' in paragraph (c)(4)(i)(A) of this section includes the concept of relative authority over the subject matter or activities associated with the perpetrator's conduct. This may be relevant to a civilian superior who cannot be held responsible under this offense for the behavior of subordinates involved in activities that have nothing to do with such superior's sphere of authority.

(B) A commander or superior charged with failing to take appropriate punitive or investigative action subsequent to the perpetration of a substantive offense triable by military commission should not be charged for the substantive offense as a principal. Such commander or superior should be charged for the separate offense of failing to submit the matter for investigation and/or prosecution as detailed in these elements. This offense is not a lesser-included offense of the related substantive offense.

(5) *Accessory after the fact*—(i) *Elements*. (A) The accused received, comforted, or assisted a certain person;

(B) Such person had committed an offense triable by military commission;

(C) The accused knew that such person had committed such offense or believed such person had committed a similar or closely related offense; and

(D) The accused intended to hinder or prevent the apprehension, trial, or punishment of such person.

(ii) *Comments.* Accessory after the fact should be charged separately from the related substantive offense. It is not a lesser-included offense of the related substantive offense.

(6) *Conspiracy*—(i) *Elements.* (A) The accused entered into an agreement with one or more persons to commit one or more substantive offenses triable by military commission or otherwise joined an enterprise of persons who shared a common criminal purpose that involved, at least in part, the commission or intended commission of one or more substantive offenses triable by military commission;

(B) The accused knew the unlawful purpose of the agreement or the common criminal purpose of the enterprise and joined in it willfully, that is, with the intent to further the unlawful purpose; and

(C) One of the conspirators or enterprise members, during the existence of the agreement or enterprise, knowingly committed an overt act in order to accomplish some objective or purpose of the agreement or enterprise.

(ii) *Comments.* (A) Two or more persons are required in order to have a conspiracy. Knowledge of the identity of co-conspirators and their particular connection with the agreement or enterprise need not be established. A person may be guilty of conspiracy although incapable of committing the intended offense. The joining of another conspirator after the conspiracy has been established does not create a new conspiracy or affect the status of the other conspirators. The agreement or common criminal purpose in a conspiracy need not be in any particular form or manifested in any formal words.

(B) The agreement or enterprise must, at least in part, involve the commission or intended commission of one or more substantive offenses triable by military commission. A single conspiracy may embrace multiple criminal objectives. The agreement need not include knowledge that any relevant offense is in fact ''triable by military commission.''

(C) The overt act must be done by one or more of the conspirators, but not necessarily the accused, and it must be done to effectuate the object of the conspiracy or in furtherance of the common criminal purpose. The accused need not have entered the agreement or criminal enterprise at the time of the overt act.

(D) The overt act need not be in itself criminal, but it must advance the purpose of the conspiracy. It is not essential that any substantive offense be committed.

(E) Each conspirator is liable for all offenses committed pursuant to or in furtherance of the conspiracy by any of the co-conspirators, after such conspirator has joined the conspiracy and while the conspiracy continues and such conspirator remains a party to it.

(F) A party to the conspiracy who withdraws from or abandons the agreement or enterprise before the commission of an overt act by any conspirator is not guilty of conspiracy. An effective withdrawal or abandonment must consist of affirmative conduct that is wholly inconsistent with adherence to the unlawful agreement or common criminal purpose and that shows that the party has severed all connection with the conspiracy. A conspirator who effectively withdraws from or abandons the conspiracy after the performance of an overt act by one of the conspirators remains guilty of conspiracy and of any offenses committed pursuant to the conspiracy up to the time of the withdrawal or abandonment. The withdrawal of a conspirator from the conspiracy does not affect the status of the remaining members.

(G) That the object of the conspiracy was impossible to effect is not a defense to this offense.

(H) Conspiracy to commit an offense is a separate and distinct offense from any offense committed pursuant to or in furtherance of the conspiracy, and both the conspiracy and any related offense may be charged, tried, and punished separately. Conspiracy should be charged separately from the related substantive offense. It is not a lesser-

included offense of the substantive offense.

(7) *Attempt*—(i) *Elements*. (A) The accused committed an act;

(B) The accused intended to commit one or more substantive offenses triable by military commission;

(C) The act amounted to more than mere preparation; and

(D) The act apparently tended to effect the commission of the intended offense.

(ii) *Comments*. (A) To constitute an attempt there must be a specific intent to commit the offense accompanied by an act that tends to accomplish the unlawful purpose. This intent need not involve knowledge that the offense is in fact ''triable by military commission.''

(B) Preparation consists of devising or arranging means or measures apparently necessary for the commission of the offense. The act need not be the last act essential to the consummation of the offense. The combination of specific intent to commit an offense, plus the commission of an act apparently tending to further its accomplishment, constitutes the offense of attempt. Failure to complete the offense, whatever the cause, is not a defense.

(C) A person who purposely engages in conduct that would constitute the offense if the attendant circumstances were as that person believed them to be is guilty of an attempt.

(D) It is a defense to an attempt offense that the person voluntarily and completely abandoned the intended offense, solely because of the person's own sense that it was wrong, prior to the completion of the substantive offense. The voluntary abandonment defense is not allowed if the abandonment results, in whole or in part, from other reasons, for example, the person feared detection or apprehension, decided to await a better opportunity for success, was unable to complete the crime, or encountered unanticipated difficulties or unexpected resistance.

(E) Attempt is a lesser-included offense of any substantive offense triable by military commission and need not be charged separately. An accused may be charged with attempt without being charged with the substantive offense.

## PART 12—RESPONSIBILITIES OF THE CHIEF PROSECUTOR, PROSECUTORS, AND ASSISTANT PROSECUTORS

Sec.
12.1 Purpose.
12.2 Authority.
12.3 Office of the Chief Prosecutor.
12.4 Duties and responsibilities of the prosecution.
12.5 Policies.

AUTHORITY: 10 U.S.C. 113(d) and 140(b).

SOURCE: 68 FR 39388, July 1, 2003, unless otherwise noted.

### § 12.1 Purpose.

This part establishes the responsibilities of the Office of the Chief Prosecutor and components thereof.

### § 12.2 Authority.

This part is issued pursuant to 32 CFR 9.7(a) and in accordance with Military Order of November 13, 2001, ''Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,'' (3 CFR, 2001 comp., p. 918, 66 FR 57833) and 10 U.S.C. 113(d) and 140(b). The provisions of 32 CFR part 10 are applicable to this part.

### § 12.3 Office of the Chief Prosecutor.

(a) *General*. The Office of the Chief Prosecutor shall be a component of the Office of Military Commissions and shall be comprised of the Chief Prosecutor, Prosecutors, and other persons properly under the supervision of the Chief Prosecutor.

(b) *Chief Prosecutor*. (1) The Chief Prosecutor shall be a judge advocate of any United States armed force and shall be designated by the General Counsel of the Department of Defense.

(2) The Chief Prosecutor shall report directly to the Deputy General Counsel (Legal Counsel) of the Department of Defense.

(3) The Chief Prosecutor shall have authority to subpoena any individual to appear as a witness, to testify, or to produce any evidence in a case referred to military commissions or in a criminal investigation associated with a case that may be referred to a military commission.

(4) The Chief Prosecutor shall direct the overall prosecution effort pursuant

to 32 CFR part 9, and Military Order of November 13, 2001, ''Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,'' ensuring proper supervision and management of all personnel and resources assigned to the Office of the Chief Prosecutor.

(5) The Chief Prosecutor shall ensure that all personnel assigned to the Office of the Chief Prosecutor review, and attest that they understand and will comply with, 32 CFR part 9, and Military Order of November 13, 2001,'' Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,'' and all Supplementary Regulations and Instructions issued in accordance therewith.

(6) The Chief Prosecutor shall inform the Deputy General Counsel (Legal Counsel) of all requirements for personnel, office space, equipment, and supplies to ensure the successful functioning and mission accomplishment of the Office of the Chief Prosecutor.

(7) The Chief Prosecutor shall supervise all Prosecutors and other personnel assigned to the Office of the Chief Prosecutor including any special trial counsel of the Department of Justice who may be made available by the Attorney General of the United States.

(8) The Chief Prosecutor, or his designee, shall fulfill applicable performance evaluation requirements associated with Prosecutors and other personnel properly under the supervision of the Office of the Chief Prosecutor.

(9) The Chief Prosecutor shall detail a Prosecutor and, as appropriate, one or more Assistant Prosecutors to perform the duties of the prosecution as set forth in 32 CFR 9.4(b)(2). The Chief Prosecutor may detail himself to perform such duties.

(10) The Chief Prosecutor shall ensure that all Prosecutors and Assistant Prosecutors faithfully represent the United States in discharging their prosecutorial duties before military commissions conducted pursuant to 32 CFR part 9, and Military Order of November 13, 2001, ''Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism.''

(11) The Chief Prosecutor shall ensure that all Prosecutors and Assistant Prosecutors have taken an oath to perform their duties faithfully.

(12) The Chief Prosecutor shall ensure that all personnel properly under the supervision of the Office of the Chief Prosecutor possess the appropriate security clearances.

(c) *Prosecutors*. (1) Prosecutors shall be detailed by the Chief Prosecutor and may be either judge advocates of any United States armed force or special trial counsel of the Department of Justice who may be made available by the Attorney General of the United States.

(2) Prosecutors shall represent the United States as Prosecutors or Assistant Prosecutors as directed by the Chief Prosecutor and in accordance with 32 CFR part 9, and Military Order of November 13, 2001, ''Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism.''

(3) Prosecutors shall fulfill all responsibilities detailed in 32 CFR part 9, and Military Order of November 13, 2001, ''Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,'' those set forth in this part, and those assigned by the Chief Prosecutor.

(4) Prosecutors shall ensure that all court reporters, security personnel, and interpreters who are to perform duties in relation to a military commission proceeding have taken an oath to perform their duties faithfully. As directed by the Presiding Officer, Prosecutors also shall administer appropriate oaths to witnesses during military commission proceedings.

### § 12.4 Duties and responsibilities of the prosecution.

(a) *Regular duties*. The Prosecution shall perform all duties specified or implied in 32 CFR part 9 as responsibilities of the Prosecution.

(b) *Administrative duties*. The Prosecution shall, as directed by the Presiding Officer or the Appointing Authority, prepare any documentation necessary to facilitate the conduct of military commissions proceedings. The Prosecution shall, as directed by the Deputy General Counsel (Legal Counsel), prepare a trial guide to provide a standardized administrative plan for the

conduct of military commission proceedings. Unless directed otherwise by the Appointing Authority, the Presiding Officer may, in his discretion, depart from this guide as appropriate.

(c) *Special duties.* The Prosecution shall perform all other functions, consistent with 32 CFR part 9, and Military Order of November 13, 2001, ''Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,'' as may be directed by the Appointing Authority or the General Counsel of the Department of Defense.

### § 12.5 Policies.

(a) *Prohibition on Prosecutors serving as Defense Counsel.* Judge advocates assigned to the Office of the Chief Prosecutor shall be deemed unavailable for service as Defense Counsel under 32 CFR 9.4(c)(3)(i).

(b) *Prohibition on certain disclosures.* All Prosecutors must strictly comply with 32 CFR 9.6(d)(5) and 9.9 to ensure they do not improperly disclose classified information, national security information, or state secrets to any person not specifically authorized to receive such information.

(c) *Statements to the media.* Consistent with DoD Directive 5122.5[1], the Assistant Secretary of Defense for Public Affairs shall serve as the sole release authority for DoD information and audiovisual materials regarding military commissions. Personnel assigned to the Office of the Chief Prosecutor may communicate with news media representatives regarding cases and other matters related to military commissions only when approved by the Appointing Authority or the General Counsel of the Department of Defense.

## PART 13—RESPONSIBILITIES OF THE CHIEF DEFENSE COUNSEL, DETAILED DEFENSE COUNSEL, AND CIVILIAN DEFENSE COUNSEL

Sec.
13.1 Purpose.
13.2 Authority.
13.3 Office of the Chief Defense Counsel.
13.4 Duties and responsibilities of the defense.
13.5 Policies.

AUTHORITY: 10 U.S.C. 113(d) and 140(b).

SOURCE: 68 FR 39389, July 1, 2003, unless otherwise noted.

### § 13.1 Purpose.

This part establishes the responsibilities of the Office of Chief Defense Counsel and components thereof.

### § 13.2 Authority.

This part is issued pursuant to 32 CFR 9.7(a) and in accordance with Military Order of November 13, 2001, ''Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,'' (3 CFR, 2001 comp., p. 918, 66 FR 57833) and 10 U.S.C. 113(d) and 140(b). The provisions of 32 CFR part 10 are applicable to this part.

### § 13.3 Office of the Chief Defense Counsel.

(a) *General.* The Office of the Chief Defense Counsel shall be a component of the Office of Military Commissions and shall be comprised of the Chief Defense Counsel, Defense Counsel, and other such persons properly under the supervision of the Chief Defense Counsel.

(b) *Chief Defense Counsel.* (1) The Chief Defense Counsel shall be a judge advocate of any United States armed force and shall be designated by the General Counsel of the Department of Defense.

(2) The Chief Defense Counsel shall report directly to the Deputy General Counsel (Personnel and Health Policy) of the Department of Defense.

(3) The Chief Defense Counsel shall supervise all defense activities and the efforts of Detailed Defense Counsel and other office personnel and resources pursuant to 32 CFR part 9, and Military Order of November 13, 2001, ''Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,'' ensuring proper supervision and management of all personnel and resources assigned to the Office of the Chief Defense Counsel and facilitating the proper representation of all Accused referred to trial before a military commission appointed pursuant to 32

[1] Available at *http://www.dtic.mil/whs/directives.*

CFR part 9, and Military Order of November 13, 2001, ''Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism.''

(4) The Chief Defense Counsel shall ensure that all personnel assigned to the Office of the Chief Defense Counsel review, and attest that they understand and will comply with, 32 CFR part 9, and Military Order of November 13, 2001, ''Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,'' and all Supplementary Regulations and Instructions issued in accordance therewith. Furthermore, the Chief Defense Counsel shall regulate the conduct of Detailed Defense Counsel as deemed necessary, consistent with 32 CFR part 9, and Military Order of November 13, 2001, ''Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,'' and subordinate instructions and regulations, and specifically shall ensure that Detailed Defense Counsel have been directed to conduct their activities consistent with applicable prescriptions and proscriptions specified in Section II of the Affidavit And Agreement By Civilian Defense Counsel at Appendix B to 32 CFR part 14.

(5) The Chief Defense Counsel shall inform the Deputy General Counsel (Personnel and Health Policy) of the Department of Defense of all requirements for personnel, office space, equipment, and supplies to ensure the successful functioning and mission accomplishment of the Office of the Chief Defense Counsel.

(6) The Chief Defense Counsel shall supervise all Defense Counsel and other personnel assigned to the Office of the Chief Defense Counsel.

(7) The Chief Defense Counsel, or his designee, shall fulfill applicable performance evaluation requirements associated with Defense Counsel and other personnel properly under the supervision of the Chief Defense Counsel.

(8) The Chief Defense Counsel shall detail a judge advocate of any United States armed force to perform the duties of the Detailed Defense Counsel as set forth in 32 CFR 9.4(c)(2) and shall detail or employ any other personnel as directed by the Appointing Authority or the Presiding Officer in a particular case. The Chief Defense Counsel may not detail himself to perform the duties of Detailed Defense Counsel, nor does he form an attorney-client relationship with accused persons or incur any concomitant confidentiality obligations.

(i) The Chief Defense Counsel may, when appropriate, detail an additional judge advocate as Assistant Detailed Defense Counsel to assist in performing the duties of the Detailed Defense Counsel.

(ii) The Chief Defense Counsel may structure the Office of the Chief Defense Counsel so as to include subordinate supervising attorneys who may incur confidentiality obligations in the context of fulfilling their supervisory responsibilities with regard to Detailed Defense Counsel.

(9) The Chief Defense Counsel shall take appropriate measures to preclude Defense Counsel conflicts of interest arising from the representation of Accused before military commissions. The Chief Defense Counsel shall be provided sufficient information (potentially including protected information) to fulfill this responsibility.

(10) The Chief Defense Counsel shall take appropriate measures to ensure that each Detailed Defense Counsel is capable of zealous representation, unencumbered by any conflict of interest. In this regard, the Chief Defense Counsel shall monitor the activities of all Defense Counsel (Detailed and Civilian) and take appropriate measures to ensure that Defense Counsel do not enter into agreements with other Accused or Defense Counsel that might cause them or the Accused they represent to incur an obligation of confidentiality with such other Accused or Defense Counsel or to effect some other impediment to representation.

(11) The Chief Defense Counsel shall ensure that an Accused tried before a military commission pursuant to 32 CFR part 9, and Military Order of November 13, 2001, ''Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,'' is represented at all relevant times by Detailed Defense Counsel.

(12) The Chief Defense Counsel shall administer all requests for replacement Detailed Defense Counsel requested in

accordance with 32 CFR 9.4(c)(3). He shall determine the availability of such counsel in accordance with this part.

(13) The Chief Defense Counsel shall administer the Civilian Defense Counsel pool, screening all requests for prequalification and ad hoc qualification, making qualification determinations and recommendations in accordance with 32 CFR part 9, this part, and 32 CFR part 14, and ensuring appropriate notification to an Accused of civilian attorneys available to represent Accused before a military commission.

(14) The Chief Defense Counsel shall ensure that all Detailed Defense Counsel and Civilian Defense Counsel who are to perform duties in relation to a military commission have taken an oath to perform their duties faithfully.

(15) The Chief Defense Counsel shall ensure that all personnel properly under the supervision of the Office of the Chief Defense Counsel possess the appropriate security clearances.

(c) *Detailed Defense Counsel.* (1) Detailed Defense Counsel shall be judge advocates of any United States armed force.

(2) Detailed Defense Counsel shall represent the Accused before military commissions when detailed in accordance with 32 CFR part 9, and Military Order of November 13, 2001, ''Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism.'' In this regard Detailed Defense Counsel shall: defend the Accused to whom detailed zealously within the bounds of the law and without regard to personal opinion as to guilt; represent the interests of the Accused in any review process as provided by 32 CFR part 9; and comply with the procedures accorded the Accused pursuant to 32 CFR 9.5 and 9.6. Detailed Defense Counsel shall so serve notwithstanding any intention expressed by the Accused to represent himself.

(3) Detailed Defense Counsel shall have primary responsibility to prevent conflicts of interest related to the handling of the cases to which detailed.

(4) Detailed Defense Counsel shall fulfill all responsibilities detailed in 32 CFR part 9, and Military Order of November 13, 2001, ''Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,'' those set forth in this part, and those assigned by the Chief Defense Counsel.

(d) *Selected Detailed Defense Counsel.* (1) The Accused may select a judge advocate of any United States armed force to replace the Accused's Detailed Defense Counsel, provided that judge advocate has been determined to be available by the Chief Defense Counsel in consultation with the Judge Advocate General of that judge advocate's military department.

(2) A judge advocate shall be determined not to be available if assigned duties: as a general or flag officer; as a military judge; as a prosecutor in the Office of Military Commissions; as a judge advocate assigned to the Department of Defense Criminal Investigation Task Force or Joint Task Force Guantanamo; as a principal legal advisor to a command, organization, or agency; as an instructor or student at a service school, academy, college or university; or in any other capacity that the Judge Advocate General of the Military Department concerned may determine not to be available because of the nature or responsibilities of their assignments, exigent circumstances, military necessity, or other appropriate reasons.

(3) Consistent with 32 CFR 9.6(b), the selection and replacement of new Detailed Defense Counsel shall not unreasonably delay military commission proceedings.

(4) Unless otherwise directed by the Appointing Authority or the General Counsel of the Department of Defense, the Chief Defense Counsel will, after selection of a new Detailed Defense Counsel, relieve the original Detailed Defense Counsel of all duties with respect to that case.

(e) *Qualified Civilian Defense Counsel.* (1) The Accused may, at no expense to the United States, retain the services of a civilian attorney of the Accused's own choosing to assist in the conduct of his defense before a military commission, provided that the civilian attorney retained has been determined to be qualified pursuant to 32 CFR 9.4(c)(3)(ii).

(2) Consistent with 32 CFR 9.6(b), the retention of Civilian Defense Counsel shall not unreasonably delay military commission proceedings.

(3) Representation by Civilian Defense Counsel will not relieve Detailed Defense Counsel of the duties specified in 32 CFR 9.4(c)(2).

(4) Neither qualification of a Civilian Defense Counsel for membership in the pool of available Civilian Defense Counsel nor the entry of appearance in a specific case guarantees that counsel's presence at closed military commission proceedings or access to information protected under 32 CFR 9.6(d)(5).

(5) The Chief Defense Counsel shall monitor the conduct of all qualified Civilian Defense Counsel for compliance with all rules, regulations, and instructions governing military commissions. The Chief Defense Counsel will report all instances of noncompliance with the rules, regulations, and instructions governing military commissions to the Appointing Authority and to the General Counsel of the Department of Defense with a recommendation as to any appropriate action consistent with 32 CFR part 9 and this part.

### § 13.4 Duties and responsibilities of the defense.

(a) *Regular duties*. The Defense shall perform all duties specified or implied in 32 CFR part 9 as responsibilities of the Defense.

(b) *Special duties*. The Office of the Chief Defense Counsel shall perform such other functions, consistent with 32 CFR part 9, and Military Order of November 13, 2001, ''Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,'' and the mission of the Office of the Chief Defense Counsel, as may be directed by the Appointing Authority or the General Counsel of the Department of Defense.

### § 13.5 Policies.

(a) *Prohibition on certain agreements*. No Defense Counsel may enter into agreements with any detainee other than his client, or such detainee's Defense Counsel, that might cause him or the client he represents to incur an obligation of confidentiality with such other detainee or Defense Counsel or to effect some other impediment to representation.

(b) *Prohibition on certain disclosures*. All Defense Counsel must strictly comply with 32 CFR 9.6(d)(5) and 9.9 to ensure they do not improperly disclose classified information, national security information, or state secrets to an Accused or potential Accused or to any other person not specifically authorized to receive such information.

(c) *Statements to the media*. Consistent with DoD Directive 5122.5[1], the Assistant Secretary of Defense for Public Affairs shall serve as the sole release authority for DoD information and audiovisual materials regarding military commissions. Personnel assigned to the Office of the Chief Defense Counsel, as well as all members of the Civilian Defense Counsel pool and associated personnel may communicate with news media representatives regarding cases and other matters related to military commissions only when approved by the Appointing Authority or the General Counsel of the Department of Defense.

## PART 14—QUALIFICATION OF CIVILIAN DEFENSE COUNSEL

Sec.
14.1 Purpose.
14.2 Authority.
14.3 Policies and procedures.
APPENDIX A TO PART 14—UNITED STATES OF AMERICA AUTHORIZATION FOR RELEASE OF INFORMATION
APPENDIX B TO PART 14—AFFIDAVIT AND AGREEMENT BY CIVILIAN DEFENSE COUNSEL

AUTHORITY: 10 U.S.C. 113(d) and 140(b).

SOURCE: 68 FR 39392, July 1, 2003, unless otherwise noted.

### § 14.1 Purpose.

This part establishes policies and procedures for the creation and management of the pool of qualified Civilian Defense Counsel authorized in 32 CFR 9.4 (c)(3)(ii) in accordance with Military Order of November 13, 2001, ''Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,'' (3 CFR 2001 Comp., 918, 66 FR 57833).

[1] Available at *http://www.dtic.mil/whs/directives*.

### § 14.2 Authority.

This part is issued pursuant to 32 CFR 9.7(a) and in accordance with Military Order of November 13, 2001, ''Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,'' and 10 U.S.C. 113(d) and 140(b). The provisions of 32 CFR part 10 are applicable to this part.

### § 14.3 Policies and procedures.

(a) *Application procedures.* (1) Civilian attorneys may be prequalified as members of the pool of attorneys eligible to represent Accused before military commissions at no expense to the United States if, at the time of application, they meet the eligibility criteria set forth in 32 CFR 9.4(c)(3)(ii) as further detailed in this part, or they may be qualified on an ad hoc basis after being requested by an Accused. In both cases, qualification results in membership in the pool of available Civilian Defense Counsel.

(2) An attorney seeking qualification as a member of the pool of available Civilian Defense Counsel shall submit an application, by letter, to: Office of the General Counsel, Department of Defense, (Attn: Chief Defense Counsel, Office of Military Commissions), 1600 Defense Pentagon, Washington, DC 20301–1600. Applications will be comprised of the letter requesting qualification for membership, together with the following documents that demonstrate satisfaction of the criteria set forth in 32 CFR 9.4(c)(3)(ii):

(i) Civilian Defense Counsel shall be United States citizens (32 CFR 9.4(c)(3)(ii)(A)). Applicants will provide proof of citizenship (*e.g.*, certified true copy of passport, birth certificate, or certificate of naturalization).

(ii) Civilian Defense Counsel shall be admitted to the practice of law in a State, district, territory or possession of the United States, or before a Federal court (32 CFR 9.4(c)(3)(ii)(B)). Applicants will submit an official certificate showing that the applicant is an active member in good standing with the bar of a qualifying jurisdiction. The certificate must be dated within three months of the date of the Chief Defense Counsel's receipt of the application.

(iii) Civilian Defense Counsel shall not have been the subject of any sanction or disciplinary action by any court, bar, or other competent governmental authority for relevant misconduct (32 CFR 9.4(c)(2)(iii)).

(A) An applicant shall submit a statement detailing all sanctions or disciplinary actions, pending or final, to which he has been subject, whether by a court, bar or other competent governmental authority, for misconduct of any kind. The statement shall identify the jurisdiction or authority that imposed the sanction or disciplinary action, together with any explanation deemed appropriate by the applicant. Additionally, the statement shall identify and explain any formal challenge to the attorney's fitness to practice law, regardless of the outcome of any subsequent proceedings. In the event that no sanction, disciplinary action or challenge has been imposed on or made against an applicant, the statement shall so state. Further, the applicant's statement shall identify each jurisdiction in which he has been admitted or to which he has applied to practice law, regardless of whether the applicant maintains a current active license in that jurisdiction, together with any dates of admission to or rejection by each such jurisdiction and, if no longer active, the date of and basis for inactivation. The information shall be submitted either in the form of a sworn notarized statement or as a declaration under penalty of perjury of the laws of the United States. The sworn statement or declaration must be executed and dated within three months of the date of the Chief Defense Counsel's receipt of the application.

(B) Further, applicants shall submit a properly executed Authorization for Release of Information (Appendix A to this part), authorizing the Chief Defense Counsel or his designee to obtain information relevant to qualification of the applicant as a member of the Civilian Defense Counsel pool from each jurisdiction in which the applicant has been admitted or to which he has applied to practice law.

(iv) Civilian Defense Counsel shall be determined to be eligible for access to information classified at the level SECRET or higher under the authority of

and in accordance with the procedures described in Department of Defense Regulation, DoD 5200.2–R, ''Personnel Security Program.''[1] (32 CFR 9.4(c)(2)(iv)

(A) Civilian Defense Counsel applicants who possess a valid current security clearance of SECRET or higher shall provide, in writing, the date of their background investigation, the date such clearance was granted, the level of the clearance, and the adjudicating authority.

(B) Civilian Defense Counsel applicants who do not possess a valid current security clearance of SECRET or higher shall state in writing their willingness to submit to a background investigation in accordance with DoD 5200.2–R and to pay any actual costs associated with the processing of the same. The security clearance application, investigation, and adjudication process will not be initiated until the applicant has submitted an application that otherwise fully complies with this part and the Chief Defense Counsel has determined that the applicant would otherwise be qualified for membership in the Civilian Defense Counsel pool. Favorable adjudication of the applicant's personnel security investigation must be completed before an applicant will be qualified for membership in the pool of Civilian Defense Counsel. The Chief Defense Counsel may, at his discretion, withhold qualification and wait to initiate the security clearance process until such time as the Civilian Defense Counsel's services are likely to be sought.

(v) Civilian Defense Counsel shall have signed a written agreement to comply with all applicable regulations or instructions for counsel, including any rules of court for conduct during the course of proceedings (32 CFR 9.4(c)(2)(v)). This requirement shall be satisfied by the execution of the Affidavit And Agreement By Civilian Defense Counsel at Appendix B to this part. The Affidavit And Agreement By Civilian Defense Counsel shall be executed and agreed to without change, (*i.e.*, no omissions, additions or substitutions). Proper execution shall require the notarized signature of the applicant. The Affidavit And Agreement By Civilian Defense Counsel shall be dated within three months of the date of the Chief Defense Counsel's receipt of the application.

(3) Applications mailed in a franked U.S. Government envelope or received through U.S. Government distribution will not be considered. Telefaxed or electronic mail application materials will not be accepted. Failure to provide all of the requisite information and documentation may result in rejection of the application. A false statement in any part of the application may preclude qualification and/or render the applicant liable for disciplinary or criminal sanction, including under 18 U.S.C. 1001.

(b) *Application review.* (1) The Chief Defense Counsel or his designee shall review all Civilian Defense Counsel pool applications for compliance with 32 CFR part 9 and Military Order of November 13, 2001, ''Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,'' and with this part.

(2) The Chief Defense Counsel shall consider all applicants for qualification as members of the Civilian Defense Counsel pool without regard to race, religion, color, sex, age, national origin, or other non-disqualifying physical or mental disability.

(3) The Chief Defense Counsel may reject any Civilian Defense Counsel application that is incomplete or otherwise fails to comply with 32 CFR part 9 and Military Order of November 13, 2001, ''Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,'' or with this part.

(4) Subject to review by the General Counsel of the Department of Defense, the Chief Defense Counsel shall determine the number of qualified attorneys that shall constitute the pool of available Civilian Defense Counsel. Similarly, subject to review by the General Counsel of the Department of Defense, the Chief Defense Counsel shall determine the qualification of applicants for membership in such pool. This shall include determinations as to whether any sanction, disciplinary action, or

[1] Available at *http://www.dtic.mil/whs/directives.*

challenge is related to relevant misconduct that would disqualify the Civilian Defense Counsel applicant.

(5) The Chief Defense Counsel's determination as to each applicant's qualification for membership in the pool of qualified Civilian Defense Counsel shall be deemed effective as of the date of the Chief Defense Counsel's written notification publishing such determination to the applicant. Subsequent to this notification, the retention of qualified Civilian Defense Counsel is effected upon written entry of appearance, communicated to the military commission through the Chief Defense Counsel.

(6) The Chief Defense Counsel may reconsider his determination as to an individual's qualification as a member of the Civilian Defense Counsel pool on the basis of subsequently discovered information indicating material nondisclosure or misrepresentation in the application, or material violation of obligations of the Civilian Defense Counsel, or other good cause, or the matter may be referred to the Appointing Authority or the General Counsel of the Department of Defense, who may revoke or suspend the qualification of any member of the Civilian Defense Counsel pool.

## APPENDIX A TO PART 14—UNITED STATES OF AMERICA AUTHORIZATION FOR RELEASE OF INFORMATION

*United States of America*

Authorization for Release of Information

(Carefully read this authorization to release information about you, then sign and date it in ink.)

I authorize the Chief Defense Counsel, Office of Military Commissions, Department of Defense, his designee or other duly authorized representative of the Department of Defense who may be charged with assessing or determining my qualification for membership in the pool of Civilian Defense Counsel available to represent Accused before military commissions, to obtain any information from any court, the bar of any State, locality, district, territory or possession of the United States, or from any other governmental authority.

This information may include, but is not limited to, information relating to: Any application for a security clearance; my admission or application for admission to practice law in any jurisdiction, including action by the jurisdiction upon such application, together with my current status with regard to the practice of law in such jurisdiction; any sanction or disciplinary action to which I have been subject for misconduct of any kind; and any formal challenge to my fitness to practice law, regardless of the outcome of subsequent proceedings.

I authorize custodians of such records or information and other sources of information pertaining to me to release such at the request of the officials named above, regardless of any previous agreement to the contrary.

I understand that for certain custodians or sources of information a separate specific release may be required and that I may be contacted for the purposes of executing such at a later date.

I understand that the records or information released by custodians and other sources of information are for official use by the Department of Defense, only for the purposes provided herein, and that they may be redisclosed by the Department of Defense only as authorized by law.

Copies of this authorization that show my signature are as valid as the original signed by me. This authorization is valid for five (5) years from the date signed or upon termination of my affiliation with the Department of Defense, whichever is later.

Signature (sign in ink) SSN

Date

## APPENDIX B TO PART 14—AFFIDAVIT AND AGREEMENT BY CIVILIAN DEFENSE COUNSEL

AFFIDAVIT AND AGREEMENT BY CIVILIAN DEFENSE COUNSEL

Pursuant to Section 4(C)(3)(b) of Department of Defense Military Commission Order No. 1, ''Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism,'' dated March 21, 2002 (''MCO No. 1''), Military Commission Instructions No. 4, ''Responsibilities of the Chief Defense Counsel, Detailed Defense Counsel, and Civilian Defense Counsel'' (''MCI No. 4'') and No. 5, ''Qualification of Civilian Defense Counsel'' (''MCI No. 5''), and in accordance with the President's Military Order of November 13, 2001, ''Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,'' 66 FR 57833 (Nov. 16, 2001) (''President's Military Order''), I [Name of Civilian Attorney], make this Affidavit and Agreement for the purposes of applying for qualification as a member of the pool of Civilian Defense Counsel available to represent Accused before military commissions and serving in that capacity.

I. *Oaths or Affirmations.* I swear or affirm that the following information is true to the best of my knowledge and belief:

A. I have read and understand the President's Military Order, MCO No. 1, MCI No. 4, MCI No. 5, and all other Military Commission Orders and Instructions concerning the rules, regulations and instructions applicable to trial by military commissions. I will read all future Orders and Instructions applicable to trials by military commissions.

B. I am aware that my qualification as a Civilian Defense Counsel does not guarantee my presence at closed military commission proceedings or guarantee my access to any information protected under Section 6(D)(5) or Section 9 of MCO No. 1.

II. *Agreements.* I hereby agree to comply with all applicable regulations and instructions for counsel, including any rules of court for conduct during the course of proceedings, and specifically agree, without limitation, to the following:

A. I will notify the Chief Defense Counsel and, as applicable, the relevant Presiding Officer immediately if, after the execution of this Affidavit and Agreement but prior to the conclusion of proceedings (defined as the review and final decision of the President or, if designated, the Secretary of Defense), if there is any change in any of the information provided in my application, including this Affidavit and Agreement, for qualification as member of the Civilian Defense Counsel pool. I understand that such notification shall be in writing and shall set forth the substantive nature of the changed information.

B. I will be well-prepared and will conduct the defense zealously, representing the Accused throughout the military commission process, from the inception of my representation through the completion of any post trial proceedings as detailed in Section 6(H) of MCO No. 1. I will ensure that these proceedings are my primary duty. I will not seek to delay or to continue the proceedings for reasons relating to matters that arise in the course of my law practice or other professional or personal activities that are not related to military commission proceedings.

C. The Defense Team shall consist entirely of myself, Detailed Defense Counsel, and other personnel provided by the Chief Defense Counsel, the Presiding Officer, or the Appointing Authority. I will make no claim against the U.S. Government for any fees or costs associated with my conduct of the defense or related activities or efforts.

D. Recognizing that my representation does not relieve Detailed Defense Counsel of duties specified in Section 4(C)(2) of MCO No. 1, I will work cooperatively with such counsel to ensure coordination of efforts and to ensure such counsel is capable of conducting the defense independently if necessary.

E. During the pendency of the proceedings, unless I obtain approval in advance from the Presiding Officer to do otherwise, I will comply with the following restrictions on my travel and communications:

1. I will not travel or transmit documents from the site of the proceedings without the approval of the Appointing Authority or the Presiding Officer. The Defense Team and I will otherwise perform all of our work relating to the proceedings, including any electronic or other research, at the site of the proceedings (except that this shall not apply during post-trial proceedings detailed in Section 6(H) of MCO No. 1).

2. I will not discuss or otherwise communicate or share documents or information about the case with anyone except persons who have been designated as members of the Defense Team in accordance with this Affidavit and Agreement and other applicable rules, regulations and instructions.

F. At no time, to include any period subsequent to the conclusion of the proceedings, will I make any public or private statements regarding any closed sessions of the proceedings or any classified information or material, or document or material constituting protected information under MCO No. 1.

G. I understand and agree to comply with all rules, regulations and instructions governing the handling of classified information and material. Furthermore, no document or material constituting protected information under MCO No. 1, regardless of its classification level, may leave the site of the proceedings.

H. I understand that there may be reasonable restrictions on the time and duration of contact I may have with my client, as imposed by the Appointing Authority, the Presiding Officer, detention authorities, or regulation.

I. I understand that my communications with my client, even if traditionally covered by the attorney-client privilege, may be subject to monitoring or review by government officials, using any available means, for security and intelligence purposes. I understand that any such monitoring will only take place in limited circumstances when approved by proper authority, and that any evidence or information derived from such communications will not be used in proceedings against the Accused who made or received the relevant communication. I further understand that communications are not protected if they would facilitate criminal acts or a conspiracy to commit criminal acts, or if those communications are not related to the seeking or providing of legal advice.

J. I agree that I shall reveal to the Chief Defense Counsel and any other appropriate authorities, information relating to the representation of my client to the extent that I reasonably believe necessary to prevent the

commission of a future criminal act that I believe is likely to result in death or substantial bodily harm, or significant impairment of national security.

K. I understand and agree that nothing in this Affidavit and Agreement creates any substantive, procedural, or other rights for me as counsel or for my client(s).

/s/ _____

Print Name: _____

Address: _____

Date: _____

State of )

County of )

Sworn to and subscribed before me, by _____, this ____ day of _____, 20____.

Notary

My commission expires: _____

# PART 15—REPORTING RELATIONSHIPS FOR MILITARY COMMISSION PERSONNEL

Sec.
15.1 Purpose.
15.2 Authority.
15.3 Policies and procedures.

AUTHORITY: 10 U.S.C. 113(d) and 140(b).

SOURCE: 68 FR 39395, July 1, 2003, unless otherwise noted.

## § 15.1 Purpose.

This part establishes supervisory and performance evaluation relationships for military commission personnel.

## § 15.2 Authority.

This part is issued pursuant to 32 CFR 9.7(a) and in accordance with Military Order of November 13, 2001, ''Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,'' (3 CFR 2001 Comp., p. 918, 66 FR 57833) and 10 U.S.C. 113(d) and 140(b). The provisions of 32 CFR part 10 are applicable to this part.

## § 15.3 Policies and Procedures.

(a) *Supervisory and performance evaluation relationships.* Individuals appointed, assigned, detailed, designated or employed in a capacity related to the conduct of military commission proceedings conducted in accordance with 32 CFR part 9 and Military Order of November 13, 2001, ''Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,'' shall be subject to the relationships set forth in paragraphs (a)(1) through (a)(9) of this section. Unless stated otherwise, the person to whom an individual ''reports,'' as set forth in paragraphs (a)(1) through (a)(9) of this section, shall be deemed to be such individual's supervisor and shall, to the extent possible, fulfill all performance evaluation responsibilities normally associated with the function of direct supervisor in accordance with the subordinate's Military Service performance evaluation regulations.

(1) Appointing Authority: Any Appointing Authority designated by the Secretary of Defense pursuant to 32 CFR part 9 shall report to the Secretary of Defense in accordance with 10 U.S.C. 113(d).

(2) Legal Advisor to Appointing Authority: The Legal Advisor to the Appointing Authority shall report to the Appointing Authority.

(3) Chief Prosecutor: The Chief Prosecutor shall report to the Deputy General Counsel (Legal Counsel) of the Department of Defense and then to the General Counsel of the Department of Defense.

(4) Prosecutors and Assistant Prosecutors: Prosecutors and Assistant Prosecutors shall report to the Chief Prosecutor and then to the Deputy General Counsel (Legal Counsel) of the Department of Defense.

(5) Chief Defense Counsel: The Chief Defense Counsel shall report to the Deputy General Counsel (Personnel and Health Policy) of the Department of Defense and then to the General Counsel of the Department of Defense.

(6) Detailed Defense Counsel: Detailed Defense Counsel shall report to the Chief Defense Counsel and then to the Deputy General Counsel (Personnel and Health Policy) of the Department of Defense.

(7) Review Panel members: Members of the Review Panel shall report to the Secretary of Defense.

(8) Commission members: Commission members shall continue to report to their parent commands. The consideration or evaluation of the performance of duty as a member of a military commission is prohibited in preparing effectiveness, fitness, or evaluation reports of a commission member.

(9) Other personnel: All other military commission personnel, such as court reporters, interpreters, security personnel, bailiffs, and clerks detailed or employed by the Appointing Authority pursuant to 32 CFR 9.4(d), if not assigned to the Office of the Chief Prosecutor or the Office of the Chief Defense Counsel, shall report to the Appointing Authority or his designee.

(b) *Responsibilities of supervisory/reporting officials.* Officials designated in this part as supervisory/reporting officials shall:

(1) Supervise subordinates in the performance of their duties.

(2) Prepare fitness or performance evaluation reports and, as appropriate, process awards and citations for subordinates. To the extent practicable, a reporting official shall comply with the rated subordinate's Military Service regulations regarding the preparation of fitness or performance evaluation reports and in executing related duties.

## PART 16—SENTENCING

Sec.
16.1 Purpose.
16.2 Authority.
16.3 Available sentences.
16.4 Sentencing procedures.

AUTHORITY: 10 U.S.C. 113(d) and 140(b).

SOURCE: 68 FR 39396, July 1, 2003, unless otherwise noted.

### § 16.1 Purpose.

This part promulgates policy, assigns responsibilities, and prescribes procedures for matters related to sentencing of persons with regard to whom a finding of guilty is entered for an offense referred for trial by a military commission appointed pursuant to 32 CFR part 9 and Military Order of November 13, 2001, ''Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism'' (3 CFR 2001 Comp., p. 918, 66 FR 57833).

### § 16.2 Authority.

This part is issued pursuant to 32 CFR 9.7(a) and in accordance with Military Order of November 13, 2001, ''Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,'' and 10 U.S.C. 113(d) and 140(b). The provisions of 32 CFR part 10 are applicable to this part.

### § 16.3 Available sentences.

(a) *General.* 32 CFR part 9 permits a military commission wide latitude in sentencing. Any lawful punishment or condition of punishment is authorized, including death, so long as the prerequisites detailed in 32 CFR part 9 are met. Detention associated with an individual's status as an enemy combatant shall not be considered to fulfill any term of imprisonment imposed by a military commission. The sentence determination should be made while bearing in mind that there are several principal reasons for a sentence given to those who violate the law. Such reasons include: punishment of the wrongdoer; protection of society from the wrongdoer; deterrence of the wrongdoer and those who know of his crimes and sentence from committing the same or similar offenses; and rehabilitation of the wrongdoer. In determining an appropriate sentence, the weight to be accorded any or all of these reasons rests solely within the discretion of commission members. All sentences should, however, be grounded in a recognition that military commissions are a function of the President's war-fighting role as Commander-in-Chief of the Armed Forces of the United States and of the broad deterrent impact associated with a sentence's effect on adherence to the laws and customs of war in general.

(b) *Conditions of imprisonment.* Decisions regarding the location designated for any imprisonment, the conditions under which a sentence to imprisonment is served, or the privileges accorded one during any period of imprisonment should generally not be made by the commission. Those decisions and actions, however, may be appropriate subjects for recommendation to the person making a final decision on the sentence in accordance with of 32 CFR 9.6(h).

(c) *Prospective recommendations for sentence modification.* A sentence imposed by military commission may be accompanied by a recommendation to suspend, remit, commute or otherwise modify the adjudged sentence in concert with one or more conditions upon

which the suspension, remission, commutation, or other modification is contingent (usually relating to the performance, behavior or conduct of the Accused). Unless otherwise directed, a decision or action in accordance with such a recommendation will be effected by direction or delegation to the Appointing Authority by the official making a final decision on the sentence in accordance with of 32 CFR 9.6(h).

### § 16.4 Sentencing procedures.

(a) *General*. 32 CFR part 9 permits the military commission substantial discretion regarding the conduct of sentencing proceedings. Sentencing proceedings should normally proceed expeditiously. In the discretion of the Presiding Officer, as limited by the Appointing Authority, reasonable delay between the announcement of findings and the commencement of sentencing proceedings may be authorized to facilitate the conduct of proceedings in accordance with of 32 CFR 9.6(b).

(b) *Information relevant to sentencing*. 32 CFR 9.6(e)(10) permits the Prosecution and Defense to present information to aid the military commission in determining an appropriate sentence. Such information may include a recommendation of an appropriate sentence, information regarding sentence ranges for analogous offenses (*e.g.*, the sentencing range under the Federal Sentencing Guidelines that could be applicable to the Accused for the most analogous federal offenses), and other relevant information. Regardless of any presentation by the Prosecution or Defense, the military commission shall consider any evidence admitted for consideration prior to findings regarding guilt. The Presiding Officer may limit or require the presentation of certain information consistent with 32 CFR part 9 and Military Order of November 13, 2001, ''Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism'.

(c) *Cases involving plea agreements*. In accordance with 32 CFR 9.6(a)(4), after determining the voluntary and informed nature of a plea agreement approved by the Appointing Authority, the military commission is bound to adjudge findings and a sentence pursuant to that plea agreement. Accordingly, the Presiding Officer may exercise the authority granted in of 32 CFR 9.6(e) to curtail or preclude the presentation of information and argument relative to the military commission's determination of an appropriate sentence.

(d) *Special duties*. In cases involving plea agreements or recommendations for certain conditions of imprisonment or prospective sentence modification, the Prosecution and Defense shall provide whatever post-trial information or recommendation as is relevant to any subsequent decision regarding such condition or suspension, remission, commutation, or other modification recommendation associated with the sentence.

## PART 17—ADMINISTRATIVE PROCEDURES

Sec.
17.1 Purpose.
17.2 Authority.
17.3 Commission personnel.
17.4 Interlocutory questions.
17.5 Implied duties of the presiding officer.
17.6 Disclosures.

AUTHORITY: 10 U.S.C. 113(d) and 140(b).

SOURCE: 68 FR 39397, July 1, 2003, unless otherwise noted.

### § 17.1 Purpose.

This part promulgates policy, assigns responsibilities, and prescribes procedures for the conduct of trials by a military commission appointed pursuant to 32 CFR part 9 and Military Order of November 13, 2001, ''Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,'' (3 CFR 2001 Comp., p. 918, 66 FR 57833).

### § 17.2 Authority.

This part is issued pursuant to 32 CFR 9.7(a) and in accordance with Military Order of November 13, 2001, ''Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,'' and 10 U.S.C. 113(d) and 140(b). The provisions of 32 CFR part 10 are applicable to this part.

### § 17.3 Commission personnel.

(a) *Appointment and removal of Commission members*. (1) In accordance with

32 CFR part 9, the Appointing Authority shall appoint at least three but no more than seven members and one or two alternate members. The Appointing Authority may remove members and alternate members for good cause. In the event a member (or alternate member) is removed for good cause, the Appointing Authority may replace the member, direct that an alternate member serve in the place of the original member, direct that proceedings simply continue without the member, or convene a new commission. In the absence of guidance from the Appointing Authority regarding replacement, the Presiding Officer shall select an alternate member to replace the member in question.

(2) The Presiding Officer shall determine if it is necessary to conduct or permit questioning of members (including the Presiding Officer) on issues of whether there is good cause for their removal. The Presiding Officer may permit questioning in any manner he deems appropriate. Consistent with 32 CFR part 9, any such questioning shall be narrowly focused on issues pertaining to whether good cause may exist for the removal of any member.

(3) From time to time, it may be appropriate for a Presiding Officer to forward to the Appointing Authority information and, if appropriate, a recommendation relevant to the question of whether a member (including the Presiding Officer) should be removed for good cause. While awaiting the Appointing Authority's decision on such matter, the Presiding Officer may elect either to hold proceedings in abeyance or to continue. The Presiding Officer may issue any appropriate instructions to the member whose continued service is in question. A military commission shall not engage in deliberations on findings or sentence prior to the Appointing Authority's decision in any case in which the Presiding Officer has recommended a member's removal.

(b) *Military commission security officer.* The Appointing Authority may detail a Security Officer to advise a military commission on matters related to classified and protected information. In addition to any other duties assigned by the Appointing Authority, the Security Officer shall ensure that all classified or protected evidence and information is appropriately safeguarded at all times and that only personnel with the appropriate clearances and authorizations are present when classified or protected materials are presented before military commissions.

(c) *Other military commission personnel.* The Appointing Authority may detail court reporters, interpreters, security personnel, bailiffs, clerks, and any other personnel to a military commission as deemed necessary. In the absence of a detailing by the Appointing Authority, the Chief Prosecutor shall be responsible to ensure the availability of necessary or appropriate personnel to facilitate the impartial and expeditious conduct of full and fair trials by military commission.

### § 17.4 Interlocutory questions.

(a) *Certification of interlocutory questions.* The Presiding Officer shall generally adjudicate all motions and questions that arise during the course of a trial by military commission. In accordance with 32 CFR 9.4(a)(5)(iv), however, the Presiding Officer shall certify all interlocutory questions, the disposition of which would effect a termination of proceedings with respect to a charge, for decision by the Appointing Authority. In addition, the Presiding Officer may certify other interlocutory questions to the Appointing Authority as the Presiding Officer deems appropriate.

(b) *Submission of interlocutory questions.* The Presiding Officer shall determine what, if any, documentary or other materials should be forwarded to the Appointing Authority in conjunction with an interlocutory question.

(c) *Effect of interlocutory question certification on proceedings.* While decision by the Appointing Authority is pending on any certified interlocutory question, the Presiding Officer may elect either to hold proceedings in abeyance or to continue.

### § 17.5 Implied duties of the presiding officer.

The Presiding Officer shall ensure the execution of all ancillary functions necessary for the impartial and expeditious conduct of a full and fair trial by military commission in accordance

with 32 CFR part 9. Such functions include, for example, scheduling the time and place of convening of a military commission, ensuring that an oath or affirmation is administered to witnesses and military commission personnel as appropriate, conducting appropriate *in camera* meetings to facilitate efficient trial proceedings, and providing necessary instructions to other commission members. The Presiding Officer shall rule on appropriate motions or, at his discretion consistent with 32 CFR part 9, may submit them to the commission for decision or to the Appointing Authority as a certified interlocutory question.

### § 17.6 Disclosures.

(a) *General*. Unless directed otherwise by the Presiding Officer upon a showing of good cause or for some other reason, counsel for the Prosecution and the Defense shall provide to opposing counsel, at least one week prior to the scheduled convening of a military commission, copies of all information intended for presentation as evidence at trial, copies of all motions the party intends to raise before the military commission, and names and contact information of all witnesses a party intends to call. Motions shall also be provided to the Presiding Officer at the time they are provided to opposing counsel. Unless directed otherwise by the Presiding Officer, written responses to any motions will be provided to opposing counsel and the Presiding Officer no later than three days prior to the scheduled convening of a military commission.

(b) *Notifications by the prosecution*. The Prosecution shall provide the Defense with access to evidence known to the Prosecution that tends to exculpate the Accused as soon as practicable, and in no instance later than one week prior to the scheduled convening of a military commission.

(c) *Notifications by the defense*. The Defense shall give notice to the Prosecution of any intent to raise an affirmative defense to any charge at least one week prior to the scheduled convening of a military commission.

(d) *Evidence related to mental responsibility*. If the Defense indicates an intent to raise a defense of lack of mental responsibility or introduce expert testimony regarding an Accused's mental condition, the prosecution may require that the Accused submit to a mental examination by a military psychologist or psychiatrist, and both parties shall have access to the results of that examination.

## PART 18—APPOINTING AUTHORITY FOR MILITARY COMMISSIONS

Sec.
18.1 Purpose
18.2 Applicability and scope.
18.3 Organization.
18.4 Responsibilities and functions.
18.5 Relationships.
18.6 Authorities.

AUTHORITY: 10 U.S.C. 113 and 131(b)(8).

SOURCE: 69 FR 31292, June 3, 2004, unless otherwise noted.

### § 18.1 Purpose.

Pursuant to the authority vested in the Secretary of Defense under the U.S. Constitution, Article II, Section 2, Clause 2, 10 U.S.C. 113 and 131(b)(8) and Military Order of November 13, 2001, ''Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,'' (66 FR 57833 (November 16, 2001)) (''President's Military Order'') this part establishes the position and office of the Appointing Authority for Military Commissions, with the responsibilities, functions, relationships, and authorities as prescribed herein.

### § 18.2 Applicability and scope.

This part applies to:

(a) The Office of the Secretary of Defense (OSD), the Military Departments, the Chairman of the Joint Chiefs of Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, all other organizational entities in the Department of Defense (hereafter referred to collectively as ''the DoD Components'').

(b) Any special trial counsel of the Department of Justice who may be made available by the Attorney General of the United States to serve as a prosecutor in trials before military commissions pursuant to section

4(B)(2) of DoD Military Commission Order No. 1,[1] ''Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism,'' March 21, 2002.

(c) Any civilian attorney who seeks qualification as a member of a pool of qualified Civilian Defense Counsel authorized in section 4(C)(3)(b) of DoD Military Commission Order No. 1; and to any attorney who has been qualified as a member of that pool.

### § 18.3 Organization.

(a) The Appointing Authority for Military Commissions is established in the Office of the Secretary of Defense under the authority, direction, and control of the Secretary of Defense.

(b) The Office of the Appointing Authority shall consist of the Appointing Authority, the Legal Advisor to the Appointing Authority, and such other subordinate officials and organizational elements as are established by the General Counsel of the Department of Defense within the resources assigned by the Secretary of Defense.

### § 18.4 Responsibilities and functions.

(a) The Appointing Authority for Military Commissions is an officer of the United States appointed by the Secretary of Defense pursuant to the U.S. Constitution and 10 U.S.C. In this capacity, the Appointing Authority for Military Commissions shall exercise the duties prescribed in DoD Military Commission Order No. 1 and this part and shall:

(1) Issue orders from time to time appointing one or more military commissions to try individuals subject to the President's Military Order and DoD Military Commission Order No. 1; and appoint any other personnel necessary to facilitate military commissions.

(2) Appoint military commission members and alternate members, based on competence to perform the duties involved. Remove members and alternate members for good cause pursuant to Military Commission Instruction No. 8.

(3) Designate a Presiding Officer from among the members of each military commission to preside over the proceedings of that military commission. The Presiding Officer shall be a military officer who is a judge advocate of any United States Armed Force.

(4) Approve and refer charges prepared by that Prosecution against an individual or individuals subject to Military Order of November 13, 2001.

(5) Approve plea agreements with an Accused.

(6) Decide interlocutory questions certified by the Presiding Officer.

(7) Ensure military commission proceedings are open to the maximum extent practicable. Decide when military commission proceedings should be closed pursuant to Military Order of November 13, 2001 and DoD Military Commission Order No. 1.

(8) Make decisions related to attendance at military commission proceedings by the public and accredited press and the public release of transcripts. Such matters, including policy and plans for media coverage shall be coordinated with the Assistant Secretary of Defense for Public Affairs (ASD(PA)) and, as appropriate, the Assistant Secretary of Defense for Special Operations/Low Intensity Conflict (ASD(SO/LIC)) under the Under Secretary of Defense for Policy (USD(P)).

(9) Approve or disapprove requests from the Prosecution and Defense to communicate with news media representatives regarding cases and other matters related to military commissions. Such matters shall be coordinated with the ASD(PA).

(10) Detail or employ personnel such as court reporters, interpreters, security personnel, bailiffs, and clerks to support military commissions, as necessary. When such details effect resources committed to operational missions, coordinate with the ASD (SO/LIC) under the USD(P) and the Heads of appropriate DoD Components.

(11) Order that such investigative or other resources be made available to Defense Counsel and the Accused ad deemed necessary for a full and fair trial, including appointing interpreters.

[1] DoD Military Commission Orders and Instructions referenced in this Directive can be found at *http://www.dtic.mil/whs/directives/corres/mco.htm*.

(12) Promptly review military commission records of trial for administrative completeness and determine appropriate disposition, either transmitting the record of trial to the Review Panel or returning it to the military commission for any necessary supplementary proceedings.

(13) Implement directions of officials with final decision-making authority for sentences.

(14) Perform supervisory and performance evaluation duties pursuant to this part and DoD Military Commission Instruction No. 6.

(15) Coordinate matters involving members of the Congress, including correspondence, with the Assistant Secretary of Defense for Legislative Affairs; and coordinate and exchange data and information with other OSD officials, the Heads of the DoD Components, and other Federal officials having collateral or related functions.

(16) Establish, maintain, and preserve records that serve as evidence of the organization, functions, policies, decisions, procedures, operations, and other activities of the Office of the Appointing Authority for Military Commissions in accordance with Title 44 U.S.C.

(17) Perform such other functions as the Secretary of Defense may prescribe.

(b) The General Counsel of the Department of Defense shall:

(1) Review and approve such regulations, instructions, memoranda, and other DoD publications prepared by the Appointing Authority (see § 18.6(c)) for the conduct of proceedings by military commissions established pursuant to Military Order of November 13, 2001 and DoD Military Commission Order No. 1.

(2) Provide guidance and issue instructions necessary to facilitate the conduct of proceedings by military commissions established pursuant to Military Order of November 13, 2001 and DoD Military Commission Order No. 1, including but not limited to instructions pertaining to military commission-related offices, performance evaluations and reporting relationships.

(c) The Chairman of the Joint Chiefs of Staff and the OSD Principal Staff Assistants shall exercise their designated authorities and responsibilities as established by law or DoD guidance to support the Appointing Authority for Military Commissions in the implementation of the responsibilities and functions specified herein.

(d) The Secretaries of the Military Departments shall support the personnel requirements of the Appointing Authority as validated by the General Counsel of the Department of Defense and provide other requested assistance and support within their capabilities.

### § 18.5 Relationships.

(a) In the performance of assigned functions and responsibilities, the Appointing Authority for Military Commission shall:

(1) Report directly to the Secretary of Defense.

(2) Use existing facilities and services of the Department of Defense and other Federal Agencies, whenever practicable, to avoid duplication and to achieve an appropriate level of efficiency and economy.

(b) Other OSD officials and the Heads of the DoD Components shall coordinate with the Appointing Authority for Military Commissions on all matters related to the responsibilities and functions cited in § 18.4.

(c) Nothing herein shall be interpreted to subsume or replace the responsibilities, functions, or authorities of the OSD Principal Staff Assistants, the Secretaries of the Military Departments, the Chairman of the Joint Chiefs of Staff, the Commanders of Combatant Commands, or the Heads of Defense Agencies or the Department of Defense Field Activities prescribed by law or Department of Defense guidance.

### § 18.6 Authorities.

The Appointing Authority for Military Commissions is hereby delegated authority to:

(a) Obtain reports and information, consistent with DoD Directive 8910.1 as necessary to carry out assigned functions.

(b) Communicate directly with the Heads of the DoD Components as necessary to carry out assigned functions, including the transmission of requests for advice and assistance. Communications to the Military Departments

shall be transmitted through the Secretaries of the Military Departments, their designees, or as otherwise provided in law or directed by the Secretary of Defense in other Department of Defense issuances. Communications to the Commanders of the Combatant Commands, except in unusual circumstances, shall be transmitted through the Chairman of the Joint Chiefs of Staff.

(c) Subject to the approval of the General Counsel of the Department of Defense, issue DoD Publications and one-time directive-type memoranda consistent with DoD 5025.1–M; Military Commission Instructions consistent with DoD Military Commission Instruction No. 1; and such other regulations as are necessary or appropriate for the conduct of proceedings by military commissions established pursuant to Military Order of November 13, 2001 and DoD Military Commission Order No. 1. Instructions to the Military Departments shall be issued through the Secretaries of the Military Departments. Instructions to the Combatant Commands, except in unusual circumstances, shall be communicated through the Chairman of the Joint Chiefs of Staff.

(d) Communicate with other Government officials, representatives of the Legislative Branch, members of the public, and representatives of foreign governments, as applicable, in carrying out assigned functions.

## PARTS 19–20 [RESERVED]

# SUBCHAPTER C—DoD GRANT AND AGREEMENT REGULATIONS

## PART 21—DoD GRANTS AND AGREEMENTS—GENERAL MATTERS

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AUTHORITY: 5 U.S.C. 301 and 10 U.S.C. 113.

SOURCE: 68 FR 47153, Aug. 7, 2003, unless otherwise noted.

## Subpart A—Introduction

### § 21.100 What are the purposes of this part?

This part of the DoD Grant and Agreement Regulations:

(a) Provides general information about the Defense Grant and Agreement Regulatory System (DGARS).

(b) Sets forth general policies and procedures related to DoD Components' overall management of functions related to assistance and certain other nonprocurement instruments subject to the DGARS (*see* § 21.205(b)).

## Subpart B—Defense Grant and Agreement Regulatory System

### § 21.200 What is the Defense Grant and Agreement Regulatory System (DGARS)?

The Defense Grant and Agreement Regulatory System (DGARS) is the system of regulatory policies and procedures for the award and administration of DoD Components' assistance and other nonprocurement awards. DoD Directive 3210.6[1] established the DGARS.

[1] Electronic copies may be obtained at the Washington Headquarters Services Internet site *http://www.dtic.mil/whs/directives*. Paper copies may be obtained, at cost, from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161.

### § 21.205 What types of instruments are covered by the DGARS?

The Defense Grant and Agreement Regulatory System (DGARS) applies to the following types of funding instruments awarded by DoD Components:

(a) All grants, cooperative agreements, and technology investment agreements.

(b) Other nonprocurement instruments, as needed to implement statutes, Executive orders, or other Federal Governmentwide rules that apply to those other nonprocurement instruments, as well as to grants and cooperative agreements.

### § 21.210 What are the purposes of the DGARS?

The purposes of the DGARS are to provide uniform policies and procedures for DoD Components' awards, in order to meet DoD needs for:

(a) Efficient program execution, effective program oversight, and proper stewardship of Federal funds.

(b) Compliance with relevant statutes; Executive orders; and applicable guidance, such as Office of Management and Budget (OMB) circulars.

(c) Collection from DoD Components, retention, and dissemination of management and fiscal data related to awards.

### § 21.215 Who is responsible for the DGARS?

The Director of Defense Research and Engineering, or his or her designee, develops and implements DGARS policies and procedures. He or she does so by issuing and maintaining the DoD publications that comprise the DGARS.

### § 21.220 What publications are in the DGARS?

A DoD publication (DoD 3210.6–R[2]) entitled ''The DoD Grant and Agreement Regulations'' is the principal element of the DGARS. The Director of Defense Research and Engineering also may publish DGARS policies and procedures in DoD instructions and other DoD publications, as appropriate.

[2] *See* footnote 1 to § 21.200.

## Subpart C—The DoD Grant and Agreement Regulations

### § 21.300 What instruments are subject to the DoD Grant and Agreement Regulations (DoDGARs)?

(a) The types of instruments that are subject to the DoDGARs vary from one portion of the DoDGARs to another. The types of instruments include grants, cooperative agreements, and technology investment agreements. Some portions of the DoDGARs apply to other types of assistance or nonprocurement instruments. The term ''awards,'' as defined in subpart D of this part, is used in this part to refer collectively to all of the types of instruments that are subject to one or more portions of the DoDGARs.

(b) Note that each portion of the DoDGARs identifies the types of instruments to which it applies. However, grants officers and agreements officers must exercise caution when determining the applicability of some Governmentwide rules that are included within the DoDGARs, because a term may be defined differently in a Governmentwide rule than it is defined elsewhere in the DoDGARs. One example is part 33 of the DoDGARs (32 CFR part 33), which contains administrative requirements for awards to State and local governments. That DoDGARs part is the DoD's codification of the Governmentwide rule implementing OMB Circular A–102.[3] Part 33 states that it applies to grants, but defines the term ''grant'' to include cooperative agreements and other forms of financial assistance.

(c) For convenience, the table in Appendix A to this part provides an overview of the applicability of the various portions of the DoDGARs.

### § 21.305 What is the purpose of the DoDGARs?

The DoD Grant and Agreement Regulations provide uniform policies and procedures for the award and administration of DoD Components' awards. The DoDGARs are the primary DoD regulations for achieving the DGARS purposes described in § 21.210.

### § 21.310 Who ensures DoD Component compliance with the DoDGARs?

The Head of each DoD Component that makes or administers awards, or his or her designee, is responsible for ensuring compliance with the DoDGARs within that DoD Component.

### § 21.315 May DoD Components issue supplemental policies and procedures to implement the DoDGARs?

Yes, Heads of DoD Components or their designees may issue regulations, procedures, or instructions to implement the DGARS or supplement the DoDGARs to satisfy needs that are specific to the DoD Component, as long as the regulations, procedures, or instructions do not impose additional costs or administrative burdens on recipients or potential recipients.

### § 21.320 Are there areas in which DoD Components must establish policies and procedures to implement the DoDGARs?

Yes, Heads of DoD Components or their designees must establish policies and procedures in areas where uniform policies and procedures throughout the DoD Component are required, such as for:

(a) Requesting class deviations from the DoDGARs (*see* §§ 21.335(b) and 21.340(a)) or exemptions from the provisions of 31 U.S.C. 6301 through 6308, that govern the appropriate use of contracts, grants, and cooperative agreements (*see* 32 CFR 22.220).

(b) Designating one or more Grant Appeal Authorities to resolve claims, disputes, and appeals (*see* 32 CFR 22.815).

(c) Reporting data on assistance awards and programs, as required by 31 U.S.C. chapter 61 (*see* subpart E of this part).

(d) Prescribing requirements for use and disposition of real property acquired under awards, if the DoD Component makes any awards to institutions of higher education or to other nonprofit organizations under which real property is acquired in whole or in

[3] Electronic copies may be obtained at the Internet site *http://www.whitehouse.gov/OMB*. For paper copies, contact the Office of Management and Budget, EOP Publications, 725 17th St., NW., New Executive Office Building, Washington, DC 20503.

part with Federal funds (*see* 32 CFR 32.32).

### § 21.325 Do acquisition regulations also apply to DoD grants and agreements?

Unless the DoDGARs specify that they apply, policies and procedures in the following acquisition regulations that apply to procurement contracts do not apply to grants, cooperative agreements, technology investment agreements, or to other assistance or nonprocurement awards:

(a) The Federal Acquisition Regulation (FAR)(48 CFR parts 1–53).

(b) The Defense Federal Acquisition Regulation Supplement (DFARS)(48 CFR parts 201–270).

(c) DoD Component supplements to the FAR and DFARS.

### § 21.330 How are the DoDGARs published and maintained?

(a) The DoD publishes the DoDGARs in the Code of Federal Regulations (CFR) and in a separate internal DoD document (DoD 3210.6–R).

(1) The location of the DoDGARs in the CFR currently is in transition. They are moving from Chapter I, Subchapter C, Title 32, to a new location in Chapter XI, Title 2 of the CFR. During the transition, there will be some parts of the DoDGARs in each of the two titles.

(2) The DoD document is divided into parts, subparts, and sections, to parallel the CFR publication. Cross references within the DoD document are stated as CFR citations (*e.g.*, a reference to section 21.215 in part 21 would be to 32 CFR 21.215), which also is how they are stated in the CFR publication of the DoDGARs.

(b) The DoD publishes updates to the DoDGARs in the FEDERAL REGISTER. When finalized, the DoD also posts the updates to the internal DoD document on the World Wide Web at *http://www.dtic.mil/whs/directives*.

(c) A standing working group recommends revisions to the DoDGARs to the Director of Defense Research and Engineering (DDR&E). The DDR&E, Director of Defense Procurement, and each Military Department must be represented on the working group. Other DoD Components that make or administer awards may also nominate representatives. The working group meets when necessary.

[68 FR 47153, Aug. 7, 2003, as amended at 72 FR 34986, June 26, 2007]

### § 21.335 Who can authorize deviations from the DoDGARs?

(a) The Head of the DoD Component or his or her designee may authorize individual deviations from the DoDGARs, which are deviations that affect only one award, if the deviations are not prohibited by statute, executive order or regulation.

(b) The Director of Defense Research and Engineering (DDR&E) or his or her designee must approve in advance any class deviation that affects more than one award. Note that OMB concurrence also is required for class deviations from two parts of the DoDGARs, 32 CFR parts 32 and 33, in accordance with 32 CFR 32.4 and 33.6, respectively.

### § 21.340 What are the procedures for requesting and documenting deviations?

(a) DoD Components must submit copies of justifications and agency approvals for individual deviations and written requests for class deviations to: Deputy Director of Defense Research and Engineering, ATTN: Basic Research, 3080 Defense Pentagon, Washington, DC 20301–3080.

(b) Grants officers and agreements officers must maintain copies of requests and approvals for individual and class deviations in award files.

## Subpart D—Authorities and Responsibilities for Making and Administering Assistance Awards

### § 21.400 To what instruments does this subpart apply?

This subpart applies to grants, cooperative agreements, and technology investment agreements, which are legal instruments used to reflect assistance relationships between the United States Government and recipients.

### § 21.405 What is the purpose of this subpart?

This subpart describes the sources and flow of authority to make or administer assistance awards, and assigns the broad responsibilities associated with DoD Components' use of those instruments.

### § 21.410 Must a DoD Component have statutory authority to make an assistance award?

Yes, the use of an assistance instrument to carry out a program requires authorizing legislation. That is unlike the use of a procurement contract, for which Federal agencies have inherent, Constitutional authority.

### § 21.415 Must the statutory authority specifically mention the use of grants or other assistance instruments?

No, the statutory authority described in § 21.410 need not specifically say that the purpose of the program is assistance or mention the use of any type of assistance instrument. However, the intent of the statute must support a judgment that the use of an assistance instrument is appropriate. For example, a DoD Component may judge that the principal purpose of a program for which it has authorizing legislation is assistance, rather than acquisition. The DoD Component would properly use an assistance instrument to carry out that program, in accordance with 31 U.S.C. chapter 63.

### § 21.420 Under what types of statutory authorities do DoD Components award assistance instruments?

DoD Components may use assistance instruments under a number of statutory authorities that fall into three categories:

(a) *Authorities that statutes provide to the Secretary of Defense.* These authorities generally are delegated by the Secretary of Defense to Heads of DoD Components, usually through DoD directives, instructions, or policy memoranda that are not part of the Defense Grant and Agreement Regulatory System. Examples of statutory authorities in this category are:

(1) Authority under 10 U.S.C. 2391 to award grants or cooperative agreements to help State and local governments alleviate serious economic impacts of defense program changes (*e.g.*, base openings and closings, contract changes, and personnel reductions and increases).

(2) Authority under 10 U.S.C. 2413 to enter into cooperative agreements with entities that furnish procurement technical assistance to businesses.

(b) *Authorities that statutes may provide directly to Heads of DoD Components.* When a statute authorizes the Head of a DoD Component to use a funding instrument to carry out a program with a principal purpose of assistance, use of that authority requires no delegation by the Secretary of Defense. For example, 10 U.S.C. 2358 authorizes the Secretaries of the Military Departments, in addition to the Secretary of Defense, to perform research and development projects through grants and cooperative agreements. Similarly, 10 U.S.C. 2371 provides authority for the Secretaries of the Military Departments and Secretary of Defense to carry out basic, applied, or advanced research projects using assistance instruments other than grants and cooperative agreements. A Military Department's use of the authority of 10 U.S.C. 2358 or 10 U.S.C. 2371 therefore requires no delegation by the Secretary of Defense.

(c) *Authorities that arise indirectly as the result of statute.* For example, authority to use an assistance instrument may result from:

(1) A federal statute authorizing a program that is consistent with an assistance relationship (*i.e.*, the support or stimulation of a public purpose, rather than the acquisition of a good or service for the direct benefit of the Department of Defense). In accordance with 31 U.S.C. chapter 63, such a program would appropriately be carried out through the use of grants or cooperative agreements. Depending upon the nature of the program (*e.g.*, research) and whether the program statute includes authority for any specific types of instruments, there also may be authority to use other assistance instruments.

(2) Exemptions requested by the Department of Defense and granted by the Office of Management and Budget

under 31 U.S.C. 6307, as described in 32 CFR 22.220.

### § 21.425 How does a DoD Component's authority flow to awarding and administering activities?

The Head of a DoD Component, or his or her designee, may delegate to the heads of contracting activities (HCAs) within the Component, that Component's authority to make and administer awards, to appoint grants officers and agreements officers (*see* §§ 21.435 through 21.450), and to broadly manage the DoD Component's functions related to assistance instruments. The HCA is the same official (or officials) designated as the head of the contracting activity for procurement contracts, as defined at 48 CFR 2.101. The intent is that overall management responsibilities for a DoD Component's functions related to nonprocurement instruments be assigned only to officials that have similar responsibilities for procurement contracts.

### § 21.430 What are the responsibilities of the head of the awarding or administering activity?

When designated by the Head of the DoD Component or his or her designee (see 32 CFR 21.425), the head of the awarding or administering activity (*i.e.*, the HCA) is responsible for the awards made by or assigned to that activity. He or she must supervise and establish internal policies and procedures for that activity's awards.

### § 21.435 Must DoD Components formally select and appoint grants officers and agreements officers?

Yes, each DoD Component that awards grants or enters into cooperative agreements must have a formal process (see § 21.425) for selecting and appointing grants officers and for terminating their appointments. Similarly, each DoD Component that awards or administers technology investment agreements must have a process for selecting and appointing agreements officers and for terminating their appointments.

### § 21.440 What are the standards for selecting and appointing grants officers and agreements officers?

In selecting grants officers and agreements officers, DoD Components must use the following minimum standards:

(a) In selecting a grants officer, the appointing official must judge whether the candidate has the necessary experience, training, education, business acumen, judgment, and knowledge of assistance instruments and contracts to function effectively as a grants officer. The appointing official also must take those attributes of the candidate into account when deciding the complexity and dollar value of the grants and cooperative agreements to be assigned.

(b) In selecting an agreements officer, the appointing official must consider all of the same factors as in paragraph (a) of this section. In addition, the appointing official must consider the candidate's ability to function in the less structured environment of technology investment agreements, where the rules provide more latitude and the individual must have a greater capacity for exercising judgment. Agreements officers therefore should be individuals who have demonstrated expertise in executing complex assistance and acquisition instruments.

### § 21.445 What are the requirements for a grants officer's or agreements officer's statement of appointment?

A statement of a grants officer's or agreements officer's appointment:

(a) Must be in writing.

(b) Must clearly state the limits of the individual's authority, other than limits contained in applicable laws or regulations. Information on those limits of a grants officer's or agreements officer's authority must be readily available to the public and agency personnel.

(c) May, if the individual is a contracting officer, be incorporated into his or her statement of appointment as a contracting officer (*i.e.*, there does not need to be a separate written statement of appointment for assistance instruments).

### § 21.450 What are the requirements for a termination of a grants officer's or agreements officer's appointment?

A termination of a grants officer's or agreements officer's authority:

(a) Must be in writing, unless the written statement of appointment provides for automatic termination.

(b) May not be retroactive.

(c) May be integrated into a written termination of the individual's appointment as a contracting officer, as appropriate.

### § 21.455 Who can sign, administer, or terminate assistance instruments?

Only grants officers are authorized to sign, administer, or terminate grants or cooperative agreements (other than technology investment agreements) on behalf of the Department of Defense. Similarly, only agreements officers may sign, administer, or terminate technology investment agreements.

### § 21.460 What is the extent of grants officers' and agreements officers' authority?

Grants officers and agreements officers may bind the Government only to the extent of the authority delegated to them in their written statements of appointment (*see* § 21.445).

### § 21.465 What are grants officers' and agreements officers' responsibilities?

Grants officers and agreements officers should be allowed wide latitude to exercise judgment in performing their responsibilities, which are to ensure that:

(a) Individual awards are used effectively in the execution of DoD programs, and are made and administered in accordance with applicable laws, Executive orders, regulations, and DoD policies.

(b) Sufficient funds are available for obligation.

(c) Recipients of awards receive impartial, fair, and equitable treatment.

## Subpart E—Information Reporting on Awards Subject to 31 U.S.C. Chapter 61

### § 21.500 What is the purpose of this subpart?

This subpart prescribes policies and procedures for compiling and reporting data related to DoD awards and programs that are subject to information reporting requirements of 31 U.S.C. chapter 61. That chapter of the U.S. Code requires the Office of Management and Budget to maintain a Governmentwide information system to collect data on Federal agencies' domestic assistance awards and programs.

### § 21.505 What is the Catalog of Federal Domestic Assistance (CFDA)?

The Catalog of Federal Domestic Assistance (CFDA) is a Governmentwide compilation of information about domestic assistance programs. It covers all domestic assistance programs and activities, regardless of the number of awards made under the program, the total dollar value of assistance provided, or the duration. In addition to programs using grants and agreements, covered programs include those providing assistance in other forms, such as payments in lieu of taxes or indirect assistance resulting from Federal operations.

### § 21.510 Why does the DoD report information to the CFDA?

The Federal Program Information Act (31 U.S.C. 6101 through 6106), as implemented through OMB Circular A–89,[4] requires the Department of Defense and other Federal agencies to provide certain information about their domestic assistance programs to the OMB and the General Services Administration (GSA). The GSA makes this information available to the public by publishing it in the Catalog of Federal Domestic Assistance (CFDA) and maintaining the Federal Assistance Programs Retrieval System, a computerized data base of the information.

[4] See footnote 3 to § 21.300(b).

### § 21.515 Who reports the information for the CFDA?

(a) Each DoD Component that provides domestic financial assistance must:

(1) Report to the Director of Information, Operations and Reports, Washington Headquarters Services (DIOR, WHS) all new programs and changes as they occur or as the DoD Component submits its annual updates to existing CFDA information.

(2) Identify to the DIOR, WHS a point-of-contact who will be responsible for reporting the program information and for responding to inquiries related to it.

(b) The DIOR, WHS is the Department of Defense's single office for collecting, compiling and reporting such program information to the OMB and GSA.

### § 21.520 What are the purposes of the Defense Assistance Awards Data System (DAADS)?

Data from the Defense Assistance Awards Data System (DAADS) are used to provide:

(a) DoD inputs to meet statutory requirements for Federal Government-wide reporting of data related to obligations of funds by assistance instrument.

(b) A basis for meeting Government-wide requirements to report to the Federal Assistance Awards Data System (FAADS) maintained by the Department of Commerce and for preparing other recurring and special reports to the President, the Congress, the General Accounting Office, and the public.

(c) Information to support policy formulation and implementation and to meet management oversight requirements related to the use of awards.

### § 21.525 Who issues policy guidance for the DAADS?

The Deputy Director, Defense Research and Engineering (DDDR&E), or his or her designee, issues necessary policy guidance for the Defense Assistance Awards Data System.

### § 21.530 Who operates the DAADS?

The Director of Information Operations and Reports, Washington Headquarters Services (DIOR, WHS), consistent with guidance issued by the DDDR&E:

(a) Processes DAADS information on a quarterly basis and prepares recurring and special reports using such information.

(b) Prepares, updates, and disseminates instructions for reporting information to the DAADS. The instructions are to specify procedures, formats, and editing processes to be used by DoD Components, including record layout, submission deadlines, media, methods of submission, and error correction schedules.

### § 21.535 Do DoD Components have central points for collecting DAADS data?

Each DoD Component must have a central point for collecting DAADS information from contracting activities within that DoD Component. The central points are as follows:

(a) For the Army: As directed by the U.S. Army Contracting Support Agency.

(b) For the Navy: As directed by the Office of Naval Research.

(c) For the Air Force: As directed by the Office of the Secretary of the Air Force, Acquisition Contracting Policy and Implementation Division (SAF/AQCP).

(d) For the Office of the Secretary of Defense, Defense Agencies, and DoD Field Activities: Each Defense Agency must identify a central point for collecting and reporting DAADS information to the DIOR, WHS, at the address given in § 21.555(a). DIOR, WHS serves as the central point for offices and activities within the Office of the Secretary of Defense and for DoD Field Activities.

### § 21.540 What are the duties of the DoD Components' central points for the DAADS?

The office that serves, in accordance with § 21.535, as the central point for collecting DAADS information from contracting activities within each DoD Component must:

(a) Establish internal procedures to ensure reporting by contracting activities that make awards subject to 31 U.S.C. chapter 61.

(b) Collect information required by DD Form 2566,[5] ''DoD Assistance Award Action Report,'' from those contracting activities, and report it to DIOR, WHS, in accordance with §§ 21.545 through 21.555.

(c) Submit to the DIOR, WHS, any recommended changes to the DAADS.

### § 21.545 Must DoD Components report every obligation to the DAADS?

Yes, DoD Components' central points must collect and report the data required by the DD Form 2566 for each individual action that involves the obligation or deobligation of Federal funds for an award that is subject to 31 U.S.C. chapter 61.

### § 21.550 Must DoD Components relate reported actions to listings in the CFDA?

Yes, DoD Components' central points must report each action as an obligation or deobligation under a specific programmatic listing in the Catalog of Federal Domestic Assistance (CFDA, see § 21.505). The programmatic listing to be shown is the one that provided the funds being obligated or deobligated. For example, if a grants officer or agreements officer in one DoD Component obligates appropriations of a second DoD Component's programmatic listing, the grants officer or agreements officer must show the CFDA programmatic listing of the second DoD Component on the DD Form 2566.

### § 21.555 When and how must DoD Components report to the DAADS?

DoD Components' central points must report:

(a) On a quarterly basis to DIOR, WHS. For the first three quarters of the Federal fiscal year, the data are due by close-of-business (COB) on the 15th day after the end of the quarter (*i.e.*, first-quarter data are due by COB on January 15th, second-quarter data by COB April 15th, and third-quarter data by COB July 15th). Fourth-quarter data are due by COB October 25th, the 25th day after the end of the quarter. If any due date falls on a weekend or holiday, the data are due on the next regular workday. The mailing address for DIOR, WHS is 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202–4302.

(b) On a floppy diskette or by other means permitted either by the instructions described in § 21.530(b) or by agreement with the DIOR, WHS. The data must be reported in the format specified in the instructions.

### § 21.560 Must DoD Components assign numbers uniformly to awards?

Yes, DoD Components must assign identifying numbers to all awards subject to this subpart, including grants, cooperative agreements, and technology investment agreements. The uniform numbering system parallels the procurement instrument identification (PII) numbering system specified in 48 CFR 204.70 (in the ''Defense Federal Acquisition Regulation Supplement''), as follows:

(a) The first six alphanumeric characters of the assigned number must be identical to those specified by 48 CFR 204.7003(a)(1) to identify the DoD Component and contracting activity.

(b) The seventh and eighth positions must be the last two digits of the fiscal year in which the number is assigned to the grant, cooperative agreement, or other nonprocurement instrument.

(c) The 9th position must be a number:

(1) ''1'' for grants.

(2) ''2'' for cooperative agreements, including technology investment agreements that are cooperative agreements (see Appendix B to 32 CFR part 37).

(3) ''3'' for other nonprocurement instruments, including technology investment agreements that are not cooperative agreements.

(d) The 10th through 13th positions must be the serial number of the instrument. DoD Components and contracting activities need not follow any specific pattern in assigning these numbers and may create multiple series of letters and numbers to meet internal needs for distinguishing between various sets of awards.

[5] Department of Defense forms are available at Internet site *http://www.dior.whs.mil/ICDHOME/FORMTAB.HTM*.

### § 21.565 Must DoD Components' electronic systems accept Data Universal Numbering System (DUNS) numbers?

The DoD Components must comply with paragraph 5.e of the Office of Management and Budget (OMB) policy directive entitled, ''Requirement for a DUNS number in Applications for Federal Grants and Cooperative Agreements.''[6] Paragraph 5.e requires electronic systems that handle information about grants and cooperative agreements (which, for the DoD, include Technology Investment Agreements) to accept DUNS numbers. Each DoD Component that awards or administers grants or cooperative agreements must ensure that DUNS numbers are accepted by each such system for which the DoD Component controls the system specifications. If the specifications of such a system are subject to another organization's control and the system can not accept DUNS numbers, the DoD Component must alert that organization to the OMB policy directive's requirement for use of DUNS numbers with a copy to: Director for Basic Sciences, ODDR&E, 3040 Defense Pentagon, Washington, DC 20301–3040.

[72 FR 34986, June 26, 2007]

## Subpart F—Definitions

### § 21.605 Acquisition.

The acquiring (by purchase, lease, or barter) of property or services for the direct benefit or use of the United States Government (see more detailed definition at 48 CFR 2.101). In accordance with 31 U.S.C. 6303, procurement contracts are the appropriate legal instruments for acquiring such property or services.

### § 21.610 Agreements officer.

An official with the authority to enter into, administer, and/or terminate technology investment agreements.

[6] This OMB policy directive is available at the Internet site *http://www.whitehouse.gov/omb/grants/grants_docs.html*.

### § 21.615 Assistance.

The transfer of a thing of value to a recipient to carry out a public purpose of support or stimulation authorized by a law of the United States (*see* 31 U.S.C. 6101(3)). Grants, cooperative agreements, and technology investment agreements are examples of legal instruments used to provide assistance.

### § 21.620 Award.

A grant, cooperative agreement, technology investment agreement, or other nonprocurement instrument subject to one or more parts of the DoD Grant and Agreement Regulations (*see* appendix A to this part).

### § 21.625 Contract.

See the definition for procurement contract in this subpart.

### § 21.630 Contracting activity.

An activity to which the Head of a DoD Component has delegated broad authority regarding acquisition functions, pursuant to 48 CFR 1.601.

### § 21.635 Contracting officer.

A person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings. A more detailed definition of the term appears at 48 CFR 2.101.

### § 21.640 Cooperative agreement.

A legal instrument which, consistent with 31 U.S.C. 6305, is used to enter into the same kind of relationship as a grant (see definition ''grant''), except that substantial involvement is expected between the Department of Defense and the recipient when carrying out the activity contemplated by the cooperative agreement. The term does not include ''cooperative research and development agreements'' as defined in 15 U.S.C. 3710a.

### § 21.645 Deviation.

The issuance or use of a policy or procedure that is inconsistent with the DoDGARs.

### § 21.650 DoD Components.

The Office of the Secretary of Defense, the Military Departments, the

Defense Agencies, and DoD Field Activities.

**§ 21.655 Grant.**

A legal instrument which, consistent with 31 U.S.C. 6304, is used to enter into a relationship:

(a) Of which the principal purpose is to transfer a thing of value to the recipient to carry out a public purpose of support or stimulation authorized by a law of the United States, rather than to acquire property or services for the Department of Defense's direct benefit or use.

(b) In which substantial involvement is not expected between the Department of Defense and the recipient when carrying out the activity contemplated by the grant.

**§ 21.660 Grants officer.**

An official with the authority to enter into, administer, and/or terminate grants or cooperative agreements.

**§ 21.665 Nonprocurement instrument.**

A legal instrument other than a procurement contract. Examples include instruments of financial assistance, such as grants or cooperative agreements, and those of technical assistance, which provide services in lieu of money.

**§ 21.670 Procurement contract.**

A legal instrument which, consistent with 31 U.S.C. 6303, reflects a relationship between the Federal Government and a State, a local government, or other recipient when the principal purpose of the instrument is to acquire property or services for the direct benefit or use of the Federal Government. See the more detailed definition for contract at 48 CFR 2.101.

**§ 21.675 Recipient.**

An organization or other entity receiving an award from a DoD Component.

**§ 21.680 Technology investment agreements.**

A special class of assistance instruments used to increase involvement of commercial firms in defense research programs and for other purposes related to integrating the commercial and defense sectors of the nation's technology and industrial base. Technology investment agreements include one kind of cooperative agreement with provisions tailored for involving commercial firms, as well as one kind of other assistance transaction. Technology investment agreements are described more fully in 32 CFR part 37.

APPENDIX A TO PART 21—INSTRUMENTS TO WHICH DODGARS PORTIONS APPLY

| DoDGARs . . . | which addresses . . . | applies to . . . |
|---|---|---|
| Part 21 (32 CFR part 21), all but Subparts D and E | The Defense Grant and Agreement Regulatory System and the DoD Grant and Agreement Regulations | "awards," which are grants, cooperative agreements, technology investment agreements (TIAs), and other nonprocurement instruments subject to one or more parts of the DoDGARs. |
| Part 21 (32 CFR part 21), Subpart D | Authorities and responsibilities for assistance award and administration | grants, cooperative agreements, and TIAs. |
| Part 21 (32 CFR part 21), Subpart E | DoD Components' information reporting requirements | grants, cooperative agreements, TIAs, and other nonprocurement instruments subject to reporting requirements in 31 U.S.C. chapter 61. |
| Part 22 (32 CFR part 22) | DoD grants officers' responsibilities for award and administration of grants and cooperative agreements | grants and cooperative agreements other than TIAs. |
| Part 26 (32 CFR part 26) | Governmentwide drug-free workplace requirements | grants, cooperative agreements and other financial assistance instruments, including TIAs, that are included in the definition of "award" at 32 CFR 26.605. |
| Part 28 (32 CFR part 28) | Governmentwide restrictions on lobbying | grants, cooperative agreements and other financial assistance instruments, including TIAs, that are included in the definitions of "Federal grant" and "Federal cooperative agreement" at 32 CFR 28.105. |
| Part 32 (32 CFR part 32) | Administrative requirements for grants and agreements with institutions of higher education, hospitals, and other non-profit organizations | grants, cooperative agreements other than TIAs, and other assistance included in "award," as defined in 32 CFR 32.2. Portions of this part apply to TIAs, but only as 32 CFR part 37 refers to them and makes them apply. |
| Part 33 (32 CFR part 33) | Administrative requirements for grants and agreements with State and local governments | grants, cooperative agreements other than TIAs, and other assistance included in "grant," as defined in 32 CFR 33.3. Portions of this part apply to TIAs, but only as 32 CFR part 37 refers to them and makes them apply. |
| Part 34 (32 CFR part 34) | Administrative requirements for grants and agreements with for-profit organizations | grants and cooperative agreements other than TIAs ("awards," as defined in 32 CFR 34.2). Portions of this part apply to TIAs, but only as 32 CFR part 37 refers to them and makes them apply. |
| Part 37 (32 CFR part 37) | Agreements officers' responsibilities for award and administration of TIAs | TIAs. Note that this part refers to portions of DoDGARs parts 32, 33, and 34 that apply to TIAs. |
| Part 1125 (2 CFR part 1125) | Governmentwide debarment and suspension requirements | nonprocurement generally, including grants, cooperative agreements, TIAs, and any other instruments that are covered transactions under OMB guidance in 2 CFR 180.210 and 180.215, as implemented by 2 CFR part 1125, except acquisition transactions to carry out prototype projects (see 2 CFR 1125.20). |

[72 FR 34986, June 26, 2007]

# PART 22—DoD GRANTS AND AGREEMENTS—AWARD AND ADMINISTRATION

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AUTHORITY: 5 U.S.C. 301 and 10 U.S.C. 113.

SOURCE: 63 FR 12164, Mar. 12, 1998, unless otherwise noted.

## Subpart A—General

### § 22.100 Purpose, relation to other parts, and organization.

(a) This part outlines grants officers' and DoD Components' responsibilities related to the award and administration of grants and cooperative agreements.

(b) In doing so, it also supplements other parts of the DoD Grant and Agreement Regulations (DoDGARs) that are either Governmentwide rules or DoD implementation of Governmentwide guidance in Office of Management and Budget (OMB) Circulars. Those other parts of the DoDGARs, which are referenced as appropriate in this part, are:

(1) The DoD implementation, in 2 CFR part 1125, of OMB guidance on nonprocurement debarment and suspension.

(2) The Governmentwide rule on drug-free workplace requirements, in 32 CFR part 26.

(3) The Governmentwide rule on lobbying restrictions, in 32 CFR part 28.

(4) Administrative requirements for grants and agreements awarded to specific types of recipients:

(i) For State and local governmental organizations, in the Governmentwide rule at 32 CFR part 33.

(ii) For institutions of higher education and other nonprofit organizations, at 32 CFR part 32.

(iii) For for-profit organizations, at 32 CFR part 34.

(c) The organization of this part parallels the award and administration process, from pre-award through post-award matters. It therefore is organized in the same manner as the parts of the DoDGARs (32 CFR parts 32, 33, and 34) that prescribe administrative requirements for specific types of recipients.

[63 FR 12164, Mar. 12, 1998, as amended at 70 FR 49464, Aug. 23, 2005; 72 FR 34988, June 26, 2007]

### § 22.105 Definitions.

Other than the terms defined in this section, terms used in this part are defined in 32 CFR part 21, subpart F.

*Administrative offset.* An action whereby money payable by the United States Government to, or held by the Government for, a recipient is withheld to satisfy a delinquent debt the recipient owes the Government.

*Advanced research.* Advanced technology development that creates new technology or demonstrates the viability of applying existing technology to new products and processes in a general way. Advanced research is most closely analogous to precompetitive technology development in the commercial sector (i.e., early phases of research and development on which commercial competitors are willing to collaborate, because the work is not so coupled to specific products and processes that the results of the work must be proprietary). It does not include development of military systems and hardware where specific requirements have been defined. It is typically funded in Advanced Technology Development (Budget Activity 3 and Research Category 6.3A) programs within Research, Development, Test and Evaluation (RDT&E).

*Applied research.* Efforts that attempt to determine and exploit the potential of scientific discoveries or improvements in technology such as new materials, devices, methods and processes. It typically is funded in Applied Research (Budget Activity 2 and Research Category 6.2) programs within Research, Development, Test and Evaluation (RDT&E). Applied research normally follows basic research but may not be fully distinguishable from the related basic research. The term does not include efforts whose principal aim is the design, development, or testing of specific products, systems or processes to be considered for sale or acquisition; these efforts are within the definition of ''development.''

*Basic research.* Efforts directed toward increasing knowledge and understanding in science and engineering, rather than the practical application of that knowledge and understanding. It typically is funded within Basic Research (Budget Activity 1 and Research Category 6.1) programs within Research, Development, Test and Evaluation (RDT&E). For the purposes of this part, basic research includes:

(1) Research-related, science and engineering education, including graduate fellowships and research traineeships.

(2) Research instrumentation and other activities designed to enhance the infrastructure for science and engineering research.

*Claim.* A written demand or written assertion by one of the parties to a grant or cooperative agreement seeking as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of award terms, or other relief arising under or relating to a grant or cooperative agreement. A routine request for payment that is not in dispute when submitted is not a claim. The submission may be converted to a claim by written notice to the grants officer if it is disputed either as to liability or amount, or is not acted upon in a reasonable time.

*Debt.* Any amount of money or any property owed to a Federal Agency by any person, organization, or entity except another United States Federal Agency. Debts include any amounts due from insured or guaranteed loans, fees, leases, rents, royalties, services, sales of real or personal property, or overpayments, penalties, damages, interest, fines and forfeitures, and all other claims and similar sources.

Amounts due a nonappropriated fund instrumentality are not debts owed the United States, for the purposes of this subchapter.

*Delinquent debt*. A debt:

(1) That the debtor fails to pay by the date specified in the initial written notice from the agency owed the debt, normally within 30 calendar days, unless the debtor makes satisfactory payment arrangements with the agency by that date; and

(2) With respect to which the debtor has elected not to exercise any available appeals or has exhausted all agency appeal processes.

*Development*. The systematic use of scientific and technical knowledge in the design, development, testing, or evaluation of potential new products, processes, or services to meet specific performance requirements or objectives. It includes the functions of design engineering, prototyping, and engineering testing.

*Electronic commerce*. The conduct of business through the use of automation and electronic media, in lieu of paper transactions, direct personal contact, telephone, or other means. For grants and cooperative agreements, electronic commerce can include the use of electronic data interchange, electronic mail, electronic bulletin board systems, and electronic funds transfer for: program announcements or solicitations; applications or proposals; award documents; recipients' requests for payment; payment authorizations; and payments.

*Electronic data interchange*. The exchange of standardized information communicated electronically between business partners, typically between computers. It is DoD policy that DoD Component EDI applications conform to the American National Standards Institute (ANSI), Accredited Standards Committee (ASC) X–12 standard.[1]

*Electronic funds transfer*. A system that provides the authority to debit or credit accounts in financial institutions by electronic means rather than source documents (e.g., paper checks). Processing typically occurs through the Federal Reserve System and/or the Automated Clearing House (ACH) computer network. It is DoD policy that DoD Component EFT transmissions conform to the American National Standards Institute (ANSI), Accredited Standards Committee (ASC) X–12 standard.

*Historically Black colleges and universities*. Institutions of higher education determined by the Secretary of Education to meet the requirements of 34 CFR 608.2. Each DoD Component's contracting activities and grants officers may obtain a list of historically Black colleges and universities from that DoD Component's Small and Disadvantaged Business Utilization office.

*Institution of higher education*. An educational institution that meets the criteria in section 1201(a) of the Higher Education Act of 1965 (20 U.S.C. 1141(a)). Note, however, that institution of higher education has a different meaning in § 22.520, as given at § 22.520(b)(2).

*Minority institutions*. Institutions of higher education that meet the criteria for *minority institutions* specified in 10 U.S.C. 2323. Each DoD Component's contracting activities and grants officers may obtain copies of a current list of institutions that qualify as *minority institutions* under 10 U.S.C. 2323 from that DoD Component's Small and Disadvantaged Business Utilization office (the list of *minority institutions* changes periodically, based on Department of Education data on institutions' enrollments of minority students).

*Research*. Basic, applied, and advanced research, as defined in this section.

*Subaward*. An award of financial assistance in the form of money, or property in lieu of money, made under a DoD grant or cooperative agreement by a recipient to an eligible subrecipient. The term includes financial assistance for substantive program performance by the subrecipient of a portion of the program for which the DoD grant or cooperative agreement was made. It

[1] Available from Accredited Standards Committee, X–12 Secretariat, Data Interchange Standards Association, 1800 Diagonal Road, Suite 355, Alexandria, VA 22314–2852; Attention: Manager Maintenance and Publications.

does not include the recipient's procurement of goods and services needed to carry out the program.

[63 FR 12164, Mar. 12, 1998, as amended at 68 FR 47160, Aug. 7, 2003]

## Subpart B—Selecting the Appropriate Instrument

### § 22.200 Purpose.

This subpart provides the bases for determining the appropriate type of instrument in a given situation.

### § 22.205 Distinguishing assistance from procurement.

Before using a grant or cooperative agreement, the grants officer shall make a positive judgment that an assistance instrument, rather than a procurement contract, is the appropriate instrument, based on the following:

(a) *Purpose.* (1) The grants officer must judge that the principal purpose of the activity to be carried out under the instrument is to stimulate or support a public purpose (i.e., to provide assistance), rather than acquisition (i.e., to acquire goods and services for the direct benefit of the United States Government). If the principal purpose is acquisition, then the grants officer shall judge that a procurement contract is the appropriate instrument, in accordance with 31 U.S.C. chapter 63 (''Using Procurement Contracts and Grant and Cooperative Agreements''). Assistance instruments shall not be used in such situations, except:

(i) When a statute specifically provides otherwise; or

(ii) When an exemption is granted, in accordance with § 22.220.

(2) For research and development, the appropriate use of grants and cooperative agreements therefore is almost exclusively limited to the performance of selected basic, applied, and advanced research projects. Development projects nearly always shall be performed by contract or other acquisition transaction because their principal purpose is the acquisition of specific deliverable items (e.g., prototypes or other hardware) for the benefit of the Department of Defense.

(b) *Fee or profit.* Payment of fee or profit is consistent with an activity whose principal purpose is the acquisition of goods and services for the direct benefit or use of the United States Government, rather than an activity whose principal purpose is assistance. Therefore, the grants officer shall use a procurement contract, rather than an assistance instrument, in all cases where:

(1) Fee or profit is to be paid to the recipient of the instrument; or

(2) The instrument is to be used to carry out a program where fee or profit is necessary to achieving program objectives.

### § 22.210 Authority for providing assistance.

(a) Before a grant or cooperative agreement may be used, the grants officer must:

(1) Identify the program statute, the statute that authorizes the DoD Component to carry out the activity the principal purpose of which is assistance (see 32 CFR 21.410 through 21.420.

(2) Review the program statute to determine if it contains requirements that affect the:

(i) Solicitation, selection, and award processes. For example, program statutes may authorize assistance to be provided only to certain types of recipients; may require that recipients meet certain other criteria to be eligible to receive assistance; or require that a specific process shall be used to review recipients' proposals.

(ii) Terms and conditions of the award. For example, some program statutes require a specific level of cost sharing or matching.

(b) The grants officer shall ensure that the award of DoD appropriations through a grant or cooperative agreement for a research project meets the standards of 10 U.S.C. 2358, DoD's broad authority to carry out research, even if the research project is authorized under a statutory authority other than 10 U.S.C. 2358. The standards of 10 U.S.C. 2358 are that, in the opinion of the Head of the DoD Component or his or her designee, the projects must be:

(1) Necessary to the responsibilities of the DoD Component.

(2) Related to weapons systems and other military needs or of potential interest to the DoD Component.

[63 FR 12164, Mar. 12, 1998, as amended at 68 FR 47160, Aug. 7, 2003]

### § 22.215 Distinguishing grants and cooperative agreements.

(a) Once a grants officer judges, in accordance with §§ 22.205 and 22.210, that either a grant or cooperative agreement is the appropriate instrument, the grants officer shall distinguish between the two instruments as follows:

(1) Grants shall be used when the grants officer judges that substantial involvement is not expected between the Department of Defense and the recipient when carrying out the activity contemplated in the agreement.

(2) Cooperative agreements shall be used when the grants officer judges that substantial involvement is expected. The grants officer should document the nature of the substantial involvement that led to selection of a cooperative agreement. Under no circumstances are cooperative agreements to be used solely to obtain the stricter controls typical of a contract.

(b) In judging whether substantial involvement is expected, grants officers should recognize that ''substantial involvement'' is a relative, rather than an absolute, concept, and that it is primarily based on programmatic factors, rather than requirements for grant or cooperative agreement award or administration. For example, substantial involvement may include collaboration, participation, or intervention in the program or activity to be performed under the award.

### § 22.220 Exemptions.

Under 31 U.S.C. 6307, ''the Director of the Office of Management and Budget may exempt an agency transaction or program'' from the requirements of 31 U.S.C. chapter 63. Grants officers shall request such exemptions only in exceptional circumstances. Each request shall specify for which individual transaction or program the exemption is sought; the reasons for requesting an exemption; the anticipated consequences if the exemption is not granted; and the implications for other agency transactions and programs if the exemption is granted. The procedures for requesting exemptions shall be:

(a) In cases where 31 U.S.C. chapter 63 would require use of a contract and an exemption from that requirement is desired:

(1) The grants officer shall submit a request for exemption, through appropriate channels established by his or her DoD Component (see 32 CFR 21.320(a)), to the Director of Defense Procurement and Acquisition Policy (DDP&AP).

(2) The DDP&AP, after coordination with the Director of Defense Research and Engineering (DDR&E), shall transmit the request to OMB or notify the DoD Component that the request has been disapproved.

(b) In other cases, the DoD Component shall submit a request for the exemption through appropriate channels to the DDR&E. The DDR&E shall transmit the request to OMB or notify the DoD Component that the request has been disapproved.

(c) Where an exemption is granted, documentation of the approval shall be maintained in the award file.

[63 FR 12164, Mar. 12, 1998, as amended at 68 FR 47160, Aug. 7, 2003; 70 FR 49464, Aug. 23, 2005]

## Subpart C—Competition

### § 22.300 Purpose.

This subpart establishes DoD policy and implements statutes related to the use of competitive procedures in the award of grants and cooperative agreements.

### § 22.305 General policy and requirement for competition.

(a) It is DoD policy to maximize use of competition in the award of grants and cooperative agreements. This also conforms with:

(1) 31 U.S.C. 6301(3), which encourages the use of competition in awarding all grants and cooperative agreements.

(2) 10 U.S.C. 2374(a), which sets out Congressional policy that any new grant for research, development, test, or evaluation be awarded through merit-based selection procedures.

(b) Grants officers shall use merit-based, competitive procedures (as defined by § 22.315) to award grants and cooperative agreements:

(1) In every case where required by statute (e.g., 10 U.S.C. 2361, as implemented in § 22.310, for certain grants to institutions of higher education).

(2) To the maximum extent practicable in all cases where not required by statute.

**§ 22.310 Statutes concerning certain research, development, and facilities construction grants.**

(a) *Definitions specific to this section.* For the purposes of implementing the requirements of 10 U.S.C. 2374 in this section, the following terms are defined:

(1) *Follow-on grant.* A grant that provides for continuation of research and development performed by a recipient under a preceding grant. Note that follow-on grants are distinct from incremental funding actions during the period of execution of a multi-year award.

(2) *New grant.* A grant that is not a follow-on grant.

(b) *Statutory requirement to use competitive procedures.* (1) A grants officer shall not award a grant by other than merit-based, competitive procedures (as defined by § 22.315) to an institution of higher education for the performance of research and development or for the construction of research or other facilities, unless:

(i) In the case of a new grant for research and development, there is a statute meeting the criteria in paragraph (c)(1) of this section;

(ii) In the case of a follow-on grant for research and development, or of a grant for the construction of research or other facilities, there is a statute meeting the criteria in paragraph (c)(2) of this section; and

(iii) The Secretary of Defense submits to Congress a written notice of intent to make the grant. The grant may not be awarded until 180 calendar days have elapsed after the date on which Congress received the notice of intent. Contracting activities must submit a draft notice of intent with supporting documentation through channels to the Deputy Director, Defense Research and Engineering.

(2) Because subsequently enacted statutes may, by their terms, impose different requirements than set out in paragraph (b)(1) of this section, grants officers shall consult legal counsel on a case-by-case basis, when grants for the performance of research and development or for the construction of research or other facilities are to be awarded to institutions of higher education by other than merit-based competitive procedures.

(c) *Subsequent statutes.* In accordance with 10 U.S.C. 2361 and 10 U.S.C. 2374, a provision of law may not be construed as requiring the award of a grant through other than the merit-based, competitive procedures described in § 22.315, unless:

(1) *Institutions of higher education—new grants for research and development.* In the case of a new grant for research and development to an institution of higher education, such provision of law specifically:

(i) Identifies the particular institution of higher education involved;

(ii) States that such provision of law modifies or supersedes the provisions of 10 U.S.C. 2361 (a requirement that applies only if the statute authorizing or requiring award by other than competitive procedures was enacted after September 30, 1989); and

(iii) States that the award to the institution of higher education involved is required by such provision of law to be made in contravention of the policy set forth in 10 U.S.C. 2374(a).

(2) *Institutions of higher education—follow-on grants for research and development and grants for the construction of any research or other facility.* In the case of any such grant to an institution of higher education, such provision of law specifically:

(i) Identifies the particular institution of higher education involved; and

(ii) States that such provision of law modifies or supersedes the provisions of 10 U.S.C. 2361 (a requirement that applies only if the statute authorizing or requiring award by other than competitive procedures was enacted after September 30, 1989).

(3) *Other entities—new grants for research and development*—(i) *General.* In

the case of a new grant for research and development to an entity other than an institution of higher education, such provision of law specifically:

(A) Identifies the particular entity involved;

(B) States that the award to that entity is required by such provision of law to be made in contravention of the policy set forth in 10 U.S.C. 2374(a).

(ii) *Exception*. The requirement of paragraph (c)(3)(i) of this section does not apply to any grant that calls upon the National Academy of Sciences to:

(A) Investigate, examine, or experiment upon any subject of science or art of significance to the Department of Defense or any Military Department; and

(B) Report on such matters to the Congress or any agency of the Federal Government.

### § 22.315 Merit-based, competitive procedures.

Competitive procedures are methods that encourage participation in DoD programs by a broad base of the most highly qualified performers. These procedures are characterized by competition among as many eligible proposers as possible, with a published or widely disseminated notice. Competitive procedures include, as a minimum:

(a) *Notice to prospective proposers*. The notice may be a notice of funding availability or Broad Agency Announcement that is publicly disseminated, with unlimited distribution, or a specific notice that is distributed to eligible proposers (a specific notice must be distributed to at least two eligible proposers to be considered as part of a competitive procedure). Requirements for notices are as follows:

(1) The format and content of each notice must conform with the Governmentwide format for announcements of funding opportunities established by the Office of Management and Budget (OMB) in a policy directive entitled, ''Format for Financial Assistance Program Announcements.''[2]

(2) In accordance with that OMB policy directive, DoD Components also must post on the Internet any notice under which domestic entities may submit proposals, if the distribution of the notice is unlimited. DoD Components are encouraged to simultaneously publish the notice in other media (*e.g.*, the FEDERAL REGISTER), if doing so would increase the likelihood of its being seen by potential proposers. If a DoD Component issues a specific notice with limited distribution (*e.g.*, for national security considerations), the notice need not be posted on the Internet.

(3) To comply with an OMB policy directive entitled, ''Requirement to Post Funding Opportunity Announcement Synopses at Grants.gov and Related Data Elements/Format,''[3] DoD Components must post on the Internet a synopsis for each notice that, in accordance with paragraph (a)(2) of this section, is posted on the Internet. The synopsis must be posted at the Governmentwide site designated by the OMB (currently *http://www.FedGrants.gov*). The synopsis for each notice must provide complete instructions on where to obtain the notice and should have an electronic link to the Internet location at which the notice is posted.

(4) In accordance with an OMB policy directive entitled, ''Requirement for a DUNS Number in Applications for Federal Grants and Cooperative Agreements,''[4] each notice must include a requirement for proposers to include Data Universal Numbering System (DUNS) numbers in their proposals. If a notice provides for submission of application forms, the forms must incorporate the DUNS number. To the extent that unincorporated consortia of separate organizations may submit proposals, the notice should explain that an unincorporated consortium

[2] This OMB policy directive is available at the Internet site *http://www.whitehouse.gov/omb/grants/grants_docs.html* (the link is ''Final Policy Directive on Financial Assistance Program Announcements'').

[3] This OMB policy directive is available at the Internet site *http://www.whitehouse.gov/omb/grants/grants_docs.html* (the link is ''Office of Federal Financial Management Policy Directive on Use of Grants.Gov FIND'').

[4] This OMB policy directive is available at the Internet site *http://www.whitehouse.gov/omb/grants/grants_docs.html* (the link is ''Use of a Universal Identifier by Grant Applicants'').

would use the DUNS number of the entity proposed to receive DoD payments under the award (usually, a lead organization that consortium members identify for administrative matters).

(b) At least two eligible, prospective proposers.

(c) Impartial review of the merits of applications or proposals received in response to the notice, using the evaluation method and selection criteria described in the notice. For research and development awards, in order to be considered as part of a competitive procedure, the two principal selection criteria, unless statute provides otherwise, must be the:

(1) Technical merits of the proposed research and development; and

(2) Potential relationship of the proposed research and development to Department of Defense missions.

[63 FR 12164, Mar. 12, 1998, as amended at 70 FR 49464, Aug. 23, 2005; 72 FR 34988, June 26, 2007]

### § 22.320 Special competitions.

Some programs may be competed for programmatic or policy reasons among specific classes of potential recipients. An example would be a program to enhance U.S. capabilities for academic research and research-coupled graduate education in defense-critical, science and engineering disciplines, a program that would be competed specifically among institutions of higher education. All such special competitions shall be consistent with program representations in the President's budget submission to Congress and with subsequent Congressional authorizations and appropriations for the programs.

### § 22.325 Historically Black colleges and universities (HBCUs) and other minority institutions (MIs).

Increasing the ability of HBCUs and MIs to participate in federally funded, university programs is an objective of Executive Order 12876 (3 CFR, 1993 Comp., p. 671) and 10 U.S.C. 2323. Grants officers shall include appropriate provisions in Broad Agency Announcements (BAAs) or other announcements for programs in which awards to institutions of higher education are anticipated, in order to promote participation of HBCUs and MIs in such programs. Also, whenever practicable, grants officers shall reserve appropriate programmatic areas for exclusive competition among HBCUs and MIs when preparing announcements for such programs.

## Subpart D—Recipient Qualification Matters—General Policies and Procedures

### § 22.400 Purpose.

The purpose of this subpart is to specify policies and procedures for grants officers' determination of recipient qualifications prior to award.

### § 22.405 Policy.

(a) *General*. Grants officers normally shall award grants or cooperative agreements only to qualified recipients that meet the standards in § 22.415. This practice conforms with the Governmentwide policy to do business only with responsible persons, which is stated in OMB guidance at 2 CFR 180.125(a) and implemented by the Department of Defense in 2 CFR part 1125.

(b) *Exception*. In exceptional circumstances, grants officers may make awards to recipients that do not fully meet the standards in § 22.415 and include special award conditions that are appropriate to the particular situation, in accordance with 32 CFR 32.14, 33.12, or 34.4.

[63 FR 12164, Mar. 12, 1998, as amended at 70 FR 49464, Aug. 23, 2005; 72 FR 34988, June 26, 2007]

### § 22.410 Grants officers' responsibilities.

The grants officer is responsible for determining a recipient's qualification prior to award. The grants officer's signature on the award document shall signify his or her determination that either:

(a) The potential recipient meets the standards in § 22.415 and is qualified to receive the grant or cooperative agreement; or

(b) An award is justified to a recipient that does not fully meet the standards, pursuant to § 22.405(b). In such cases, grants officers shall document in the award file the rationale for making

an award to a recipient that does not fully meet the standards.

**§ 22.415 Standards.**

To be qualified, a potential recipient must:

(a) Have the management capability and adequate financial and technical resources, given those that would be made available through the grant or cooperative agreement, to execute the program of activities envisioned under the grant or cooperative agreement.

(b) Have a satisfactory record of executing such programs or activities (if a prior recipient of an award).

(c) Have a satisfactory record of integrity and business ethics.

(d) Be otherwise qualified and eligible to receive a grant or cooperative agreement under applicable laws and regulations (see § 22.420(c)).

**§ 22.420 Pre-award procedures.**

(a) The appropriate method to be used and amount of effort to be expended in deciding the qualification of a potential recipient will vary. In deciding on the method and level of effort, the grants officer should consider factors such as:

(1) DoD's past experience with the recipient;

(2) Whether the recipient has previously received cost-type contracts, grants, or cooperative agreements from the Federal Government; and

(3) The amount of the prospective award and complexity of the project to be carried out under the award.

(b) There is no DoD-wide requirement to obtain a pre-award credit report, audit, or any other specific piece of information. On a case-by-case basis, the grants officer will decide whether there is a need to obtain any such information to assist in deciding whether the recipient meets the standards in § 22.415 (a), (b), and (c).

(1) Should the grants officer in a particular case decide that a pre-award credit report, audit, or survey is needed, he or she should consult first with the appropriate grants administration office (identified in § 22.710), and decide whether pre-existing surveys or audits of the recipient, such as those of the recipient's internal control systems under OMB Circular A–133[5] will satisfy the need (see § 22.715(a)(1)).

(2) If, after consulting with the grants administration office, the grants officer decides to obtain a credit report, audit, or other information, and the report or other information discloses that a potential recipient is delinquent on a debt to an agency of the United States Government, then:

(i) The grants officer shall take such information into account when determining whether the potential recipient is qualified with respect to the grant or cooperative agreement; and

(ii) If the grants officer decides to make the award to the recipient, unless there are compelling reasons to do otherwise, the grants officer shall delay the award of the grant or cooperative agreement until payment is made or satisfactory arrangements are made to repay the debt.

(c) In deciding whether a recipient is otherwise qualified and eligible in accordance with the standard in § 22.415(d), the grants officer shall ensure that the potential recipient:

(1) Is not identified in the Governmentwide Excluded Parties List System (EPLS) as being debarred, suspended, or otherwise ineligible to receive the award. In addition to being a requirement for every new award, note that checking the EPLS also is a requirement for subsequent obligations of additional funds, such as incremental funding actions, in the case of pre-existing awards to institutions of higher education, as described at 32 CFR 22.520(e)(5). The grants officer's responsibilities include (see the OMB guidance at 2 CFR 180.425 and 180.430, as implemented by the Department of Defense at 2 CFR 1125.425) checking the EPLS for:

(i) Potential recipients of prime awards; and

(ii) A recipient's principals (as defined in OMB guidance at 2 CFR 180.995, implemented by the Department of Defense in 2 CFR part 1125), potential recipients of subawards, and principals of

[5] Electronic copies may be obtained at Internet site *http://www.whitehouse.gov/OMB*. For paper copies, contact the Office of Management and Budget, EOP Publications, 725 17th St. NW., New Executive Office Building, Washington, DC 20503.

those potential subaward recipients, if DoD Component approval of those principals or lower-tier recipients is required under the terms of the award (*e.g.*, if a subsequent change in a recipient's principal investigator or other key person would be subject to the DoD Component's prior approval under 32 CFR 32.25(c)(2), 33.30(d)(3), or 34.15(c)(2)(i)).

(2) Has provided all certifications and assurances required by Federal statute, Executive order, or codified regulation, unless they are to be addressed in award terms and conditions at the time of award (see § 22.510).

(3) Meets any eligibility criteria that may be specified in the statute authorizing the specific program under which the award is being made (see § 22.210(a)(2)).

(d) Grants officers shall obtain each recipient's Taxpayer Identification Number (TIN, which may be the Social Security Number for an individual and Employer Identification Number for a business or non-profit entity) and notify the recipient that the TIN is being obtained for purposes of collecting and reporting on any delinquent amounts that may arise out of the recipient's relationship with the Government. Obtaining the TIN and so notifying the recipient is a statutory requirement of 31 U.S.C. 7701, as amended by the Debt Collection Improvement Act of 1996 (section 31001(i)(1), Pub. L. 104–134).

[63 FR 12164, Mar. 12, 1998, as amended at 70 FR 49464, Aug. 23, 2005; 72 FR 34988, June 26, 2007]

## Subpart E—National Policy Matters

### § 22.505 Purpose.

The purpose of this subpart is to supplement other regulations that implement national policy requirements, to the extent that it is necessary to provide additional guidance to DoD grants officers. The other regulations that implement national policy requirements include:

(a) The other parts of the DoDGARs (32 CFR parts 32, 33, and 34) that implement the Governmentwide guidance in OMB Circulars A–102[6] and A–110[7] on administrative requirements for grants and cooperative agreements. Those parts address some national policy matters that appear in the OMB Circulars.

(b) DoD regulations other than the DoDGARs.

(c) Other Federal agencies' regulations.

[63 FR 12164, Mar. 12, 1998, as amended at 70 FR 49464, Aug. 23, 2005]

### § 22.510 Certifications, representations, and assurances.

(a) *Certifications*—(1) *Policy*. Certifications of compliance with national policy requirements are to be obtained from recipients only for those national policies where a statute, Executive order, or codified regulation specifically states that a certification is required. Other national policy requirements may be addressed by obtaining representations or assurances (see paragraph (b) of this section). Grants officers should utilize methods for obtaining certifications, in accordance with Executive Order 12866 (3 CFR, 1993 Comp., p. 638), that minimize administration and paperwork.

(2) *Procedures*. (i) When necessary, grants officers may obtain individual, written certifications.

(ii) Whenever possible, and to the extent consistent with statute and codified regulation, grants officers should identify the certifications that are required for the particular type of recipient and program, and consolidate them into a single certification provision that cites them by reference.

(A) If a grants officer elects to have proposers incorporate certifications by reference into their proposals, he or she must do so in one of the two following ways. When required by statute or codified regulation, the solicitation must include the full text of the certifications that proposers are to provide by reference. In other cases, the grants officer may include language in the solicitation that informs the proposers where the full text may be found (*e.g.*, in documents or computer network sites that are readily available to the public) and offers to provide it to proposers upon request.

[6] See footnote 5 to § 22.420(b)(1).
[7] See footnote 5 to § 22.420(b)(1).

(B) Appendix A to this part provides language that may be used for incorporating by reference the certification on lobbying, which currently is the only certification requirement that commonly applies to DoD grants and agreements. Because that certification is required by law to be submitted at the time of proposal, rather than at the time of award, Appendix A includes language to incorporate the certification by reference into a proposal.

(C) Grants officers may incorporate certifications by reference in award documents when doing so is consistent with statute and codified regulation (that is not the case for the lobbying certification addressed in paragraph (a)(2)(ii)(B) of this section). The provision that a grants officer would use to incorporate certifications in award documents, when consistent with statute and codified regulation, would be similar to the provision in Appendix A to this part, except that it would be modified to state that the recipient is providing the required certifications by signing the award document or by accepting funds under the award.

(b) *Representations and assurances.* Many national policies, either in statute or in regulation, require recipients of grants and cooperative agreements to make representations or provide assurances (rather than certifications) that they are in compliance with the policies. As discussed in § 22.610(b), Appendix B to this part suggests award terms and conditions that may be used to address several of the more commonly applicable national policy requirements. These terms and conditions may be used to obtain required assurances and representations, if the grants officer wishes to do so at the time of award, rather than through the use of the standard application form (SF–424[8]) or other means at the time of proposal.

[63 FR 12164, Mar. 12, 1998, as amended at 70 FR 49464, Aug. 23, 2005]

[8] For copies of Standard Forms listed in this part, contact regional grants administration offices of the Office of Naval Research. Addresses for the offices are listed in the ''Federal Directory of Contract Administration Services (CAS) Components,'' which may be accessed through the Defense Contract Management Agency homepage at: *http://www.dcma.mil*.

### § 22.515 Provisions of annual appropriations acts.

An annual appropriations act can include general provisions stating national policy requirements that apply to the use of funds (e.g., obligation through a grant or cooperative agreement) appropriated by the act. Because these requirements are of limited duration (the period during which a given year's appropriations are available for obligation), and because they can vary from year to year and from one agency's appropriations act to another agency's, the grants officer must know the agency(ies) and fiscal year(s) of the appropriations being obligated by a given grant or cooperative agreement, and may need to consult legal counsel if he or she does not know the requirements applicable to those appropriations.

### § 22.520 Campus access for military recruiting and Reserve Officer Training Corps (ROTC).

(a) *Purpose.* (1) The purpose of this section is to implement 10 U.S.C. 983 as it applies to grants. Under that statute, DoD Components are prohibited from providing funds to institutions of higher education that have policies or practices, as described in paragraph (c) of this section, restricting campus access of military recruiters or the Reserve Officer Training Corps (ROTC).

(2) By addressing the effect of 10 U.S.C. 983 on grants and cooperative agreements, this section supplements the DoD's primary implementation of that statute in 32 CFR part 216, ''Military Recruiting and Reserve Officer Training Corps Program Access to Institutions of Higher Education.'' Part 216 establishes procedures by which the Department of Defense identifies institutions of higher education that have a policy or practice described in paragraph (c) of this section.

(b) *Definition specific to this section.* ''Institution of higher education'' in this section has the meaning given at 32 CFR 216.3, which is different than the meaning given at § 22.105 for other sections of this part.

(c) *Statutory requirement of 10 U.S.C. 983.* No funds made available to the Department of Defense may be provided by grant to an institution of higher education (including any subelement of such institution) if the Secretary of Defense determines that the institution (or any subelement of that institution) has a policy or practice that either prohibits, or in effect prevents:

(1) The Secretary of a Military Department from maintaining, establishing, or operating a unit of the Senior ROTC (in accordance with 10 U.S.C. 654 and other applicable Federal laws) at that institution (or any subelement of that institution);

(2) A student at that institution (or any subelement of that institution) from enrolling in a unit of the Senior ROTC at another institution of higher education;

(3) The Secretary of a Military Department or Secretary of Homeland Security from gaining access to campuses, or access to students (who are 17 years of age or older) on campuses, for purposes of military recruiting in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer; or

(4) Access by military recruiters for purposes of military recruiting to the following information pertaining to students (who are 17 years of age or older) enrolled at that institution (or any subelement of that institution):

(i) Names, addresses, and telephone listings.

(ii) Date and place of birth, levels of education, academic majors, degrees received, and the most recent educational institution enrolled in by the student.

(d) *Policy.* (1) *Applicability to cooperative agreements.* As a matter of DoD policy, the restrictions of 10 U.S.C. 983, as implemented by 32 CFR part 216, apply to cooperative agreements, as well as grants.

(2) *Deviations.* Grants officers may not deviate from any provision of this section without obtaining the prior approval of the Director of Defense Research and Engineering. Requests for deviations shall be submitted, through appropriate channels, to: Director for Basic Sciences, ODUSD(LABS), 3040 Defense Pentagon, Washington, D.C. 20301–3040.

(e) *Grants officers' responsibility.* (1) A grants officer shall not award any grant or cooperative agreement to an institution of higher education that has been identified pursuant to the procedures of 32 CFR part 216. Such institutions are identified as being ineligible on the Governmentwide Excluded Parties List System (EPLS). The cause and treatment code on the EPLS indicates the reason for an institution's ineligibility, as well as the effect of the exclusion. Note that OMB guidance in 2 CFR 180.425 and 180.430, as implemented by the Department of Defense at 2 CFR part 1125, require a grants officer to check the EPLS prior to determining that a recipient is qualified to receive an award.

(2) A grants officer shall not consent to a subaward of DoD funds to such an institution, under a grant or cooperative agreement to any recipient, if the subaward requires the grants officer's consent.

(3) A grants officer shall include the following award term in each grant or cooperative agreement with an institution of higher education (note that this requirement does not flow down and that recipients are not required to include the award term in subawards):

"As a condition for receipt of funds available to the Department of Defense (DoD) under this award, the recipient agrees that it is not an institution of higher education (as defined in 32 CFR part 216) that has a policy or practice that either prohibits, or in effect prevents:

(A) The Secretary of a Military Department from maintaining, establishing, or operating a unit of the Senior Reserve Officers Training Corps (in accordance with 10 U.S.C. 654 and other applicable Federal laws) at that institution (or any subelement of that institution);

(B) Any student at that institution (or any subelement of that institution) from enrolling in a unit of the Senior ROTC at another institution of higher education;

(C) The Secretary of a Military Department or Secretary of Homeland Security from gaining access to campuses, or access to students (who are 17 years of age or older) on campuses, for purposes of military recruiting in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer; or

(D) Access by military recruiters for purposes of military recruiting to the names of students (who are 17 years of age or older and enrolled at that institution or any subelement of that institution); their addresses, telephone listings, dates and places of birth, levels of education, academic majors, and degrees received; and the most recent educational institutions in which they were enrolled.

If the recipient is determined, using the procedures in 32 CFR part 216, to be such an institution of higher education during the period of performance of this agreement, the Government will cease all payments of DoD funds under this agreement and all other DoD grants and cooperative agreements to the recipient, and it may suspend or terminate such grants and agreements unilaterally for material failure to comply with the terms and conditions of award.''

(4) If an institution of higher education refuses to accept the award term in paragraph (e)(3) of this section, the grants officer shall:

(i) Determine that the institution is not qualified with respect to the award. The grants officer may award to an alternative recipient.

(ii) Transmit the name of the institution, through appropriate channels, to the Director for Accession Policy, Office of the Deputy Under Secretary of Defense for Military Personnel Policy (ODUSD(MPP)), 4000 Defense Pentagon, Washington, DC 20301–4000. This will allow ODUSD(MPP) to decide whether to initiate an evaluation of the institution under 32 CFR part 216, to determine whether it is an institution that has a policy or practice described in paragraph (c) of this section.

(5) With respect to any pre-existing award to an institution of higher education that currently is listed on the EPLS pursuant to a determination under 32 CFR part 216, a grants officer:

(i) Shall not obligate additional funds available to the DoD for the award. A grants officer therefore must check the EPLS before approving an incremental funding action or other additional funding for any pre-existing award to an institution of higher education. The grants officer may not obligate the additional funds if the cause and treatment code indicates that the reason for an institution's EPLS listing is a determination under 32 CFR part 216 that institutional policies or practices restrict campus access of military recruiters or ROTC.

(ii) Shall not approve any request for payment submitted by such an institution (including payments for costs already incurred).

(iii) Shall:

(A) Terminate the award unless he or she has a reason to believe, after consulting with the ODUSD(MPP), 4000 Defense Pentagon, Washington, DC 20301–4000), that the institution may be removed from the EPLS in the near term and have its eligibility restored; and

(B) Suspend any award that is not immediately terminated, as well as all payments under it.

(f) *Post-award administration responsibilities of the Office of Naval Research (ONR).* As the DoD office assigned responsibility for performing field administration services for grants and cooperative agreements with institutions of higher education, the ONR shall disseminate the list it receives from the ODUSD(MPP) of institutions of higher education identified pursuant to the procedures of 32 CFR part 216 to:

(1) ONR field administration offices, with instructions to:

(i) Disapprove any payment requests under awards to such institutions for which post-award payment administration was delegated to the ONR; and

(ii) Alert the DoD offices that made the awards to their responsibilities under paragraphs (e)(5)(i) and (e)(5)(iii) of this section.

(2) Awarding offices in DoD Components that may be identified from data in the Defense Assistance Awards Data System (see 32 CFR 21.520 through 21.555) as having awards with such institutions for which post-award payment administration was not delegated to ONR. The ONR is to alert those offices to their responsibilities under paragraph (e)(5) of this section.

[70 FR 49465, Aug. 23, 2005, as amended at 72 FR 34988, June 26, 2007]

### § 22.525 Paperwork Reduction Act.

Grants officers shall include appropriate award terms or conditions, if a recipient's activities under an award will be subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3500, et seq.):

(a) Generally, the Act only applies to Federal agencies—it requires agencies to obtain clearance from the Office of Management and Budget before collecting information using forms, schedules, questionnaires, or other methods calling either for answers to:

(1) Identical questions from ten or more persons other than agencies, instrumentalities, or employees of the United States.

(2) Questions from agencies, instrumentalities, or employees of the United States which are to be used for statistical compilations of general public interest.

(b) The Act applies to similar collections of information by recipients of grants or cooperative agreements only when:

(1) A recipient collects information at the specific request of the awarding Federal agency; or

(2) The terms and conditions of the award require specific approval by the agency of the information collection or the collection procedures.

### § 22.530 Metric system of measurement.

(a) *Statutory requirement*. The Metric Conversion Act of 1975, as amended by the Omnibus Trade and Competitiveness Act of 1988 (15 U.S.C. 205) and implemented by Executive Order 12770 (3 CFR, 1991 Comp., p. 343), states that:

(1) The metric system is the preferred measurement system for U.S. trade and commerce.

(2) The metric system of measurement will be used, to the extent economically feasible, in federal agencies' procurements, grants, and other business-related activities.

(3) Metric implementation shall not be required to the extent that such use is likely to cause significant inefficiencies or loss of markets to United States firms.

(b) *Responsibilities*. DoD Components shall ensure that the metric system is used, to the maximum extent practicable, in measurement-sensitive activities supported by programs that use grants and cooperative agreements, and in measurement-sensitive outputs of such programs.

## Subpart F—Award

### § 22.600 Purpose.

This subpart sets forth grants officers' responsibilities relating to the award document and other actions at the time of award.

### § 22.605 Grants officers' responsibilities.

At the time of award, the grants officer is responsible for ensuring that:

(a) The award instrument contains the appropriate terms and conditions, in accordance with § 22.610.

(b) Information about the award is provided to the office responsible for preparing reports for the Defense Assistance Award Data System (DAADS), to ensure timely and accurate reporting of data required by 31 U.S.C. 6101–6106 (see 32 CFR part 21, subpart E).

(c)(1) In addition to the copy of the award document provided to the recipient, a copy is forwarded to the office designated to administer the grant or cooperative agreement, and another copy is forwarded to the finance and accounting office designated to make the payments to the recipient.

(2) For any award subject to the electronic funds transfer (EFT) requirement described in § 22.810(b)(2), the grants officer shall include a prominent notification of that fact on the first page of the copies forwarded to the recipient, the administrative grants officer, and the finance and accounting office. On the first page of the copy forwarded to the recipient, the grants officer also shall include a prominent notification that the recipient, to be paid, must submit a Payment Information Form (Standard Form SF–3881[9]) to the responsible DoD payment office, if that payment office does not currently have the information (e.g., bank name and account number) needed to pay the recipient by EFT.

[63 FR 12164, Mar. 12, 1998, as amended at 68 FR 47160, Aug. 7, 2003; 70 FR 49465, Aug. 23, 2005]

[9] See footnote 8 to § 22.510(b).

**§ 22.610 Award instruments.**

(a) Each award document shall include terms and conditions that:

(1) Address programmatic requirements (e.g., a statement of work or other appropriate terms or conditions that describe the specific goals and objectives of the project). The grants officer shall develop such terms and conditions in coordination with program officials.

(2) Provide for the recipient's compliance with:

(i) Pertinent Federal statutes or Executive orders that apply broadly to Federal or DoD assistance awards.

(ii) Any program-specific requirements that are prescribed in the program statute (see § 22.210(a)(2)), or appropriation-specific requirements that are stated in the pertinent Congressional appropriations (see § 22.515).

(iii) Pertinent portions of the DoDGARs or other Federal regulations, including those that implement the Federal statutes or Executive orders described in paragraphs (a)(2) (i) and (ii) of this section.

(3) Specify the grants officer's instructions for post-award administration, for any matter where the post-award administration provisions in 32 CFR part 32, 33, or 34 give the grants officer options for handling the matter. For example, under 32 CFR 32.24(b), the grants officers must choose among possible methods for the recipient's disposition of program income. It is essential that the grants officer identify the option selected in each case, to provide clear instructions to the recipient and the grants officer responsible for post-award administration of the grant or cooperative agreement.

(b) To assist grants officers:

(1) Appendix B to this part provides model clauses to implement certain Federal statutes, Executive orders, and regulations (see paragraph (a)(2)(i) of this section) that frequently apply to DoD grants and cooperative agreements. Grants officers may incorporate the model clauses into award terms and conditions, as appropriate. It should be noted that Appendix B to this part is an aid, and not an exhaustive list of all requirements that apply in all cases. Depending on the circumstances of a given award, other statutes, Executive orders, or codified regulations also may apply (e.g., Appendix B to this part does not list program-specific requirements described in paragraph (a)(2)(ii) of this section).

(2) Appendix C to this part is a list of administrative requirements that apply to awards to different types of recipients. It also identifies post-award administration issues that the grants officer must address in the award terms and conditions.

## Subpart G—Field Administration

**§ 22.700 Purpose.**

This subpart prescribes policies and procedures for administering grants and cooperative agreements. It does so in conjunction with 32 CFR parts 32, 33, and 34, which prescribe administrative requirements for particular types of recipients.

**§ 22.705 Policy.**

(a) DoD policy is to have each recipient deal with a single office, to the maximum extent practicable, for post-award administration of its grants and cooperative agreements. This reduces burdens on recipients that can result when multiple DoD offices separately administer grants and cooperative agreements they award to a given recipient. It also minimizes unnecessary duplication of field administration services.

(b) To further reduce burdens on recipients, the office responsible for performing field administration services for grants and cooperative agreements to a particular recipient shall be, to the maximum extent practicable, the same office that is assigned responsibility for performing field administration services for contracts awarded to that recipient.

(c) Contracting activities and grants officers therefore shall use cross-servicing arrangements whenever practicable and, to the maximum extent possible, delegate responsibility for post-award administration to the cognizant grants administration offices identified in § 22.710.

### § 22.710 Assignment of grants administration offices.

In accordance with the policy stated in § 22.705(b), the DoD offices (referred to in this part as ''grants administration offices'') that are assigned responsibility for performing field administration services for grants and cooperative agreements are (see the ''Federal Directory of Contract Administration Services (CAS) Components''[10] for specific addresses of administration offices):

(a) Regional offices of the Office of Naval Research, for grants and cooperative agreements with:

(1) Institutions of higher education and laboratories affiliated with such institutions, to the extent that such organizations are subject to the university cost principles in OMB Circular A–21.[11]

(2) Nonprofit organizations that are subject to the cost principles in OMB Circular A–122,[12] if their principal business with the Department of Defense is research and development.

(b) Field offices of the Defense Contract Management Command, for grants and cooperative agreements with all other entities, including:

(1) For-profit organizations.

(2) Nonprofit organizations identified in Attachment C of OMB Circular A–122 that are subject to for-profit cost principles in 48 CFR part 31.

(3) Nonprofit organizations subject to the cost principles in OMB Circular A–122, if their principal business with the Department of Defense is other than research and development.

(4) State and local governments.

[63 FR 12164, Mar. 12, 1998, as amended at 70 FR 49466, Aug. 23, 2005; 72 FR 34989, June 26, 2007]

### § 22.715 Grants administration office functions.

The primary responsibility of cognizant grants administration offices shall be to advise and assist grants officers and recipients prior to and after award, and to help ensure that recipients fulfill all requirements in law, regulation, and award terms and conditions. Specific functions include:

(a) Conducting reviews and coordinating reviews, audits, and audit requests. This includes:

(1) Advising grants officers on the extent to which audits by independent auditors (i.e., public accountants or Federal auditors) have provided the information needed to carry out their responsibilities. If a recipient has had an independent audit in accordance with OMB Circular A–133, and the audit report disclosed no material weaknesses in the recipient's financial management and other management and control systems, additional preaward or closeout audits usually will not be needed (see §§ 22.420(b) and 22.825(b)).

(2) Performing pre-award surveys, when requested by a grants officer, after providing advice described in paragraph (a)(1) of this section.

(3) Reviewing recipients' systems and compliance with Federal requirements, in coordination with any reviews and compliance audits performed by independent auditors under OMB Circular A–133, or in accordance with the terms and conditions of the award. This includes:

(i) Reviewing recipients' financial management, property management, and purchasing systems, to determine the adequacy of such systems.

(ii) Determining that recipients have drug-free workplace programs, as required under 32 CFR part 26.

(iii) Determining that governmental, university and nonprofit recipients have complied with requirements in OMB Circular A–133, as implemented at 32 CFR 32.26 and 33.26, to have single audits and submit audit reports to the Federal Audit Clearinghouse. If a recipient has not had a required audit, appropriate action must be taken (*e.g.*, contacting the recipient and coordinating with the Office of the Assistant Inspector General for Audit Policy and Oversight (OAIG(P&O)), Office of the Deputy Inspector General for Inspections and Policy, Office of the Inspector General of the Department of Defense (OIG, DoD), 400 Army-Navy Drive, Arlington, VA 22202).

[10] The ''Federal Directory of Contract Administration Services (CAS) Components'' may be accessed through the Defense Contract Management Agency hompage at *http://www.dcma.mil*.

[11] See footnote 5 to § 22.420(b)(1).

[12] See footnote 5 to § 22.420(b)(1).

(4) Issuing timely management decisions, in accordance with DoD Directive 7640.2, ''Policy for Follow-up on Contract Audit Reports,''[13] on single audit findings referred by the OIG, DoD, under DoD Directive 7600.10, ''Audits of States, Local Governments, and Non-Profit Organizations.''[14]

(b) Performing property administration services for Government-owned property, and for any property acquired by a recipient, with respect to which the recipient has further obligations to the Government.

(c) Ensuring timely submission of required reports.

(d) Executing administrative closeout procedures.

(e) Establishing recipients' indirect cost rates, where the Department of Defense is the cognizant or oversight Federal agency with the responsibility for doing so.

(f) Performing other administration functions (e.g., receiving recipients' payment requests and transmitting approved payment authorizations to payment offices) as delegated by applicable cross-servicing agreements or letters of delegation.

[63 FR 12164, Mar. 12, 1998, as amended at 70 FR 49466, Aug. 23, 2005; 72 FR 34989, June 26, 2007]

## Subpart H—Post-Award Administration

### § 22.800 Purpose and relation to other parts.

This subpart sets forth grants officers' and DoD Components' responsibilities for post-award administration, by providing DoD-specific requirements on payments; debt collection; claims, disputes and appeals; and closeout audits.

### § 22.805 Post-award requirements in other parts.

Grants officers responsible for post-award administration of grants and cooperative agreements shall administer such awards in accordance with the following parts of the DoDGARs, as supplemented by this subpart:

(a) *Awards to domestic recipients.* Standard administrative requirements for grants and cooperative agreements with domestic recipients are specified in other parts of the DoDGARs, as follows:

(1) For awards to domestic institutions of higher education and other nonprofit organizations, requirements are specified in 32 CFR part 32, which is the DoD implementation of OMB Circular A–110.

(2) For awards to State and local governments, requirements are specified in 32 CFR part 33, which is the DoD codification of the Governmentwide common rule to implement OMB Circular A–102.

(3) For awards to domestic for-profit organizations, requirements are specified in 32 CFR part 34, which is modeled on the requirements in OMB Circular A–110.

(b) *Awards to foreign recipients.* DoD Components shall use the administrative requirements specified in paragraph (a) of this section, to the maximum extent practicable, for grants and cooperative agreements to foreign recipients.

### § 22.810 Payments.

(a) *Purpose.* This section prescribes policies and grants officers' post-award responsibilities, with respect to payments to recipients of grants and cooperative agreements.

(b) *Policy.* (1) It is Governmentwide policy to minimize the time elapsing between any payment of funds to a recipient and the recipient's disbursement of the funds for program purposes (see 32 CFR 32.22(a) and 33.21(b), and the implementation of the Cash Management Improvement Act at 31 CFR part 205).

(2) It also is a Governmentwide requirement to use electronic funds transfer (EFT) in the payment of any grant for which an application or proposal was submitted or renewed on or after July 26, 1996, unless the recipient has obtained a waiver by submitting to the head of the pertinent Federal agency a certification that it has neither an

[13] Electronic copies may be obtained at the Washington Headquarters Services Internet site *http://www.dtic.mil/whs/directives*. Paper copies may be obtained, at cost, from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161.

[14] *See* footnote 13 to § 22.715(a)(4).

account with a financial institution nor an authorized payment agent. This requirement is in 31 U.S.C. 3332, as amended by the Debt Collection Improvement Act of 1996 (section 31001(x)(1)(A), Pub. L. 104–134), and as implemented by Department of Treasury regulations at 31 CFR part 208. As a matter of DoD policy, this requirement applies to cooperative agreements, as well as grants. Within the Department of Defense, the Defense Finance and Accounting Service implements this EFT requirement, and grants officers have collateral responsibilities at the time of award, as described in § 22.605(c), and in postaward administration, as described in § 22.810(c)(3)(iv).

(3) Expanding on these Governmentwide policies, DoD policy is for DoD Components to use electronic commerce, to the maximum extent practicable, in the portions of the payment process for grants and cooperative agreements for which grants officers are responsible. In cases where recipients submit each payment request to the grants officer, this includes using electronic methods to receive recipients' requests for payment and to transmit authorizations for payment to the DoD payment office. Using electronic methods will improve timeliness and accuracy of payments and reduce administrative burdens associated with paper-based payments.

(c) *Post-award responsibilities*. In cases where the recipient submits each payment request to the grants officer, the administrative grants officer designated to handle payments for a grant or cooperative agreement is responsible for:

(1) Handling the recipient's requests for payments in accordance with DoD implementation of Governmentwide guidance (see 32 CFR 32.22, 33.21, or 34.12, as applicable).

(2) Reviewing each payment request to ensure that:

(i) The request complies with the award terms.

(ii) Available funds are adequate to pay the request.

(iii) The recipient will not have excess cash on hand, based on expenditure patterns.

(3) Maintaining a close working relationship with the personnel in the finance and accounting office responsible for making the payments. A good working relationship is necessary, to ensure timely and accurate handling of financial transactions for grants and cooperative agreements. Administrative grants officers:

(i) Should be generally familiar with policies and procedures for disbursing offices that are contained in Chapter 19 of Volume 10 of the DoD Financial Management Regulation (the FMR, DoD 7000.14-R [15]).

(ii) Shall forward authorizations to the designated payment office expeditiously, so that payments may be made in accordance with the timely payment guidelines in Chapter 19 of Volume 10 of the FMR. Unless alternative arrangements are made with the payment office, authorizations should be forwarded to the payment office at least 3 working days before the end of the period specified in the FMR. The period specified in the FMR is:

(A) No more than seven calendar days after receipt of the recipient's request by the administrative grants officer, whenever electronic commerce is used (i.e., EDI to request and authorize payments and electronic funds transfer (EFT) to make payments).

(B) No more than thirty calendar days after receipt of the recipient's request by the administrative grants officer, when it is not possible to use electronic commerce and paper transactions are used.

(C) No more than seven calendar days after each date specified, when payments are authorized in advance based on a predetermined payment schedule, provided that the payment schedule was received in the disbursing office at least 30 calendar days in advance of the date of the scheduled payment.

(iii) Shall ensure that the recipients' Taxpayer Identification Number (TIN) is included with each payment authorization forwarded to the payment office. This is a statutory requirement of 31 U.S.C. 3325, as amended by the Debt Collection Improvement Act of 1996 (section 31001(y), Pub. L. 104–134).

[15] See footnote 13 to § 22.715(a)(4).

(iv) For each award that is required to be paid by EFT (see § 22.605(c) and (§ 22.810(b)(2)), shall prominently indicate that fact in the payment authorization.

[63 FR 12164, Mar. 12, 1998, as amended at 70 FR 49467, Aug. 23, 2005]

### § 22.815 Claims, disputes, and appeals.

(a) *Award terms.* Grants officers shall include in grants and cooperative agreements a term or condition that incorporates the procedures of this section for:

(1) Processing recipient claims and disputes.

(2) Deciding appeals of grants officers' decisions.

(b) *Submission of claims*—(1) *Recipient claims.* If a recipient wishes to submit a claim arising out of or relating to a grant or cooperative agreement, the grants officer shall inform the recipient that the claim must:

(i) Be submitted in writing to the grants officer for decision;

(ii) Specify the nature and basis for the relief requested; and

(iii) Include all data that supports the claim.

(2) *DoD Component claims.* Claims by a DoD Component shall be the subject of a written decision by a grants officer.

(c) *Alternative Dispute Resolution (ADR)*—(1) *Policy.* DoD policy is to try to resolve all issues concerning grants and cooperative agreements by mutual agreement at the grants officer's level. DoD Components therefore are encouraged to use ADR procedures to the maximum extent practicable. ADR procedures are any voluntary means (e.g., mini-trials or mediation) used to resolve issues in controversy without resorting to formal administrative appeals (see paragraph (e) of this section) or to litigation.

(2) *Procedures.* (i) The ADR procedures or techniques to be used may either be agreed upon by the Government and the recipient in advance (e.g., when agreeing on the terms and conditions of the grant or cooperative agreement), or may be agreed upon at the time the parties determine to use ADR procedures.

(ii) If a grants officer and a recipient are not able to resolve an issue through unassisted negotiations, the grants officer shall encourage the recipient to enter into ADR procedures. ADR procedures may be used prior to submission of a recipient's claim or at any time prior to the Grant Appeal Authority's decision on a recipient's appeal (see paragraph (e)(3)(iii) of this section).

(d) *Grants officer decisions.* (1) Within 60 calendar days of receipt of a written claim, the grants officer shall either:

(i) Prepare a written decision, which shall include the reasons for the decision; shall identify all relevant data on which the decision is based; shall identify the cognizant Grant Appeal Authority and give his or her mailing address; and shall be included in the award file; or

(ii) Notify the recipient of a specific date when he or she will render a written decision, if more time is required to do so. The notice shall inform the recipient of the reason for delaying the decision (e.g., the complexity of the claim, a need for more time to complete ADR procedures, or a need for the recipient to provide additional information to support the claim).

(2) The decision of the grants officer shall be final, unless the recipient decides to appeal. If a recipient decides to appeal a grants officer's decision, the grants officer shall encourage the recipient to enter into ADR procedures, as described in paragraph (c) of this section.

(e) *Formal administrative appeals*—(1) *Grant appeal authorities.* Each DoD Component that awards grants or cooperative agreements shall establish one or more Grant Appeal Authorities to decide formal, administrative appeals in accordance with paragraph (e)(3) of this section. Each Grant Appeal Authority shall be either:

(i) An individual at a grade level in the Senior Executive Service, if civilian, or at the rank of Flag or General Officer, if military; or

(ii) A board chaired by such an individual.

(2) *Right of appeal.* A recipient has the right to appeal a grants officer's decision to the Grant Appeal Authority (but note that ADR procedures, as described in paragraph (c) of this section, are the preferred means for resolving any appeal).

(3) *Appeal procedures*—(i) *Notice of appeal*. A recipient may appeal a decision of the grants officer within 90 calendar days of receiving that decision, by filing a written notice of appeal to the Grant Appeal Authority and to the grants officer. If a recipient elects to use an ADR procedure, the recipient is permitted an additional 60 calendar days to file the written notice of appeal to the Grant Appeal Authority and grants officer.

(ii) *Appeal file*. Within 30 calendar days of receiving the notice of appeal, the grants officer shall forward to the Grant Appeal Authority and the recipient the appeal file, which shall include copies of all documents relevant to the appeal. The recipient may supplement the file with additional documents it deems relevant. Either the grants officer or the recipient may supplement the file with a memorandum in support of its position. The Grant Appeal Authority may request additional information from either the grants officer or the recipient.

(iii) *Decision*. The appeal shall be decided solely on the basis of the written record, unless the Grant Appeal Authority decides to conduct fact-finding procedures or an oral hearing on the appeal. Any fact-finding or hearing shall be conducted using procedures that the Grant Appeal Authority deems appropriate.

(f) *Representation*. A recipient may be represented by counsel or any other designated representative in any claim, appeal, or ADR proceeding brought pursuant to this section, as long as the representative is not otherwise prohibited by law or regulation from appearing before the DoD Component concerned.

(g) *Non-exclusivity of remedies*. Nothing in this section is intended to limit a recipient's right to any remedy under the law.

### § 22.820 Debt collection.

(a) *Purpose*. This section prescribes procedures for establishing debts owed by recipients of grants and cooperative agreements, and transferring them to payment offices for collection.

(b) *Resolution of indebtedness*. The grants officer shall attempt to resolve by mutual agreement any claim of a recipient's indebtedness to the United States arising out of a grant or cooperative agreement (e.g., by a finding that a recipient was paid funds in excess of the amount to which the recipient was entitled under the terms and conditions of the award).

(c) *Grants officer's decision*. In the absence of such mutual agreement, any claim of a recipient's indebtedness shall be the subject of a grants officer decision, in accordance with § 22.815(b)(2). The grants officer shall prepare and transmit to the recipient a written notice that:

(1) Describes the debt, including the amount, the name and address of the official who determined the debt (e.g., the grants officer under § 22.815(d)), and a copy of that determination.

(2) Informs the recipient that:

(i) Within 30 calendar days of the grants officer's decision, the recipient shall either pay the amount owed to the grants officer (at the address that was provided pursuant to paragraph (c)(1) of this section) or inform the grants officer of the recipient's intention to appeal the decision.

(ii) If the recipient elects not to appeal, any amounts not paid within 30 calendar days of the grants officer's decision will be a delinquent debt.

(iii) If the recipient elects to appeal the grants officer's decision the recipient has 90 calendar days, or 150 calendar days if ADR procedures are used, after receipt of the grants officer's decision to file the appeal, in accordance with § 22.815(e)(3)(i).

(iv) The debt will bear interest, and may include penalties and other administrative costs, in accordance with the debt collection provisions in Chapters 29, 31, and 32 of Volume 5 and Chapters 18 and 19 of Volume 10 of the DoD Financial Management Regulation (DoD 7000.14–R). No interest will be charged if the recipient pays the amount owed within 30 calendar days of the grants officer's decision. Interest will be charged for the entire period from the date the decision was mailed, if the recipient pays the amount owed after 30 calendar days.

(d) *Follow-up*. Depending upon the response from the recipient, the grants officer shall proceed as follows:

(1) If the recipient pays the amount owed within 30 calendar days to the grants officer, the grants officer shall forward the payment to the responsible payment office.

(2) If within 30 calendar days the recipient elects to appeal the grants officer's decision, further action to collect the debt is deferred, pending the outcome of the appeal. If the final result of the appeal is a determination that the recipient owes a debt to the Federal Government, the grants officer shall send a demand letter to the recipient and transfer responsibility for further debt collection to a payment office, as described in paragraph (d)(3) of this section.

(3) If within 30 calendar days the recipient has neither paid the amount due nor provided notice of intent to file an appeal of the grants officer's decision, the grants officer shall send a demand letter to the recipient, with a copy to the payment office that will be responsible for collecting the delinquent debt. The payment office will be responsible for any further debt collection activity, including issuance of additional demand letters (see Chapter 19 of volume 10 of the DoD Financial Management Regulation, DoD 7000.14–R). The grants officer's demand letter shall:

(i) Describe the debt, including the amount, the name and address of the official that determined the debt (e.g., the grants officer under § 22.815(d)), and a copy of that determination.

(ii) Notify the recipient that the debt is a delinquent debt that bears interest from the date of the grants officer's decision, and that penalties and other administrative costs may be assessed.

(iii) Identify the payment office that is responsible for the collection of the debt, and notify the recipient that it may submit a proposal to that payment office to defer collection, if immediate payment is not practicable.

(e) *Administrative offset*. In carrying out the responsibility for collecting delinquent debts, a disbursing officer may need to consult grants officers, to determine whether administrative offset against payments to a recipient owing a delinquent debt would interfere with execution of projects being carried out under grants or cooperative agreements. Disbursing officers may also ask grants officers whether it is feasible to convert payment methods under grants or cooperative agreements from advance payments to reimbursements, to facilitate use of administrative offset. Grants officers therefore should be familiar with guidelines for disbursing officers, in Chapter 19 of Volume 10 of the Financial Management Regulation (DoD 7000.14–R), concerning withholding and administrative offset to recover delinquent debts.

### § 22.825 Closeout audits.

(a) *Purpose*. This section establishes DoD policy for obtaining audits at closeout of individual grants and cooperative agreements. It thereby supplements the closeout procedures specified in:

(1) 32 CFR 32.71 and 32.72, for awards to institutions of higher education and other nonprofit organizations.

(2) 32 CFR 33.50 and 33.51, for awards to State and local governments.

(3) 32 CFR 34.61 and 34.62, for awards to for-profit entities.

(b) *Policy*. Grants officers shall use their judgment on a case-by-case basis, in deciding whether to obtain an audit prior to closing out a grant or cooperative agreement (i.e., there is no specific DoD requirement to obtain an audit prior to doing so). Factors to be considered include:

(1) The amount of the award.

(2) DoD's past experience with the recipient, including the presence or lack of findings of material deficiencies in recent:

(i) Audits of individual awards; or

(ii) Systems-wide financial audits and audits of the compliance of the recipient's systems with Federal requirements, under OMB Circular A–133, where that Circular is applicable. (See § 22.715(a)(1)).

APPENDIX A TO PART 22—PROPOSAL PROVISION FOR REQUIRED CERTIFICATION

| PROVISION IN PROPOSAL (or, suitably modified, in award) | USED FOR | | | SOURCE OF REQUIREMENT |
|---|---|---|---|---|
| | Type of Award | Type of Recipient | Specific Situation | |
| By signing and submitting this proposal, the recipient is providing the certification at Appendix A to 32 CFR Part 28 regarding lobbying. | Any financial assistance [see 32 CFR 28.105(b) and definitions of "Federal grant," "Federal cooperative agreement," and "Federal loan" in 32 CFR 28.105(c), (d), and (e)] | All but Indian tribe or tribal organization with respect to expenditures specifically permitted by other Federal law [see 32 CFR 28.105(l)] | Any | 32 CFR 28, which implements 31 U.S.C. 1352 |

[70 FR 49468, Aug. 23, 2005]

APPENDIX B TO PART 22—SUGGESTED AWARD PROVISIONS FOR NATIONAL POLICY REQUIREMENTS THAT OFTEN APPLY

| SUGGESTED AWARD PROVISION | USED FOR: | | | SOME REQUIREMENT(S) THE GRANTS OFFICER SHOULD NOTE |
|---|---|---|---|---|
| | Type of Award | Type of Recipient | Specific Situation | |
| Nondiscrimination<br>By signing this agreement or accepting funds under this agreement, the recipient assures that it will comply with applicable provisions of the following, national policies prohibiting discrimination: | | | | |
| a. On the basis of race, color, or national origin, in Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d, et seq.), as implemented by DoD regulations at 32 CFR part 195. | Grants, cooperative agreements, and other financial assistance included at 32 CFR 195.2(d). | Any. | Any. | 32 CFR part 195.6 requires grants officer to obtain recipient's assurance of compliance. It also requires the recipient to flow down requirements to subrecipients. |
| b. On the basis of race, color, religion, sex, or national origin, in Executive Order 11246 [3 CFR, 1964-1965 Comp., p. 339], as implemented by Department of Labor regulations at 41 CFR part 60. | Grants, cooperative agreements, and other prime awards defined at 40 CFR 60-1.3 as "Federally assisted construction contract." | Any. | Awards under which construction work is to be done. | The grants officer should inform recipients that 41 CFR 60-1.4(b) prescribes a clause that recipients must include in federally assisted construction awards and subawards [60-1.4(d) allows incorporation by reference]. This requirement also is at 32 CFR 33.36(I)(3) and in Appendices A to 32 CFR part 32 and 32 CFR part 34. |
| c. On the basis of sex or blindness, in Title IX of the Education Amendments of 1972 (20 U.S.C. 1681, et seq.), as implemented by DoD regulations at 32 CFR part 196. | Grants, cooperative agreements, and other financial assistance included at 20 U.S.C. 1682. | Any [for sex discrimination, 32 CFR 196.235 excepts an entity controlled by a religious organization, if not consistent with the organization's religious tenets]. | Any educational program or activity receiving Federal financial assistance. | 32 CFR 196.115 requires assurance of compliance. The inclusion of subrecipients in the definition of "recipient" at 32 CFR 196.105 requires recipient to flow down requirements to subrecipients. |
| d. On the basis of age, in the Age Discrimination Act of 1975 (42 U.S.C. 6101, et seq.), as implemented by Department of Health and Human Services regulations at 45 CFR part 90. | Grants, cooperative agreements, and other awards defined at 45 CFR 90.4 as "Federal financial assistance." | Any. | Any. | 45 CFR 90.4 requires that recipient flow down requirements to subrecipients [definition of "recipient" at 45 CFR 90.4 includes entities to which assistance is extended indirectly, through another recipient]. |

| SUGGESTED AWARD PROVISION | USED FOR: | | | SOME REQUIREMENT(S) THE GRANTS OFFICER SHOULD NOTE |
|---|---|---|---|---|
| | Type of Award | Type of Recipient | Specific Situation | |
| e. On the basis of handicap, in: | | | | |
| 1. Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), as implemented by Department of Justice regulations at 28 CFR part 41 and DoD regulations at 32 CFR part 56. | Grants, cooperative agreements, and other awards included in "Federal financial assistance" definition at 32 CFR 56.3(b). | Any. | Any. | 32 CFR 56.9(b) requires grants officer to obtain recipient's written assurance of compliance and specifies what the assurance includes. Note that requirements flow down to subawards ["recipient," defined at 32 CFR 56.3(g), includes entities receiving assistance indirectly through other recipients]. |
| 2. The Architectural Barriers Act of 1968 (42 U.S.C. 4151, et seq.). | Grant or loan. | Any. | Construction or alteration of buildings or facilities, except those restricted to use only by able-bodied uniformed personnel. | |
| Live Organisms<br>By signing this agreement or accepting funds under this agreement, the recipient assures that it will comply with applicable provisions of the following national policies concerning live organisms: | | | | |
| a. For human subjects, the Common Federal Policy for the Protection of Human Subjects, codified by the Department of Health and Human Services at 45 CFR part 46 and implemented by the Department of Defense at 32 CFR part 219. | Any. | Any. | Research, development, test, or evaluation involving live human subjects, with some exceptions [see 32 CFR part 219]. | 32 CFR 219.103 requires each recipient to have a Federally approved, written assurance of compliance [it may be HHS-approved, on file with HHS; DoD-approved, on file with a DoD Component; or may need to be obtained by the grants officer for the specific award]. |

| SUGGESTED AWARD PROVISION | USED FOR: | | | SOME REQUIREMENT(S) THE GRANTS OFFICER SHOULD NOTE |
|---|---|---|---|---|
| | Type of Award | Type of Recipient | Specific Situation | |
| b. For animals: | | | | |
| 1. Rules on animal acquisition, transport, care, handling, and use in 9 CFR parts 1-4, Department of Agriculture rules implementing the Laboratory Animal Welfare Act of 1966 (7 U.S.C. 2131-2156) , and guidelines in the National Academy of Sciences (NAS) "Guide for the Care and Use of Laboratory Animals" (1996), including the Public Health Service Policy and Government Principles Regarding the Care and Use of Animals in Appendix D to the guide. | Any. | Any. | Research, experimentation, or testing involving the use of animals. | Prior to making an award under which animal-based research, testing, or training is to be performed, DoD Directive 3216.1[1] requires administrative review of the proposal by a DoD veterinarian trained or experienced in laboratory animal science and medicine, as well as a review by the recipient's Institutional Animal Care and Use Committee. |
| 2. Prohibitions on the purchase or use of dogs or cats for certain medical training purposes, in Section 8019 (10 U.S.C. 2241 note) of the Department of Defense Appropriations Act, 1991 (Pub. Law 101-511). | Any. | Any. | Use of DoD appropriations for training on treatment of wounds. | |
| 3. Rules of the Departments of Interior (50 CFR parts 10-24) and Commerce (50 CFR parts 217-227) implementing laws and conventions on the taking, possession, transport, purchase, sale, export, or import of wildlife and plants, including the: Endangered Species Act of 1973 (16 U.S.C. 1531-1543); Marine Mammal Protection Act (16 U.S.C. 1361-1384); Lacey Act (18 U.S.C. 42); and Convention on International Trade in Endangered Species of Wild Fauna and Flora. | Any. | Any. | Activities that may involve or impact wildlife and plants. | |

1 Electronic copies may be obtained at the Washington Headquarters Services Internet site http://www.dtic.mil/whs/directives. Paper copies may be obtained, at cost, from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161.

| SUGGESTED AWARD PROVISION | USED FOR: | | | SOME REQUIREMENT(S) THE GRANTS OFFICER SHOULD NOTE |
|---|---|---|---|---|
| | Type of Award | Type of Recipient | Specific Situation | |
| Debarment and Suspension<br>The recipient agrees to comply with the requirements regarding debarment and suspension in Subpart C of the OMB guidance in 2 CFR part 180, as implemented by the Department of Defense in 2 CFR part 1125. The recipient also agrees to communicate the requirement to comply with Subpart C to persons at the next lower tier with whom the recipient enters into transactions that are "covered transactions" under Subpart B of 2 CFR part 180 and the DoD implementation in 2 CFR part 1125. | Any nonprocurement transaction [see "covered transaction" as specified in Subpart B of 2 CFR part 180, especially sections 180.210 and 180.215] | All but foreign governments, foreign governmental entities, and others excluded at 2 CFR 180.215(a) | Any | |
| Hatch Act<br>The recipient agrees to comply with the Hatch Act (5 U.S.C. 1501-1508 and 7324-7328), as implemented by the Office of Personnel Management at 5 CFR part 151, which limits political activity of employees or officers of State or local governments whose employment is connected to an activity financed in whole or part with Federal funds. | Grants or loans. | State and local governments. | All but employees of educational or research institutions supported by State; political subdivision thereof; or religious, philanthropic, or cultural organization. | |
| Environmental Standards<br>By signing this agreement or accepting funds under this agreement, the recipient assures that it will:<br><br>a. Comply with applicable provisions of the Clean Air Act (42 U.S.C. 7401, et. seq.) and Clean Water Act (33 U.S.C. 1251, et. seq.), as implemented by Executive Order 11738 [3 CFR, 1971-1975 Comp., p. 799] and Environmental Protection Agency (EPA) rules at Subpart J of 40 CFR part 32. | Any nonprocurement transaction [see 40 CFR 32.1110]. | Any. | Any. | Executive Order 11738 establishes additional responsibilities for grants officers. |

| SUGGESTED AWARD PROVISION | USED FOR: | | | SOME REQUIREMENT(S) THE GRANTS OFFICER SHOULD NOTE |
|---|---|---|---|---|
| | Type of Award | Type of Recipient | Specific Situation | |
| b. Identify to the awarding agency any impact this award may have on: | | | | |
| 1. The quality of the human environment, and provide help the agency may need to comply with the National Environmental Policy Act (NEPA, at 42 U.S.C. 4321, et. seq.) and to prepare Environmental Impact Statements or other required environmental documentation. In such cases, the recipient agrees to take no action that will have an adverse environmental impact (e.g., physical disturbance of a site such as breaking of ground) until the agency provides written notification of compliance with the environmental impact analysis process. | Any. | Any. | Any actions that may affect the environment. | The Council on Environmental Quality's regulations for implementing NEPA are at 40 C.F.R. parts 1500-1508. Executive Order 11514 [3 CFR, 1966-1970 Comp., p. 902], as amended by Executive Order 11991, sets policies and procedures for considering actions in the U.S. Executive Orders11988 [3 CFR, 1977 Comp., p. 117] and 11990 [3 CFR, 1977 Comp., p. 121] specify additional considerations, when actions involve floodplains or wetlands, respectively. |
| 2. Flood-prone areas, and provide help the agency may need to comply with the National Flood Insurance Act of 1968 and Flood Disaster Protection Act of 1973 (42 U.S.C. 4001, et. seq.), which require flood insurance, when available, for Federally assisted construction or acquisition in flood-prone areas. | Grants, cooperative agreements, and other "financial assistance" (see 42 U.S.C. 4003). | Any. | Awards involving construction, land acquisition or development, with some exceptions [see 42 U.S.C. 4001, et. seq.]. | The grants officer should inform the recipient that 42 U.S.C. 4012a prohibits awards for acquisition or construction in flood-prone areas (Federal Emergency Management Agency publishes lists of such areas in the Federal Register), unless recipient has required insurance. If action is in a floodplain, Executive Order 11988 [3 CFR, 1977 Comp., p. 117] specifies additional pre-award procedures for Federal agencies. Recipients are to apply requirements to subawards ("financial assistance," defined at 42 U.S.C. 4003, includes indirect Federal assistance). |

| SUGGESTED AWARD PROVISION | USED FOR: | | | SOME REQUIREMENT(S) THE GRANTS OFFICER SHOULD NOTE |
|---|---|---|---|---|
| | Type of Award | Type of Recipient | Specific Situation | |
| 3. Coastal zones, and provide help the agency may need to comply with the Coastal Zone Management Act of 1972 (16 U.S.C. 1451, et. Seq.), concerning protection of U.S. coastal resources. | Grants, cooperative agreements, and other "Federal assistance" [see 16 U.S.C. 1456(d)]. | State and local governments, interstate and other regional agencies. | Awards that may affect the coastal zone. | 16 U.S.C. 1456(d) prohibits approval of projects inconsistent with a coastal State's approved management program for the coastal zone. |
| 4. Coastal barriers, and provide help the agency may need to comply with the Coastal Barriers Resource Act (16 U.S.C. 3501, et. seq.), concerning preservation of barrier resources. | Grants, cooperative agreements, and other "financial assistance" (see 16 U.S.C. 3502). | Any. | Awards that may affect barriers along the Atlantic and Gulf coasts and Great Lakes' shores. | 16 U.S.C. 3504-3505 prohibit new awards for actions within Coastal Barrier System, except for certain purposes. Requirements flow to subawards (16 U.S.C. 3502 includes indirect assistance as "financial assistance"). |
| 5. Any existing or proposed component of the National Wild and Scenic Rivers system, and provide help the agency may need to comply with the Wild and Scenic Rivers Act of 1968 (16 U.S.C. 1271, et seq.). | Any. | Any. | Awards that may affect existing or proposed element of National Wild and Scenic Rivers system. | |
| 6. Underground sources of drinking water in areas that have an aquifer that is the sole or principal drinking water source, and provide help the agency may need to comply with the Safe Drinking Water Act (42 U.S.C. 300h-3). | Any. | Any. | Construction in any area with aquifer that the EPA finds would create public health hazard, if contaminated. | 42 U.S.C. 300h-3(e) precludes awards of Federal financial assistance for any project that the EPA administrator determines may contaminate a sole-source aquifer so as to threaten public health. |
| Drug-Free Workplace<br>The recipient agrees to comply with the requirements regarding drug-free workplace requirements in Subpart B (or Subpart C, if the recipient is an individual) of 32 CFR part 26, which implements sec. 5151-5160 of the Drug-Free Workplace Act of 1988 (Pub. L. 100-690, Title V, Subtitle D; 41 U.S.C. 701, et seq.). | Any financial assistance, including any grant or cooperative agreement [see "award" as broadly defined at 32 CFR 26.605] | Any | Any, except where inconsistent with international obligations of the U.S. or the laws or regulations of a foreign government [see 32 CFR 26.110] | |

| SUGGESTED AWARD PROVISION | USED FOR: | | | SOME REQUIREMENT(S) THE GRANTS OFFICER SHOULD NOTE |
|---|---|---|---|---|
| | Type of Award | Type of Recipient | Specific Situation | |
| National Historic Preservation<br>The recipient agrees to identify to the awarding agency any property listed or eligible for listing on the National Register of Historic Places that will be affected by this award, and to provide any help the awarding agency may need, with respect to this award, to comply with Section 106 of the National Historic Preservation Act of 1966 (16 U.S.C. 470, et seq.), as implemented by the Advisory Council on Historic Preservation regulations at 36 C.F.R. part 800 and Executive Order 11593 [3 CFR, 1971-1975 Comp., p. 559]. | Any. | Any. | Any construction, acquisition, modernization, or other activity that may impact a historic property. | 36 CFR part 800 requires grants officers to get comments from the Advisory Council on Historic Preservation before proceeding with Federally assisted projects that may affect properties listed on or eligible for listing on the National Register of Historic Places. |
| Officials Not to Benefit<br>No member of or delegate to Congress, or resident commissioner, shall be admitted to any share or part of this agreement, or to any benefit arising from it, in accordance with 41 U.S.C. 22. | Grants, cooperative agreements, and other "agreements." | Any. | Any. | |
| Preference for U.S. Flag Carriers<br>Travel supported by U.S. Government funds under this agreement shall use U.S.-flag air carriers (air carriers holding certificates under 49 U.S.C. 41102) for international air transportation of people and property to the extent that such service is available, in accordance with the International Air Transportation Fair Competitive Practices Act of 1974 (49 U.S.C. 40118) and the interpretative guidelines issued by the Comptroller General of the United States in the March 31, 1981, amendment to Comptroller General Decision B138942. | Any. | Any. | Any agreement under which international air travel may be supported by U.S. Government funds. | |

| SUGGESTED AWARD PROVISION | USED FOR: | | | SOME REQUIREMENT(S) THE GRANTS OFFICER SHOULD NOTE |
|---|---|---|---|---|
| | Type of Award | Type of Recipient | Specific Situation | |
| Cargo Preference<br>The recipient agrees that it will comply with the Cargo Preference Act of 1954 (46 U.S.C. 1241), as implemented by Department of Transportation regulations at 46 CFR 381.7, which require that at least 50 percent of equipment, materials or commodities procured or otherwise obtained with U.S. Government funds under this agreement, and which may be transported by ocean vessel, shall be transported on privately owned U.S.-flag commercial vessels, if available. | Grants, cooperative agreements, and other awards included in 46 CFR 381.7. | Any. | Any award where possibility exists for ocean transport of items procured or obtained by or on behalf of the recipient, or any of the recipient's contractors or subcontractors. | 46 CFR 381.7 requires grants officers to include appropriate clauses in award documents. It also requires recipients to include appropriate clauses in contracts using U.S. Government funds under agreements, where ocean transport of procured goods is possible [e.g., see clause at 46 CFR 381.7(b)]. |
| Military Recruiters<br>[Grants officers shall include the exact award provision specified at 32 CFR 22.520] | Grants and cooperative agreements. | Domestic institution of higher education (see 32 CFR 22.520). | Any. | |
| Relocation and Real Property Acquisition<br>The recipient assures that it will comply with 49 CFR part 24, which implements the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (42 U.S.C. 4601, et seq.) and provides for fair and equitable treatment of persons displaced by Federally assisted programs or persons whose property is acquired as a result of such programs. | Grants, cooperative agreements, and other "Federal financial assistance" [see 49 CFR 24.2(j)]. | "State agency" as defined in 49 CFR part 24 to include persons with authority to acquire property by eminent domain under State law. | Any project that may result in real property acquisition or displacement where State agency hasn't opted to certify to Dept. of Transportation in lieu of providing assurance. | 42 U.S.C. 4630 and 49 CFR 24.4, as implemented by DoD at 32 CFR part 259, requires grants officers to obtain recipients' assurance of compliance. |

[72 FR 34989, June 26, 2007]

APPENDIX C TO PART 22—ADMINISTRATIVE REQUIREMENTS AND ISSUES TO BE ADDRESSED IN AWARD TERMS AND CONDITIONS

| REQUIREMENT, IN BRIEF | SOURCE OF REQUIREMENT, FOR EACH TYPE OF RECIPIENT (WHERE DETAILS MAY BE FOUND) | | | ISSUES TO BE ADDRESSED IN AWARD TERMS/CONDITIONS |
|---|---|---|---|---|
| | University or other nonprofit | Governmental entity | For-profit entity | |
| Standards for Financial Management Systems. Recipients' systems to comply with: | 32 CFR 32.21 | 32 CFR 33.20 | 32 CFR 34.11 | For university, nonprofit, or for-profit entity, specify if want:<br>• Bonding and insurance [32 CFR 32.21(c) or 32 CFR 34.11(b)].<br>• Fidelity bond [32 CFR 32.21(d) or 32 CFR 34.11(c)]. |
| Payment. Recipients request payments and handle advances and interest in compliance with: | 32 CFR 32.22 | 32 CFR 33.21, 33.41(d) and (e) | 32 CFR 34.12 | Specify:<br>• Payment method (e.g., advance, reimbursement, working capital advance). NOTE: if predetermined payment schedule is used, must specify means to ensure that recipients don't develop large cash balances well in advance of needs for such funds (e.g., recipient submits SF-269 or SF-270 forms at regular intervals, for grants officer to review recipients' cash on hand).<br>• Name/address of office to which recipient sends payment requests.<br>• How frequently recipient may submit payment requests.<br>• Whether recipient requests payment by SF-270, SF-271, or other form, or by electronic means (e.g., electronic data interchange).<br>• Name/address of office that will make payments, and whether the recipient is to receive payments by electronic funds transfer (see §22.605(c) and §22.810(b)(2)).<br>• Name/address of office to which recipient is to remit any interest earned, if advance payment method is to be used. If interest is to be remitted using electronic commerce, information should be provided on required format and data elements. |
| Allowable costs. Allowability of costs to be in accordance with: | 32 CFR 32.27 and 32.28 | 32 CFR 33.22 and 33.23 | 32 CFR 34.17 | |
| Fee/profit. None allowed. | | | 32 CFR 34.18 | |
| Cost share or match. If cost share or match is required, allowability and valuation are governed by: | 32 CFR 32.23 | 32 CFR 33.24 | 32 CFR 34.13 | Specify if want to allow inclusion of certain types of items as cost share or allow them to be valued in certain ways [32 CFR 32.23(b), (c), and (g); 32 CFR 33.24(b)(4), (b)(5), and (e)(2); 32 CFR 34.13(a)(7), (b)(1), and (b)(4)(ii)]. |

| REQUIREMENT, IN BRIEF | SOURCE OF REQUIREMENT, FOR EACH TYPE OF RECIPIENT (WHERE DETAILS MAY BE FOUND) | | | ISSUES TO BE ADDRESSED IN AWARD TERMS/CONDITIONS |
|---|---|---|---|---|
| | University or other nonprofit | Governmental entity | For-profit entity | |
| Program income. Recipients account for program income in accordance with: | 32 CFR 32.24 | 32 CFR 33.25 | 32 CFR 34.14 | Specify:<br>• Method for disposition [32 CFR 32.24(b), (c), and (d); 32 CFR 33.25(g); 32 CFR 34.14(d), (e), and (f)].<br>• If want recipient to have obligation to Government for certain types of income or for income earned after end of project period [32 CFR 32.24(e) and (h), 32 CFR 33.25(a), (d), (e), and (h), 32 CFR 34.14(b)].<br>• If want to allow recipient to deduct costs of generating income [32 CFR 32.24(f), 32 CFR 33.25(c), 32 CFR 34.14(c)]. |
| Revision of budget/program plans. Recipients request prior approval for plan changes, in accordance with: | 32 CFR 32.25 | 32 CFR 33.30 | 32 CFR 34.15 | Specify if wish to:<br>• Waive some prior approvals that are optional, but are in effect unless specifically waived [32 CFR 33.30(b), (c)(1), (d)(3); 32 CFR 34.15(c)(2)].<br>• Require some prior approvals that are optional, but are only in effect if specifically stated [32 CFR 32.25(c)(5), (d), (e), (h); 32 CFR 34.15(c)(3)].<br>• Waive the requirement for prior approval [32 CFR 25.25(d)(3)] for recipient to initiate one-time, no-cost extension, as long as the DoD Component judges that the recipient's doing so would not cause the DoD Component to fail to comply with DoD funding policies (e.g., the incremental programming and budgeting policy for research funding) contained in Volume 2A of the DoD Financial Management Regulation (DoD 7000.14-R). |
| Audit. Recipients periodically to have independent, financial and compliance audit and report to DoD, subject to provisions of: | 32 CFR 32.26 | 32 CFR 33.26 | 32 CFR 34.16 | Require all but for-profit entities to submit copy of OMB Circular A-133 audit reports to IG, DoD. Require for-profit entities to submit audit reports to whichever office(s) the DoD Component wishes audit reports to be sent. |
| Procurement. Recipients' systems for acquiring goods and services under awards are to comply with: | 32 CFR 32.40 through 32.49 | 32 CFR 33.36 | 32 CFR 34.30 through 34.31 | Specify if want to require recipient to make certain preaward documents available for DoD Component's review [32 CFR 32.44(e); 32 CFR 33.36(g); 32 CFR 34.31(b)]. |

| REQUIREMENT, IN BRIEF | SOURCE OF REQUIREMENT, FOR EACH TYPE OF RECIPIENT (WHERE DETAILS MAY BE FOUND) | | | ISSUES TO BE ADDRESSED IN AWARD TERMS/CONDITIONS |
|---|---|---|---|---|
| | University or other nonprofit | Governmental entity | For-profit entity | |
| Subawards. Recipients flow down requirements to subawards in accordance with: | 32 CFR 32.5, 32 CFR 33.37, and 32 CFR 34.1(b)(2) | | | |
| Property. Recipients manage in accordance with: | 32 CFR 32.30 through 32.37 | 32 CFR 33.31 through 33.34 | 32 CFR 34.20 through 34.25 | Specify if want:<br>• To allow for-profit entities to acquire real property under awards [32 CFR 34.21(a)].<br>• University or other nonprofit to have any further obligation to Government for exempt property [32 CFR 32.33(b)].<br>• To retain right to transfer title [32 CFR 32.34(h). 32 CFR 33.32(g)].<br>• To allow recipients to use equipment for certain purposes [32 CFR 32.34(d) and (e); 32 CFR 33.32(c)(4); 32 CFR 34.21(d)].<br>• To waive data rights [32 CFR 34.25(b)(2)].<br>• To require recipients to record liens [32 CFR 32.37].<br><br>For research awards to certain recipients, include patents clause required by 37 CFR 401 [32 CFR 32.36(b); 32 CFR 34.25(a)]. |
| Reports. Requirements are specified in: | 32 CFR 32.51 and 32.52 | 32 CFR 33.40 and 33.41 | 32 CFR 34.41 | Specify:<br>• When recipients are to submit periodic and final performance reports [32 CFR 32.51(b) and (c); 32 CFR 33.40(b), (c), and (f); 32 CFR 34.41].<br>• Frequency of financial status/cash transaction reports [32 CFR 32.52(a)(1)(iii) and (a)(2)(iv); 32 CFR 33.41(b)(3) and (c); 32 CFR 34.41], or if wish to waive them under certain conditions [32 CFR 32.52(a)(1)(i) and (a)(2)(v); 32 CFR 33.41(a)(6); 32 CFR 34.41].<br>• Whether want reports on cash or accrual basis [32 CFR 32.52(a)(1)(ii); 32 CFR 33.41(b)(2); 32 CFR 34.41]. |
| Records. Retention and access requirements specified in: | 32 CFR 32.53 | 32 CFR 33.42 | 32 CFR 34.42 | |

| REQUIREMENT, IN BRIEF | SOURCE OF REQUIREMENT, FOR EACH TYPE OF RECIPIENT (WHERE DETAILS MAY BE FOUND) | | | ISSUES TO BE ADDRESSED IN AWARD TERMS/CONDITIONS |
|---|---|---|---|---|
| | University or other nonprofit | Governmental entity | For-profit entity | |
| Termination and enforcement: Award is subject to: | 32 CFR 32.61 and 32.62 | 32 CFR 33.43 and 33.44 | 32 CFR 34.51 and 34.52 | |
| Disputes, claims, and appeals: Procedures are specified in: | 32 CFR 22.815 | | | • Include term or condition that incorporates procedures, in accordance with 32 CFR 22.815(a). |
| After-the-award requirements: Closeout, subsequent adjustments, continuing responsibilities, and collection of amounts due are subject to requirements in: | 32 CFR 32.71 through 32.73 | 32 CFR 33.50 through 33.52 | 32 CFR 34.61 through 34.63 | |

[65 FR 14411, Mar. 16, 2000]

# PART 26—GOVERNMENTWIDE REQUIREMENTS FOR DRUG-FREE WORKPLACE (FINANCIAL ASSISTANCE)

## Subpart A—Purpose and Coverage

Sec.

26.100 What does this part do?

26.105 Does this part apply to me?
26.110 Are any of my Federal assistance awards exempt from this part?
26.115 Does this part affect the Federal contracts that I receive?

Subpart B—Requirements for Recipients Other Than Individuals

26.200 What must I do to comply with this part?
26.205 What must I include in my drug-free workplace statement?
26.210 To whom must I distribute my drug-free workplace statement?
26.215 What must I include in my drug-free awareness program?
26.220 By when must I publish my drug-free workplace statement and establish my drug-free awareness program?
26.225 What actions must I take concerning employees who are convicted of drug violations in the workplace?
26.230 How and when must I identify workplaces?

Subpart C—Requirements for Recipients Who Are Individuals

26.300 What must I do to comply with this part if I am an individual recipient?
26.301 [Reserved]

Subpart D—Responsibilities of DOD Component Awarding Officials

26.400 What are my responsibilities as a DOD Component awarding official?

Subpart E—Violations of This Part and Consequences

26.500 How are violations of this part determined for recipients other than individuals?
26.505 How are violations of this part determined for recipients who are individuals?
26.510 What actions will the Federal Government take against a recipient determined to have violated this part?
26.515 Are there any exceptions to those actions?

Subpart F—Definitions

26.605 Award
26.610 Controlled substance.
26.615 Conviction.
26.620 Cooperative agreement.
26.625 Criminal drug statute.
26.630 Debarment.
26.632 DOD Component.
26.635 Drug-free workplace.
26.640 Employee.
26.645 Federal agency or agency.
26.650 Grant.
26.655 Individual.
26.660 Recipient.
26.665 State.
26.670 Suspension.

AUTHORITY: 41U.S.C.701, *et seq.*

SOURCE: 68 FR 66557, 66609, Nov. 26, 2003, unless otherwise noted.

## Subpart A—Purpose and Coverage

### §26.100 What does this part do?

This part carries out the portion of the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 *et seq.*, as amended) that applies to grants. It also applies the provisions of the Act to cooperative agreements and other financial assistance awards, as a matter of Federal Government policy.

### §26.105 Does this part apply to me?

(a) Portions of this part apply to you if you are either—

(1) A recipient of an assistance award from the DOD Component; or

(2) A(n) DOD Component awarding official. (See definitions of award and recipient in §§26.605 and 26.660, respectively.)

(b) The following table shows the subparts that apply to you:

| If you are . . . | see subparts . . . |
|---|---|
| (1) A recipient who is not an individual .... | A, B and E. |
| (2) A recipient who is an individual ..... | A, C and E. |
| (3) A(n) DOD Component awarding official. | A, D and E. |

### §26.110 Are any of my Federal assistance awards exempt from this part?

This part does not apply to any award that the Head of the DOD Component or his or her designee determines that the application of this part would be inconsistent with the international obligations of the United States or the laws or regulations of a foreign government.

### §26.115 Does this part affect the Federal contracts that I receive?

It will affect future contract awards indirectly if you are debarred or suspended for a violation of the requirements of this part, as described in §26.510(c). However, this part does not apply directly to procurement contracts. The portion of the Drug-Free Workplace Act of 1988 that applies to

Federal procurement contracts is carried out through the Federal Acquisition Regulation in chapter 1 of Title 48 of the Code of Federal Regulations (the drug-free workplace coverage currently is in 48 CFR part 23, subpart 23.5).

## Subpart B—Requirements for Recipients Other Than Individuals

### § 26.200 What must I do to comply with this part?

There are two general requirements if you are a recipient other than an individual.

(a) First, you must make a good faith effort, on a continuing basis, to maintain a drug-free workplace. You must agree to do so as a condition for receiving any award covered by this part. The specific measures that you must take in this regard are described in more detail in subsequent sections of this subpart. Briefly, those measures are to—

(1) Publish a drug-free workplace statement and establish a drug-free awareness program for your employees (see §§ 26.205 through 26.220); and

(2) Take actions concerning employees who are convicted of violating drug statutes in the workplace (see § 26.225).

(b) Second, you must identify all known workplaces under your Federal awards (see § 26.230).

### § 26.205 What must I include in my drug-free workplace statement?

You must publish a statement that—

(a) Tells your employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in your workplace;

(b) Specifies the actions that you will take against employees for violating that prohibition; and

(c) Lets each employee know that, as a condition of employment under any award, he or she:

(1) Will abide by the terms of the statement; and

(2) Must notify you in writing if he or she is convicted for a violation of a criminal drug statute occurring in the workplace and must do so no more than five calendar days after the conviction.

### § 26.210 To whom must I distribute my drug-free workplace statement?

You must require that a copy of the statement described in § 26.205 be given to each employee who will be engaged in the performance of any Federal award.

### § 26.215 What must I include in my drug-free awareness program?

You must establish an ongoing drug-free awareness program to inform employees about—

(a) The dangers of drug abuse in the workplace;

(b) Your policy of maintaining a drug-free workplace;

(c) Any available drug counseling, rehabilitation, and employee assistance programs; and

(d) The penalties that you may impose upon them for drug abuse violations occurring in the workplace.

### § 26.220 By when must I publish my drug-free workplace statement and establish my drug-free awareness program?

If you are a new recipient that does not already have a policy statement as described in § 26.205 and an ongoing awareness program as described in § 26.215, you must publish the statement and establish the program by the time given in the following table:

| If . . . | then you . . . |
|---|---|
| (a) The performance period of the award is less than 30 days. | must have the policy statement and program in place as soon as possible, but before the date on which performance is expected to be completed. |
| (b) The performance period of the award is 30 days or more. | must have the policy statement and program in place within 30 days after award. |
| (c) You believe there are extraordinary circumstances that will require more than 30 days for you to publish the policy statement and establish the awareness program. | may ask the DOD Component awarding official to give you more time to do so. The amount of additional time, if any, to be given is at the discretion of the awarding official. |

### § 26.225 What actions must I take concerning employees who are convicted of drug violations in the workplace?

There are two actions you must take if an employee is convicted of a drug violation in the workplace:

(a) First, you must notify Federal agencies if an employee who is engaged in the performance of an award informs you about a conviction, as required by § 26.205(c)(2), or you otherwise learn of the conviction. Your notification to the Federal agencies must__

(1) Be in writing;

(2) Include the employee's position title;

(3) Include the identification number(s) of each affected award;

(4) Be sent within ten calendar days after you learn of the conviction; and

(5) Be sent to every Federal agency on whose award the convicted employee was working. It must be sent to every awarding official or his or her official designee, unless the Federal agency has specified a central point for the receipt of the notices.

(b) Second, within 30 calendar days of learning about an employee's conviction, you must either__

(1) Take appropriate personnel action against the employee, up to and including termination, consistent with the requirements of the Rehabilitation Act of 1973 (29 U.S.C. 794), as amended; or

(2) Require the employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for these purposes by a Federal, State or local health, law enforcement, or other appropriate agency.

### § 26.230 How and when must I identify workplaces?

(a) You must identify all known workplaces under each DOD Component award. A failure to do so is a violation of your drug-free workplace requirements. You may identify the workplaces__

(1) To the DOD Component official that is making the award, either at the time of application or upon award; or

(2) In documents that you keep on file in your offices during the performance of the award, in which case you must make the information available for inspection upon request by DOD Component officials or their designated representatives.

(b) Your workplace identification for an award must include the actual address of buildings (or parts of buildings) or other sites where work under the award takes place. Categorical descriptions may be used (*e.g.*, all vehicles of a mass transit authority or State highway department while in operation, State employees in each local unemployment office, performers in concert halls or radio studios).

(c) If you identified workplaces to the DOD Component awarding official at the time of application or award, as described in paragraph (a)(1) of this section, and any workplace that you identified changes during the performance of the award, you must inform the DOD Component awarding official.

## Subpart C—Requirements for Recipients Who Are Individuals

### § 26.300 What must I do to comply with this part if I am an individual recipient?

As a condition of receiving a(n) DOD Component award, if you are an individual recipient, you must agree that—

(a) You will not engage in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance in conducting any activity related to the award; and

(b) If you are convicted of a criminal drug offense resulting from a violation occurring during the conduct of any award activity, you will report the conviction:

(1) In writing.

(2) Within 10 calendar days of the conviction.

(3) To the DOD Component awarding official or other designee for each award that you currently have, unless § 26.301 or the award document designates a central point for the receipt of the notices. When notice is made to a central point, it must include the identification number(s) of each affected award.

### § 26.301 [Reserved]

## Subpart D—Responsibilities of DOD Component Awarding Officials

### § 26.400 What are my responsibilities as a(n) DOD Component awarding official?

As a(n) DOD Component awarding official, you must obtain each recipient's

agreement, as a condition of the award, to comply with the requirements in—

(a) Subpart B of this part, if the recipient is not an individual; or

(b) Subpart C of this part, if the recipient is an individual.

## Subpart E—Violations of this Part and Consequences

### § 26.500 How are violations of this part determined for recipients other than individuals?

A recipient other than an individual is in violation of the requirements of this part if the Head of the DOD Component or his or her designee determines, in writing, that—

(a) The recipient has violated the requirements of subpart B of this part; or

(b) The number of convictions of the recipient's employees for violating criminal drug statutes in the workplace is large enough to indicate that the recipient has failed to make a good faith effort to provide a drug-free workplace.

### § 26.505 How are violations of this part determined for recipients who are individuals?

An individual recipient is in violation of the requirements of this part if the Head of the DOD Component or his or her designee determines, in writing, that—

(a) The recipient has violated the requirements of subpart C of this part; or

(b) The recipient is convicted of a criminal drug offense resulting from a violation occurring during the conduct of any award activity.

### § 26.510 What actions will the Federal Government take against a recipient determined to have violated this part?

If a recipient is determined to have violated this part, as described in § 26.500 or § 26.505, the DOD Component may take one or more of the following actions—

(a) Suspension of payments under the award;

(b) Suspension or termination of the award; and

(c) Suspension or debarment of the recipient under 32 CFR Part 25, for a period not to exceed five years.

### § 26.515 Are there any exceptions to those actions?

The Secretary of Defense or Secretary of a Military Department may waive with respect to a particular award, in writing, a suspension of payments under an award, suspension or termination of an award, or suspension or debarment of a recipient if the Secretary of Defense or Secretary of a Military Department determines that such a waiver would be in the public interest. This exception authority cannot be delegated to any other official.

## Subpart F—Definitions

### § 26.605 Award.

*Award* means an award of financial assistance by the DOD Component or other Federal agency directly to a recipient.

(a) The term award includes:

(1) A Federal grant or cooperative agreement, in the form of money or property in lieu of money.

(2) A block grant or a grant in an entitlement program, whether or not the grant is exempted from coverage under the Governmentwide rule 32 CFR Part 33 that implements OMB Circular A–102 (for availability, see 5 CFR 1310.3) and specifies uniform administrative requirements.

(b) The term award does not include:

(1) Technical assistance that provides services instead of money.

(2) Loans.

(3) Loan guarantees.

(4) Interest subsidies.

(5) Insurance.

(6) Direct appropriations.

(7) Veterans' benefits to individuals (*i.e.*, any benefit to veterans, their families, or survivors by virtue of the service of a veteran in the Armed Forces of the United States).

### § 26.610 Controlled substance.

*Controlled substance* means a controlled substance in schedules I through V of the Controlled Substances Act (21 U.S.C. 812), and as further defined by regulation at 21 CFR 1308.11 through 1308.15.

**§ 26.615 Conviction.**

*Conviction* means a finding of guilt (including a plea of nolo contendere) or imposition of sentence, or both, by any judicial body charged with the responsibility to determine violations of the Federal or State criminal drug statutes.

**§ 26.620 Cooperative agreement.**

*Cooperative agreement* means an award of financial assistance that, consistent with 31 U.S.C. 6305, is used to enter into the same kind of relationship as a grant (see definition of grant in § 26.650), except that substantial involvement is expected between the Federal agency and the recipient when carrying out the activity contemplated by the award. The term does not include cooperative research and development agreements as defined in 15 U.S.C. 3710a.

**§ 26.625 Criminal drug statute.**

*Criminal drug statute* means a Federal or non-Federal criminal statute involving the manufacture, distribution, dispensing, use, or possession of any controlled substance.

**§ 26.630 Debarment.**

*Debarment* means an action taken by a Federal agency to prohibit a recipient from participating in Federal Government procurement contracts and covered nonprocurement transactions. A recipient so prohibited is debarred, in accordance with the Federal Acquisition Regulation for procurement contracts (48 CFR part 9, subpart 9.4) and the common rule, Government-wide Debarment and Suspension (Nonprocurement), that implements Executive Order 12549 and Executive Order 12689.

**§ 26.632 DOD Component.**

*DOD Component* means the Office of the Secretary of Defense, a Military Department, a Defense Agency, or the Office of Economic Adjustment.

[68 FR 66609, Nov. 26, 2003]

**§ 26.635 Drug-free workplace.**

*Drug-free workplace* means a site for the performance of work done in connection with a specific award at which employees of the recipient are prohibited from engaging in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance.

**§ 26.640 Employee.**

(a) *Employee* means the employee of a recipient directly engaged in the performance of work under the award, including—

(1) All direct charge employees;

(2) All indirect charge employees, unless their impact or involvement in the performance of work under the award is insignificant to the performance of the award; and

(3) Temporary personnel and consultants who are directly engaged in the performance of work under the award and who are on the recipient's payroll.

(b) This definition does not include workers not on the payroll of the recipient (*e.g.*, volunteers, even if used to meet a matching requirement; consultants or independent contractors not on the payroll; or employees of subrecipients or subcontractors in covered workplaces).

**§ 26.645 Federal agency or agency.**

*Federal agency or agency* means any United States executive department, military department, government corporation, government controlled corporation, any other establishment in the executive branch (including the Executive Office of the President), or any independent regulatory agency.

**§ 26.650 Grant.**

*Grant* means an award of financial assistance that, consistent with 31 U.S.C. 6304, is used to enter into a relationship—

(a) The principal purpose of which is to transfer a thing of value to the recipient to carry out a public purpose of support or stimulation authorized by a law of the United States, rather than to acquire property or services for the Federal Government's direct benefit or use; and

(b) In which substantial involvement is not expected between the Federal agency and the recipient when carrying out the activity contemplated by the award.

### § 26.655 Individual.

*Individual* means a natural person.

### § 26.660 Recipient.

*Recipient* means any individual, corporation, partnership, association, unit of government (except a Federal agency) or legal entity, however organized, that receives an award directly from a Federal agency.

### § 26.665 State.

*State* means any of the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States.

### § 26.670 Suspension.

*Suspension* means an action taken by a Federal agency that immediately prohibits a recipient from participating in Federal Government procurement contracts and covered nonprocurement transactions for a temporary period, pending completion of an investigation and any judicial or administrative proceedings that may ensue. A recipient so prohibited is suspended, in accordance with the Federal Acquisition Regulation for procurement contracts (48 CFR part 9, subpart 9.4) and the common rule, Government-wide Debarment and Suspension (Nonprocurement), that implements Executive Order 12549 and Executive Order 12689. Suspension of a recipient is a distinct and separate action from suspension of an award or suspension of payments under an award.

# PART 28—NEW RESTRICTIONS ON LOBBYING

## Subpart A—General

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APPENDIX A TO PART 28—CERTIFICATION REGARDING LOBBYING
APPENDIX B TO PART 28—DISCLOSURE FORM TO REPORT LOBBYING

AUTHORITY: Section 319, Public Law 102–121 (31 U.S.C. 1352); 5 U.S.C. section 301; 10 U.S.C. 113.

SOURCE: 55 FR 6737, 6752, Feb. 26, 1990, unless otherwise noted. Redesignated at 57 FR 6199, Feb. 21, 1992.

CROSS REFERENCE: See also Office of Management and Budget notice published at 54 FR 52306, December 20, 1989.

## Subpart A—General

### § 28.100 Conditions on use of funds.

(a) No appropriated funds may be expended by the recipient of a Federal contract, grant, loan, or cooperative ageement to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any of the following covered Federal actions: the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(b) Each person who requests or receives from an agency a Federal contract, grant, loan, or cooperative agreement shall file with that agency a certification, set forth in Appendix A, that the person has not made, and will not make, any payment prohibited by paragraph (a) of this section.

(c) Each person who requests or receives from an agency a Federal contract, grant, loan, or a cooperative agreement shall file with that agency a disclosure form, set forth in Appendix B, if such person has made or has agreed to make any payment using nonappropriated funds (to include profits from any covered Federal action), which would be prohibited under paragraph (a) of this section if paid for with appropriated funds.

(d) Each person who requests or receives from an agency a commitment providing for the United States to insure or guarantee a loan shall file with that agency a statement, set forth in appendix A, whether that person has made or has agreed to make any payment to influence or attempt to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with that loan insurance or guarantee.

(e) Each person who requests or receives from an agency a commitment providing for the United States to insure or guarantee a loan shall file with that agency a disclosure form, set forth in Appendix B, if that person has made or has agreed to make any payment to influence or attempt to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with that loan insurance or guarantee.

**§ 28.105 Definitions.**

For purposes of this part:

(a) *Agency,* as defined in 5 U.S.C. 552(f), includes Federal executive departments and agencies as well as independent regulatory commissions and Government corporations, as defined in 31 U.S.C. 9101(1).

(b) *Covered Federal action* means any of the following Federal actions:

(1) The awarding of any Federal contract;

(2) The making of any Federal grant;

(3) The making of any Federal loan;

(4) The entering into of any cooperative agreement; and,

(5) The extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

Covered Federal action does not include receiving from an agency a commitment providing for the United States to insure or guarantee a loan. Loan guarantees and loan insurance are addressed independently within this part.

(c) *Federal contract* means an acquisition contract awarded by an agency, including those subject to the Federal Acquisition Regulation (FAR), and any other acquisition contract for real or personal property or services not subject to the FAR.

(d) *Federal cooperative agreement* means a cooperative agreement entered into by an agency.

(e) *Federal grant* means an award of financial assistance in the form of money, or property in lieu of money, by the Federal Government or a direct appropriation made by law to any person. The term does not include technical assistance which provides services instead of money, or other assistance in the form of revenue sharing, loans, loan guarantees, loan insurance, interest subsidies, insurance, or direct United States cash assistance to an individual.

(f) *Federal loan* means a loan made by an agency. The term does not include loan guarantee or loan insurance.

(g) *Indian tribe* and *tribal organization* have the meaning provided in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450B). Alaskan Natives are included under the definitions of Indian tribes in that Act.

(h) *Influencing or attempting to influence* means making, with the intent to influence, any communication to or appearance before an officer or employee or any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any covered Federal action.

(i) *Loan guarantee* and *loan insurance* means an agency's guarantee or insurance of a loan made by a person.

(j) *Local government* means a unit of government in a State and, if chartered, established, or otherwise recognized by a State for the performance of a governmental duty, including a local

public authority, a special district, an intrastate district, a council of governments, a sponsor group representative organization, and any other instrumentality of a local government.

(k) *Officer or employee of an agency* includes the following individuals who are employed by an agency:

(1) An individual who is appointed to a position in the Government under title 5, U.S. Code, including a position under a temporary appointment;

(2) A member of the uniformed services as defined in section 101(3), title 37, U.S. Code;

(3) A special Government employee as defined in section 202, title 18, U.S. Code; and,

(4) An individual who is a member of a Federal advisory committee, as defined by the Federal Advisory Committee Act, title 5, U.S. Code appendix 2.

(l) *Person* means an individual, corporation, company, association, authority, firm, partnership, society, State, and local government, regardless of whether such entity is operated for profit or not for profit. This term excludes an Indian tribe, tribal organization, or any other Indian organization with respect to expenditures specifically permitted by other Federal law.

(m) *Reasonable compensation* means, with respect to a regularly employed officer or employee of any person, compensation that is consistent with the normal compensation for such officer or employee for work that is not furnished to, not funded by, or not furnished in cooperation with the Federal Government.

(n) *Reasonable payment* means, with respect to perfessional and other technical services, a payment in an amount that is consistent with the amount normally paid for such services in the private sector.

(o) *Recipient* includes all contractors, subcontractors at any tier, and subgrantees at any tier of the recipient of funds received in connection with a Federal contract, grant, loan, or cooperative agreement. The term excludes an Indian tribe, tribal organization, or any other Indian organization with respect to expenditures specifically permitted by other Federal law.

(p) *Regularly employed* means, with respect to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement or a commitment providing for the United States to insure or guarantee a loan, an officer or employee who is employed by such person for at least 130 working days within one year immediately preceding the date of the submission that initiates agency consideration of such person for receipt of such contract, grant, loan, cooperative agreement, loan insurance commitment, or loan guarantee commitment. An officer or employee who is employed by such person for less than 130 working days within one year immediately preceding the date of the submission that initiates agency consideration of such person shall be considered to be regularly employed as soon as he or she is employed by such person for 130 working days.

(q) *State* means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, an agency or instrumentality of a State, and a multi-State, regional, or interstate entity having governmental duties and powers.

### § 28.110 Certification and disclosure.

(a) Each person shall file a certification, and a disclosure form, if required, with each submission that initiates agency consideration of such person for:

(1) Award of a Federal contract, grant, or cooperative agreement exceeding $100,000; or

(2) An award of a Federal loan or a commitment providing for the United States to insure or guarantee a loan exceeding $150,000.

(b) Each person shall file a certification, and a disclosure form, if required, upon receipt by such person of:

(1) A Federal contract, grant, or cooperative agreement exceeding $100,000; or

(2) A Federal loan or a commitment providing for the United States to insure or guarantee a loan exceeding $150,000,

Unless such person previously filed a certification, and a disclosure form, if

required, under paragraph (a) of this section.

(c) Each person shall file a disclosure form at the end of each calendar quarter in which there occurs any event that requires disclosure or that materially affects the accuracy of the information contained in any disclosure form previously filed by such person under paragraphs (a) or (b) of this section. An event that materially affects the accuracy of the information reported includes:

(1) A cumulative increase of $25,000 or more in the amount paid or expected to be paid for influencing or attempting to influence a covered Federal action; or

(2) A change in the person(s) or individual(s) influencing or attempting to influence a covered Federal action; or,

(3) A change in the officer(s), employee(s), or Member(s) contacted to influence or attempt to influence a covered Federal action.

(d) Any person who requests or receives from a person referred to in paragraphs (a) or (b) of this section:

(1) A subcontract exceeding $100,000 at any tier under a Federal contract;

(2) A subgrant, contract, or subcontract exceeding $100,000 at any tier under a Federal grant;

(3) A contract or subcontract exceeding $100,000 at any tier under a Federal loan exceeding $150,000; or,

(4) A contract or subcontract exceeding $100,000 at any tier under a Federal cooperative agreement,

Shall file a certification, and a disclosure form, if required, to the next tier above.

(e) All disclosure forms, but not certifications, shall be forwarded from tier to tier until received by the person referred to in paragraphs (a) or (b) of this section. That person shall forward all disclosure forms to the agency.

(f) Any certification or disclosure form filed under paragraph (e) of this section shall be treated as a material representation of fact upon which all receiving tiers shall rely. All liability arising from an erroneous representation shall be borne solely by the tier filing that representation and shall not be shared by any tier to which the erroneous representation is forwarded. Submitting an erroneous certification or disclosure constitutes a failure to file the required certification or disclosure, respectively. If a person fails to file a required certification or disclosure, the United States may pursue all available remedies, including those authorized by section 1352, title 31, U.S. Code.

(g) For awards and commitments in process prior to December 23, 1989, but not made before that date, certifications shall be required at award or commitment, covering activities occurring between December 23, 1989, and the date of award or commitment. However, for awards and commitments in process prior to the December 23, 1989 effective date of these provisions, but not made before December 23, 1989, disclosure forms shall not be required at time of award or commitment but shall be filed within 30 days.

(h) No reporting is required for an activity paid for with appropriated funds if that activity is allowable under either subpart B or C.

## Subpart B—Activities by Own Employees

### § 28.200 Agency and legislative liaison.

(a) The prohibition on the use of appropriated funds, in § 28.100 (a), does not apply in the case of a payment of reasonable compensation made to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement if the payment is for agency and legislative liaison activities not directly related to a covered Federal action.

(b) For purposes of paragraph (a) of this section, providing any information specifically requested by an agency or Congress is allowable at any time.

(c) For purposes of paragraph (a) of this section, the following agency and legislative liaison activities are allowable at any time only where they are not related to a specific solicitation for any covered Federal action:

(1) Discussing with an agency (including individual demonstrations) the qualities and characteristics of the person's products or services, conditions or terms of sale, and service capabilities; and,

(2) Technical discussions and other activities regarding the application or

adaptation of the person's products or services for an agency's use.

(d) For purposes of paragraph (a) of this section, the following agencies and legislative liaison activities are allowable only where they are prior to formal solicitation of any covered Federal action:

(1) Providing any information not specifically requested but necessary for an agency to make an informed decision about initiation of a covered Federal action;

(2) Technical discussions regarding the preparation of an unsolicited proposal prior to its official submission; and,

(3) Capability presentations by persons seeking awards from an agency pursuant to the provisions of the Small Business Act, as amended by Public Law 95–507 and other subsequent amendments.

(e) Only those activities expressly authorized by this section are allowable under this section.

[55 FR 6737 and 6752, Feb. 26, 1990. Redesignated and amended at 57 FR 6199 and 6200, Feb. 21, 1992]

### § 28.205 Professional and technical services.

(a) The prohibition on the use of appropriated funds, in § 28.100 (a), does not apply in the case of a payment of reasonable compensation made to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement or an extension, continuation, renewal, amendment, or modification of a Federal contract, grant, loan, or cooperative agreement if payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal contract, grant, loan, or cooperative agreement or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal contract, grant, loan, or cooperative agreement.

(b) For purposes of paragraph (a) of this section, ''professional and technical services'' shall be limited to advice and analysis directly applying any professional or technical discipline. For example, drafting of a legal document accompanying a bid or proposal by a lawyer is allowable. Similarly, technical advice provided by an engineer on the performance or operational capability of a piece of equipment rendered directly in the negotiation of a contract is allowable. However, communications with the intent to influence made by a professional (such as a licensed lawyer) or a technical person (such as a licensed accountant) are not allowable under this section unless they provide advice and analysis directly applying their professional or technical expertise and unless the advice or analysis is rendered directly and solely in the preparation, submission or negotiation of a covered Federal action. Thus, for example, communications with the intent to influence made by a lawyer that do not provide legal advice or analysis directly and solely related to the legal aspects of his or her client's proposal, but generally advocate one proposal over another are not allowable under this section because the lawyer is not providing professional legal services. Similarly, communications with the intent to influence made by an engineer providing an engineering analysis prior to the preparation or submission of a bid or proposal are not allowable under this section since the engineer is providing technical services but not directly in the preparation, submission or negotiation of a covered Federal action.

(c) Requirements imposed by or pursuant to law as a condition for receiving a covered Federal award include those required by law or regulation, or reasonably expected to be required by law or regulation, and any other requirements in the actual award documents.

(d) Only those services expressly authorized by this section are allowable under this section.

[55 FR 6737 and 6752, Feb. 26, 1990. Redesignated and amended at 57 FR 6199 and 6200, Feb. 21, 1992]

### § 28.210 Reporting.

No reporting is required with respect to payments of reasonable compensation made to regularly employed officers or employees of a person.

## Subpart C—Activities by Other Than Own Employees

### § 28.300 Professional and technical services.

(a) The prohibition on the use of appropriated funds, in § 28.100 (a), does not apply in the case of any reasonable payment to a person, other than an officer or employee of a person requesting or receiving a covered Federal action, if the payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal contract, grant, loan, or cooperative agreement or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal contract, grant, loan, or cooperative agreement.

(b) The reporting requirments in § 28.110 (a) and (b) regarding filing a disclosure form by each person, if required, shall not apply with respect to professional or technical services rendered directly in the preparation, submission, or negotiation of any commitment providing for the United States to insure or guarantee a loan.

(c) For purposes of paragraph (a) of this section, ''professional and technical services'' shall be limited to advice and analysis directly applying any professional or technical discipline. For example, drafting of a legal document accompanying a bid or proposal by a lawyer is allowable. Similarly, technical advice provided by an engineer on the performance or operational capability of a piece of equipment rendered directly in the negotiation of a contract is allowable. However, communications with the intent to influence made by a professional (such as a licensed lawyer) or a technical person (such as a licensed accountant) are not allowable under this section unless they provide advice and analysis directly applying their professional or technical expertise and unless the advice or analysis is rendered directly and solely in the preparation, submission or negotiation of a covered Federal action. Thus, for example, communications with the intent to influence made by a lawyer that do not provide legal advice or analysis directly and solely related to the legal aspects of his or her client's proposal, but generally advocate one proposal over another are not allowable under this section because the lawyer is not providing professional legal services. Similarly, communications with the intent to influence made by an engineer providing an engineering analysis prior to the preparation or submission of a bid or proposal are not allowable under this section since the engineer is providing technical services but not directly in the preparation, submission or negotiation of a covered Federal action.

(d) Requirements imposed by or pursuant to law as a condition for receiving a covered Federal award include those required by law or regulation, or reasonably expected to be required by law or regulation, and any other requirements in the actual award documents.

(e) Persons other than officers or employees of a person requesting or receiving a covered Federal action include consultants and trade associations.

(f) Only those services expressly authorized by this section are allowable under this section.

[55 FR 6737 and 6752, Feb. 26, 1990. Redesignated and amended at 57 FR 6199 and 6200, Feb. 21, 1992]

## Subpart D—Penalties and Enforcement

### § 28.400 Penalties.

(a) Any person who makes an expenditure prohibited herein shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such expenditure.

(b) Any person who fails to file or amend the disclosure form (see Appendix B) to be filed or amended if required herein, shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

(c) A filing or amended filing on or after the date on which an administrative action for the imposition of a civil penalty is commenced does not prevent the imposition of such civil penalty for a failure occurring before that date. An administrative action is commenced

with respect to a failure when an investigating official determines in writing to commence an investigation of an allegation of such failure.

(d) In determining whether to impose a civil penalty, and the amount of any such penalty, by reason of a violation by any person, the agency shall consider the nature, circumstances, extent, and gravity of the violation, the effect on the ability of such person to continue in business, any prior violations by such person, the degree of culpability of such person, the ability of the person to pay the penalty, and such other matters as may be appropriate.

(e) First offenders under paragraphs (a) or (b) of this section shall be subject to a civil penalty of $10,000, absent aggravating circumstances. Second and subsequent offenses by persons shall be subject to an appropriate civil penalty between $10,000 and $100,000, as determined by the agency head or his or her designee.

(f) An imposition of a civil penalty under this section does not prevent the United States from seeking any other remedy that may apply to the same conduct that is the basis for the imposition of such civil penalty.

### § 28.405 Penalty procedures.

Agencies shall impose and collect civil penalties pursuant to the provisions of the Program Fraud and Civil Remedies Act, 31 U.S.C. sections 3803 (except subsection (c)), 3804, 3805, 3806, 3807, 3808, and 3812, insofar as these provisions are not inconsistent with the requirements herein.

### § 28.410 Enforcement.

The head of each agency shall take such actions as are necessary to ensure that the provisions herein are vigorously implemented and enforced in that agency.

## Subpart E—Exemptions

### § 28.500 Secretary of Defense.

(a) *Exemption authority*. The Secretary of Defense may exempt, on a case-by-case basis, a covered Federal action from the prohibition whenever the Secretary determines, in writing, that such an exemption is in the national interest. The Secretary shall transmit a copy of each such written exemption to Congress immediately after making such a determination.

(b) *Policy*. It is the policy of the Department of Defense that exemptions under paragraph (a) of this section shall be requested only rarely and in exceptional circumstances.

(c) *Procedures*. Each DoD Component that awards or administers Federal grants, Federal cooperative agreements, or Federal loans subject to this part shall establish procedures whereby:

(1) A grants officer wishing to request an exemption for a grant, cooperative agreement, or loan shall transmit such request through appropriate channels to: Director for Research, ODDR&E(R), 3080 Defense Pentagon, Washington, DC. 20301–3080.

(2) Each such request shall explain why an exemption is in the national interest, a justification that must be transmitted to Congress for each exemption that is approved.

[63 FR 12188, Mar. 12, 1998]

## Subpart F—Agency Reports

### § 28.600 Semi-annual compilation.

(a) The head of each agency shall collect and compile the disclosure reports (see appendix B) and, on May 31 and November 30 of each year, submit to the Secretary of the Senate and the Clerk of the House of Representatives a report containing a compilation of the information contained in the disclosure reports received during the six-month period ending on March 31 or September 30, respectively, of that year.

(b) The report, including the compilation, shall be available for public inspection 30 days after receipt of the report by the Secretary and the Clerk.

(c) Information that involves intelligence matters shall be reported only to the Select Committee on Intelligence of the Senate, the Permanent Select Committee on Intelligence of the House of Representatives, and the Committees on Appropriations of the Senate and the House of Representatives in accordance with procedures

agreed to by such committees. Such information shall not be available for public inspection.

(d) Information that is classified under Executive Order 12356 or any successor order shall be reported only to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives or the Committees on Armed Services of the Senate and the House of Representatives (whichever such committees have jurisdiction of matters involving such information) and to the Committees on Appropriations of the Senate and the House of Representatives in accordance with procedures agreed to by such committees. Such information shall not be available for public inspection.

(e) The first semi-annual compilation shall be submitted on May 31, 1990, and shall contain a compilation of the disclosure reports received from December 23, 1989 to March 31, 1990.

(f) Major agencies, designated by the Office of Management and Budget (OMB), are required to provide machine-readable compilations to the Secretary of the Senate and the Clerk of the House of Representatives no later than with the compilations due on May 31, 1991. OMB shall provide detailed specifications in a memorandum to these agencies.

(g) Non-major agencies are requested to provide machine-readable compilations to the Secretary of the Senate and the Clerk of the House of Representatives.

(h) Agencies shall keep the originals of all disclosure reports in the official files of the agency.

### § 28.605 Inspector General report.

(a) The Inspector General, or other official as specified in paragraph (b) of this section, of each agency shall prepare and submit to Congress each year, commencing with submission of the President's Budget in 1991, an evaluation of the compliance of that agency with, and the effectiveness of, the requirements herein. The evaluation may include any recommended changes that may be necessary to strengthen or improve the requirements.

(b) In the case of an agency that does not have an Inspector General, the agency official comparable to an Inspector General shall prepare and submit the annual report, or, if there is no such comparable official, the head of the agency shall prepare and submit the annual report.

(c) The annual report shall be submitted at the same time the agency submits its annual budget justifications to Congress.

(d) The annual report shall include the following: All alleged violations relating to the agency's covered Federal actions during the year covered by the report, the actions taken by the head of the agency in the year covered by the report with respect to those alleged violations and alleged violations in previous years, and the amounts of civil penalties imposed by the agency in the year covered by the report.

## APPENDIX A TO PART 28—CERTIFICATION REGARDING LOBBYING

*Certification for Contracts, Grants, Loans, and Cooperative Agreements*

The undersigned certifies, to the best of his or her knowledge and belief, that:

(1) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of an agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(2) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, ''Disclosure Form to Report Lobbying,'' in accordance with its instructions.

(3) The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed

when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

*Statement for Loan Guarantees and Loan Insurance*

The undersigned states, to the best of his or her knowledge and belief, that:

If any funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this commitment providing for the United States to insure or guarantee a loan, the undersigned shall complete and submit Standard Form-LLL, ''Disclosure Form to Report Lobbying,'' in accordance with its instructions.

Submission of this statement is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required statement shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

APPENDIX B TO PART 28—DISCLOSURE FORM TO REPORT LOBBYING

## DISCLOSURE OF LOBBYING ACTIVITIES

Approved by OMB 0348-0046

Complete this form to disclose lobbying activities pursuant to 31 U.S.C. 1352
(See reverse for public burden disclosure.)

**1. Type of Federal Action:**
☐ a. contract
b. grant
c. cooperative agreement
d. loan
e. loan guarantee
f. loan insurance

**2. Status of Federal Action:**
☐ a. bid/offer/application
b. initial award
c. post-award

**3. Report Type:**
☐ a. initial filing
b. material change
**For Material Change Only:**
year _____ quarter _____
date of last report _____

**4. Name and Address of Reporting Entity:**
☐ Prime ☐ Subawardee
Tier _____, *if known:*

**Congressional District,** *if known:*

**5. If Reporting Entity in No. 4 is Subawardee, Enter Name and Address of Prime:**

**Congressional District,** *if known:*

**6. Federal Department/Agency:**

**7. Federal Program Name/Description:**

CFDA Number, *if applicable:* _____

**8. Federal Action Number,** *if known:*

**9. Award Amount,** *if known:*
$

**10. a. Name and Address of Lobbying Entity** *(if individual, last name, first name, MI):*

**b. Individuals Performing Services** *(including address if different from No. 10a) (last name, first name, MI):*

*(attach Continuation Sheet(s) SF-LLL-A, if necessary)*

**11. Amount of Payment** *(check all that apply):*
$ _____ ☐ actual ☐ planned

**12. Form of Payment** *(check all that apply):*
☐ a. cash
☐ b. in-kind; specify: nature _____
value _____

**13. Type of Payment** *(check all that apply):*
☐ a. retainer
☐ b. one-time fee
☐ c. commission
☐ d. contingent fee
☐ e. deferred
☐ f. other; specify: _____

**14. Brief Description of Services Performed or to be Performed and Date(s) of Service, including officer(s), employee(s), or Member(s) contacted, for Payment Indicated in Item 11:**

*(attach Continuation Sheet(s) SF-LLL-A, if necessary)*

**15. Continuation Sheet(s) SF-LLL-A attached:** ☐ Yes ☐ No

**16.** Information requested through this form is authorized by title 31 U.S.C. section 1352. This disclosure of lobbying activities is a material representation of fact upon which reliance was placed by the tier above when this transaction was made or entered into. This disclosure is required pursuant to 31 U.S.C. 1352. This information will be reported to the Congress semi-annually and will be available for public inspection. Any person who fails to file the required disclosure shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

**Signature:** _____
**Print Name:** _____
**Title:** _____
**Telephone No.:** _____ **Date:** _____

**Federal Use Only:**

**Authorized for Local Reproduction Standard Form - LLL**

## INSTRUCTIONS FOR COMPLETION OF SF-LLL, DISCLOSURE OF LOBBYING ACTIVITIES

This disclosure form shall be completed by the reporting entity, whether subawardee or prime Federal recipient, at the initiation or receipt of a covered Federal action, or a material change to a previous filing, pursuant to title 31 U.S.C. section 1352. The filing of a form is required for each payment or agreement to make payment to any lobbying entity for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with a covered Federal action. Use the SF-LLL-A Continuation Sheet for additional information if the space on the form is inadequate. Complete all items that apply for both the initial filing and material change report. Refer to the implementing guidance published by the Office of Management and Budget for additional information.

1. Identify the type of covered Federal action for which lobbying activity is and/or has been secured to influence the outcome of a covered Federal action.
2. Identify the status of the covered Federal action.
3. Identify the appropriate classification of this report. If this is a followup report caused by a material change to the information previously reported, enter the year and quarter in which the change occurred. Enter the date of the last previously submitted report by this reporting entity for this covered Federal action.
4. Enter the full name, address, city, state and zip code of the reporting entity. Include Congressional District, if known. Check the appropriate classification of the reporting entity that designates if it is, or expects to be, a prime or subaward recipient. Identify the tier of the subawardee, e.g., the first subawardee of the prime is the 1st tier. Subawards include but are not limited to subcontracts, subgrants and contract awards under grants.
5. If the organization filing the report in item 4 checks "Subawardee", then enter the full name, address, city, state and zip code of the prime Federal recipient. Include Congressional District, if known.
6. Enter the name of the Federal agency making the award or loan commitment. Include at least one organizational level below agency name, if known. For example, Department of Transportation, United States Coast Guard.
7. Enter the Federal program name or description for the covered Federal action (item 1). If known, enter the full Catalog of Federal Domestic Assistance (CFDA) number for grants, cooperative agreements, loans, and loan commitments.
8. Enter the most appropriate Federal identifying number available for the Federal action identified in item 1 (e.g., Request for Proposal (RFP) number; Invitation for Bid (IFB) number; grant announcement number; the contract, grant, or loan award number; the application/proposal control number assigned by the Federal agency). Include prefixes, e.g., "RFP-DE-90-001."
9. For a covered Federal action where there has been an award or loan commitment by the Federal agency, enter the Federal amount of the award/loan commitment for the prime entity identified in item 4 or 5.
10. (a) Enter the full name, address, city, state and zip code of the lobbying entity engaged by the reporting entity identified in item 4 to influence the covered Federal action.

    (b) Enter the full names of the individual(s) performing services, and include full address if different from 10 (a). Enter Last Name, First Name, and Middle Initial (MI).
11. Enter the amount of compensation paid or reasonably expected to be paid by the reporting entity (item 4) to the lobbying entity (item 10). Indicate whether the payment has been made (actual) or will be made (planned). Check all boxes that apply. If this is a material change report, enter the cumulative amount of payment made or planned to be made.
12. Check the appropriate box(es). Check all boxes that apply. If payment is made through an in-kind contribution, specify the nature and value of the in-kind payment.
13. Check the appropriate box(es). Check all boxes that apply. If other, specify nature.
14. Provide a specific and detailed description of the services that the lobbyist has performed, or will be expected to perform, and the date(s) of any services rendered. Include all preparatory and related activity, not just time spent in actual contact with Federal officials. Identify the Federal official(s) or employee(s) contacted or the officer(s), employee(s), or Member(s) of Congress that were contacted.
15. Check whether or not a SF-LLL-A Continuation Sheet(s) is attached.
16. The certifying official shall sign and date the form, print his/her name, title, and telephone number.

Public reporting burden for this collection of information is estimated to average 30 mintues per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Office of Management and Budget, Paperwork Reduction Project (0348-0046), Washington, D.C. 20503.

## DISCLOSURE OF LOBBYING ACTIVITIES
### CONTINUATION SHEET

Approved by OMB
0348-0046

**Reporting Entity:** _____ **Page** _____ **of** _____

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**Standard Form - LLL-A**

# PART 32—ADMINISTRATIVE REQUIREMENTS FOR GRANTS AND AGREEMENTS WITH INSTITUTIONS OF HIGHER EDUCATION, HOSPITALS, AND OTHER NON-PROFIT ORGANIZATIONS

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AUTHORITY: 5 U.S.C. 301 and 10 U.S.C. 113.

SOURCE: 63 FR 12188, Mar. 12, 1998, unless otherwise noted.

## Subpart A—General

### § 32.1 Purpose.

(a) *General.* This part implements OMB Circular A–110[1] and establishes uniform administrative requirements for awards and subawards to institutions of higher education, hospitals, and other non-governmental, non-profit organizations.

(b) *Relationship to other parts.* This part is an integral part of the DoD Grant and Agreement Regulations (DoDGARs), which comprise this subchapter of the Code of Federal Regulations. This part includes references to other parts of the DoDGARs that implement Governmentwide guidance and provide uniform internal policies and procedures for DoD Components that make or administer awards. Although parts 21 and 22 of this subchapter do not impose any direct requirements on recipients, and recipients therefore are not required to be familiar with those parts, the information in those parts

[1] For copies of the Circular, contact the Office of Management and Budget, EOP Publications, 725 17th St. NW, New Executive Office Building, Washington, DC 20503.

concerning internal policies and procedures should be helpful to recipients of DoD awards.

(c) *Prime awards.* DoD Components shall apply the provisions of this part to awards to recipients that are institutions of higher education, hospitals, and other non-profit organizations. DoD Components shall not impose additional or inconsistent requirements, except as provided in §§ 32.4 and 32.14, or unless specifically required by Federal statute or executive order.

(d) *Subawards.* Any legal entity that receives an award from a DoD Component shall apply the provisions of this part to subawards with institutions of higher education, hospitals, and other non-profit organizations. Thus, a governmental or for-profit organization, whose prime award from a DoD Component is subject to 32 CFR part 33 or part 34, respectively, applies this part to subawards with institutions of higher education, hospitals, or other non-profit organizations. It should be noted that subawards are for the performance of substantive work under awards, and are distinct from contracts for procuring goods and services. It should be further noted that non-profit organizations that implement Federal programs for the States are also subject to State requirements.

### § 32.2 Definitions.

The following are definitions of terms used in this part. Grants officers are cautioned that terms may be defined differently in this part than they are in other parts of the DoD Grant and Agreement Regulations, because this part implements OMB Circular A–110 and uses definitions as stated in that Circular. In such cases, the definition given in this section applies to the term as it is used in this part, and the definition given in other parts applies to the term as it is used in those parts. For example, ''suspension'' is defined in this section to mean temporary withdrawal of Federal sponsorship under an award, but is defined in the part of the DoD Grant and Agreement Regulations on nonprocurement suspension and debarment (2 CFR part 1125, which implements OMB guidance at 2 CFR part 180) to be an action taken to exclude a person from participating in a grant, cooperative agreement, or other covered transaction (see definition at 2 CFR 180.1015).

*Accrued expenditures.* The charges incurred by the recipient during a given period requiring the provision of funds for:

(1) Goods and other tangible property received;

(2) Services performed by employees, contractors, subrecipients, and other payees; and

(3) Other amounts becoming owed under programs for which no current services or performance is required.

*Accrued income.* The sum of:

(1) Earnings during a given period from:

(i) Services performed by the recipient; and

(ii) Goods and other tangible property delivered to purchasers.

(2) Amounts becoming owed to the recipient for which no current services or performance is required by the recipient.

*Acquisition cost of equipment.* The net invoice price of the equipment, including the cost of modifications, attachments, accessories, or auxiliary apparatus necessary to make the property usable for the purpose for which it was acquired. Other charges, such as the cost of installation, transportation, taxes, duty or protective in-transit insurance, shall be included or excluded from the unit acquisition cost in accordance with the recipient's regular accounting practices.

*Advance.* A payment made by Treasury check or other appropriate payment mechanism to a recipient upon its request either before outlays are made by the recipient or through the use of predetermined payment schedules.

*Award.* Financial assistance that provides support or stimulation to accomplish a public purpose. Awards include grants and other agreements in the form of money or property in lieu of money, by the Federal Government to an eligible recipient. The term does not include: Technical assistance, which provides services instead of money; other assistance in the form of loans, loan guarantees, interest subsidies, or insurance; direct payments of any kind to individuals; and, contracts which

are required to be entered into and administered under procurement laws and regulations.

*Cash contributions.* The recipient's cash outlay, including the outlay of money contributed to the recipient by third parties.

*Closeout.* The process by which the grants officer administering an award made by a DoD Component determines that all applicable administrative actions and all required work of the award have been completed by the recipient and DoD Component.

*Contract.* A procurement contract under an award or subaward, and a procurement subcontract under a recipient's or subrecipient's contract.

*Cost sharing or matching.* That portion of project or program costs not borne by the Federal Government.

*Date of completion.* The date on which all work under an award is completed or the date on the award document, or any supplement or amendment thereto, on which Federal sponsorship ends.

*Disallowed costs.* Those charges to an award that the grants officer administering an award made by a DoD Component determines to be unallowable, in accordance with the applicable Federal cost principles or other terms and conditions contained in the award.

*DoD Component.* A Military Department, Defense Agency, DoD field activity, or organization within the Office of the Secretary of Defense that provides or administers an award to a recipient.

*Equipment.* Tangible nonexpendable personal property including exempt property charged directly to the award having a useful life of more than one year and an acquisition cost of $5,000 or more per unit. However, consistent with recipient policy, lower limits may be established.

*Excess property.* Property under the control of any DoD Component that, as determined by the head thereof, is no longer required for its needs or the discharge of its responsibilities.

*Exempt property.* Tangible personal property acquired in whole or in part with Federal funds, where the DoD Component has statutory authority to vest title in the recipient without further obligation to the Federal Government. An example of exempt property authority is contained in the Federal Grant and Cooperative Agreement Act (31 U.S.C. 6306), for property acquired under an award to conduct basic or applied research by a non-profit institution of higher education or non-profit organization whose principal purpose is conducting scientific research.

*Federal funds authorized.* The total amount of Federal funds obligated by a DoD Component for use by the recipient. This amount may include any authorized carryover of unobligated funds from prior funding periods when permitted by agency regulations or agency implementing instructions.

*Federal share (of real property, equipment, or supplies).* That percentage of the property's acquisition costs and any improvement expenditures paid with Federal funds.

*Funding period.* The period of time when Federal funding is available for obligation by the recipient.

*Intangible property and debt instruments.* Property that includes, but is not limited to, trademarks, copyrights, patents and patent applications and such property as loans, notes and other debt instruments, lease agreements, stock and other instruments of property ownership, whether considered tangible or intangible.

*Obligations.* The amounts of orders placed, contracts and grants awarded, services received and similar transactions during a given period that require payment by the recipient during the same or a future period.

*Outlays* or *expenditures.* Charges made to the project or program. They may be reported on a cash or accrual basis. For reports prepared on a cash basis, outlays are the sum of cash disbursements for direct charges for goods and services, the amount of indirect expense charged, the value of third party in-kind contributions applied and the amount of cash advances and payments made to subrecipients. For reports prepared on an accrual basis, outlays are the sum of cash disbursements for direct charges for goods and services, the amount of indirect expense incurred, the value of in-kind contributions applied, and the net increase (or decrease) in the amounts owed by the recipient for goods and other property received, for services performed by employees, contractors, subrecipients and

other payees and other amounts becoming owed under programs for which no current services or performance are required.

*Personal property*. Property of any kind except real property. It may be tangible, having physical existence, or intangible, having no physical existence, such as copyrights, patents, or securities.

*Prior approval*. Written approval by an authorized official evidencing prior consent.

*Program income*. Gross income earned by the recipient that is directly generated by a supported activity or earned as a result of the award (see exclusions in §32.24(e) and (h)). Program income includes, but is not limited to, income from fees for services performed, the use or rental of real or personal property acquired under federally-funded projects, the sale of commodities or items fabricated under an award, license fees and royalties on patents and copyrights, and interest on loans made with award funds. Interest earned on advances of Federal funds is not program income. Except as otherwise provided in program regulations or the terms and conditions of the award, program income does not include the receipt of principal on loans, rebates, credits, discounts, etc., or interest earned on any of them.

*Project costs*. All allowable costs, as set forth in the applicable Federal cost principles, incurred by a recipient and the value of the contributions made by third parties in accomplishing the objectives of the award during the project period.

*Project period*. The period established in the award document during which Federal sponsorship begins and ends.

*Property*. Real property and personal property (equipment, supplies, intangible property and debt instruments), unless stated otherwise.

*Real property*. Land, including land improvements, structures and appurtenances thereto, but excluding movable machinery and equipment.

*Recipient*. An organization receiving financial assistance directly from DoD Components to carry out a project or program. The term includes public and private institutions of higher education, public and private hospitals, and other quasi-public and private nonprofit organizations such as, but not limited to, community action agencies, research institutes, educational associations, and health centers. The term also includes consortia comprised of any combination of universities, other nonprofit organizations, governmental organizations, for-profit organizations, and other entities, to the extent that the consortia are legally incorporated as nonprofit organizations. The term does not include Government-owned contractor-operated facilities or research centers providing continued support for mission-oriented, large-scale programs that are Government-owned or controlled, or are designated as federally-funded research and development centers.

*Research and development*. All research activities, both basic and applied, and all development activities that are supported at universities, colleges, and other non-profit institutions. *Research* is defined as a systematic study directed toward fuller scientific knowledge or understanding of the subject studied. *Development* is the systematic use of knowledge and understanding gained from research directed toward the production of useful materials, devices, systems, or methods, including design and development of prototypes and processes. The term research also includes activities involving the training of individuals in research techniques where such activities utilize the same facilities as other research and development activities and where such activities are not included in the instruction function.

*Small award*. An award not exceeding the simplified acquisition threshold fixed at 41 U.S.C. 403(11) (currently $100,000).

*Subaward*. An award of financial assistance in the form of money, or property in lieu of money, made under an award by a recipient to an eligible subrecipient or by a subrecipient to a lower tier subrecipient. The term includes financial assistance when provided by any legal agreement, even if the agreement is called a contract, but does not include procurement of goods and services nor does it include any form of assistance which is excluded

from the definition of ''award'' in this section.

*Subrecipient*. The legal entity to which a subaward is made and which is accountable to the recipient for the use of the funds provided.

*Supplies*. All personal property excluding equipment, intangible property, and debt instruments as defined in this section, and inventions of a contractor conceived or first actually reduced to practice in the performance of work under a funding agreement (''subject inventions''), as defined in 37 CFR part 401, ''Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts, and Cooperative Agreements.''

*Suspension*. An action by a DoD Component that temporarily withdraws Federal sponsorship under an award, pending corrective action by the recipient or pending a decision to terminate the award by the DoD Component. Suspension of an award is a separate action from suspension of a participant under 2 CFR part 1125.

*Termination*. The cancellation of an award, in whole or in part, at any time prior to the date of completion.

*Third party in-kind contributions*. The value of non-cash contributions provided by non-Federal third parties. Third party in-kind contributions may be in the form of real property, equipment, supplies, and the value of goods and services directly benefiting and specifically identifiable to the project or program.

*Unliquidated obligations*. The amount of obligations incurred by the recipient:

(1) That have not been paid, if financial reports are prepared on a cash basis.

(2) For which an outlay has not been recorded, if reports are prepared on an accrued expenditure basis.

*Unobligated balance*. The portion of the funds authorized by a DoD Component that has not been obligated by the recipient and is determined by deducting the cumulative obligations from the cumulative funds authorized.

*Unrecovered indirect cost*. The difference between the amount awarded and the amount which could have been awarded under the recipient's approved negotiated indirect cost rate.

*Working capital advance*. A procedure whereby funds are advanced to the recipient to cover its estimated disbursement needs for a given initial period.

[63 FR 12188, Mar. 12, 1998, as amended at 70 FR 49477, Aug. 23, 2005; 72 FR 34998, June 26, 2007]

### § 32.3 Effect on other issuances.

For awards subject to this part, all administrative requirements of codified program regulations, program manuals, handbooks and other nonregulatory materials which are inconsistent with the requirements of this part shall be superseded, except to the extent they are required by statute, or authorized in accordance with the deviations provision in § 32.4.

### § 32.4 Deviations.

(a) *Individual deviations*. Individual deviations affecting only one award may be approved by DoD Components in accordance with procedures stated in 32 CFR 21.335(a) and 21.340.

(b) *Small awards*. DoD Components may apply less restrictive requirements than the provisions of this part when awarding small awards, except for those requirements which are statutory.

(c) *Other class deviations*. (1) For classes of awards other than small awards, the Director of Defense Research and Engineering (DDR&E), or his or her designee, may grant exceptions from the requirements of this part:

(i) With the written concurrence of the Office of the Management and Budget (OMB). The DDR&E, or his or her designee, shall provide written notification to OMB of the Department of Defense's intention to grant a class deviation; and

(ii) When exceptions are not prohibited by statute.

(2) DoD Components shall request approval for such deviations in accordance with 32 CFR 21.335(b) and 21.340. However, in the interest of maximum

uniformity, exceptions from the requirements of this part shall be permitted only in unusual circumstances.

[63 FR 12188, Mar. 12, 1998, as amended at 68 FR 47160, Aug. 7, 2003]

### § 32.5 Subawards.

Unless sections of this part specifically exclude subrecipients from coverage, the provisions of this part shall be applied to subrecipients performing work under awards if such subrecipients are institutions of higher education, hospitals or other non-profit organizations. State and local government subrecipients are subject to the provisions of 32 CFR part 33. Subrecipients that are for-profit organizations are subject to 32 CFR part 34.

## Subpart B—Pre-Award Requirements

### § 32.10 Purpose.

Sections 32.11 through 32.17 prescribe application forms and instructions and other pre-award matters.

### § 32.11 Pre-award policies.

(a) *Use of grants, cooperative agreements, and contracts.* (1) OMB Circular A–110 states that:

(i) In each instance, the Federal awarding agency shall decide on the appropriate award instrument (i.e., grant, cooperative agreement, or contract).

(ii) The Federal Grant and Cooperative Agreement Act (31 U.S.C. 6301–6308) governs the use of grants, cooperative agreements, and contracts. Under that Act:

(A) A grant or cooperative agreement shall be used only when the principal purpose of a transaction is to accomplish a public purpose of support or stimulation authorized by Federal statute.

(B) Contracts shall be used when the principal purpose is acquisition of property or services for the direct benefit or use of the Federal Government.

(C) The statutory criterion for choosing between grants and cooperative agreements is that for the latter, ''substantial involvement is expected between the executive agency and the State, local government, or other recipient when carrying out the activity contemplated in the agreement.''

(2) In selecting the appropriate award instruments, DoD Components' grants officers shall comply with the DoD implementation of the Federal Grant and Cooperative Agreement Act at 32 CFR part 22, subpart B.

(b) *Public notice and priority setting.* As a matter of Governmentwide policy, Federal awarding agencies shall notify the public of intended funding priorities for programs that use discretionary awards, unless funding priorities are established by Federal statute. For DoD Components, compliance with competition policies and statutory requirements implemented in 32 CFR part 22, subpart C, shall constitute compliance with this Governmentwide policy.

[63 FR 12188, Mar. 12, 1998, as amended at 68 FR 47160, Aug. 7, 2003]

### § 32.12 Forms for applying for Federal assistance.

(a) DoD Components shall comply with the applicable report clearance requirements of 5 CFR part 1320, ''Controlling Paperwork Burdens on the Public,'' with regard to all forms used in place of or as a supplement to the Standard Form 424[2] (SF–424) series.

(b) Applicants shall use the SF–424 series or those forms and instructions prescribed by DoD Components.

(c) For Federal programs covered by E.O. 12372 (3 CFR, 1982 Comp., p. 197), ''Intergovernmental Review of Federal Programs,'' the applicant shall complete the appropriate sections of the SF–424 (Application for Federal Assistance) indicating whether the application was subject to review by the State Single Point of Contact (SPOC). The name and address of the SPOC for a particular State can be obtained from the DoD Component or the Catalog of Federal Domestic Assistance. The

[2] For copies of Standard Forms listed in this part, contact regional grants administration offices of the Office of Naval Research. Addresses for the offices are listed in the ''DoD Directory of Contract Administration Services Components,'' DLAH 4105.4, which can be obtained from: Defense Logistics Agency, Publications Distribution Division (DASC-WDM), 8725 John J. Kingman Rd., Suite 0119, Fort Belvoir, VA 22060–6220.

SPOC shall advise the applicant whether the program for which application is made has been selected by that State for review.

(d) DoD Components that do not use the SF–424 form should indicate whether the application is subject to review by the State under E.O. 12372.

### § 32.13 Debarment and suspension.

DoD Components and recipients shall comply with the policy and procedural requirements in the OMB guidance on nonprocurement debarment and suspension (2 CFR part 180), as implemented by the Department of Defense in 2 CFR part 1125. Those policies and procedures restrict subawards and contracts with certain parties that are debarred, suspended or otherwise excluded from or ineligible for participation in Federal assistance programs or activities.

[72 FR 34998, June 26, 2007]

### § 32.14 Special award conditions.

(a) DoD Components may impose additional requirements as needed, over and above those provided in this part, if an applicant or recipient:

(1) Has a history of poor performance;

(2) Is not financially stable;

(3) Has a management system that does not meet the standards prescribed in this part;

(4) Has not conformed to the terms and conditions of a previous award; or

(5) Is not otherwise responsible.

(b) Before imposing additional requirements, DoD Components shall notify the applicant or recipient in writing as to:

(1) The nature of the additional requirements;

(2) The reason why the additional requirements are being imposed;

(3) The nature of the corrective action needed;

(4) The time allowed for completing the corrective actions; and

(5) The method for requesting reconsideration of the additional requirements imposed.

(c) Any special conditions shall be promptly removed once the conditions that prompted them have been corrected.

(d) Grants officers:

(1) Should coordinate the imposition and removal of special award conditions with the cognizant grants administration office identified in 32 CFR 22.710.

(2) Shall include in the award file the written notification to the recipient, described in paragraph (b) of this section, and the documentation required by 32 CFR 22.410(b).

### § 32.15 Metric system of measurement.

The Metric Conversion Act, as amended by the Omnibus Trade and Competitiveness Act (15 U.S.C. 205) declares that the metric system is the preferred measurement system for U.S. trade and commerce, and for Federal agencies' procurements, grants, and other business-related activities. DoD grants officers shall comply with requirements concerning the use of the metric system at 32 CFR 22.530.

### § 32.16 Resource Conservation and Recovery Act (RCRA).

Recipients' procurements shall comply with applicable requirements of the Resource Conservation and Recovery Act (RCRA), as described at § 32.49.

### § 32.17 Certifications and representations.

(a) OMB Circular A–110 authorizes and encourages each Federal agency, unless prohibited by statute or codified regulation, to allow recipients to submit certifications and representations required by statute, executive order, or regulation on an annual basis, if the recipients have ongoing and continuing relationships with the agency. The Circular further states that annual certifications and representations, when used, shall be signed by responsible officials with the authority to ensure recipients' compliance with the pertinent requirements.

(b) DoD grants officers shall comply with the provisions concerning certifications and representations at 32 CFR 22.510. Those provisions ease burdens on recipients to the extent possible, given current statutory and regulatory impediments to obtaining all certifications on an annual basis. The provisions thereby also comply with the intent of OMB Circular A–110, to use less

burdensome methods for obtaining certifications and representations, as such methods become feasible.

## Subpart C—Post-Award Requirements

FINANCIAL AND PROGRAM MANAGEMENT

### § 32.20 Purpose of financial and program management.

Sections 32.21 through 32.28 prescribe standards for financial management systems, methods for making payments and rules for: satisfying cost sharing and matching requirements, accounting for program income, budget revision approvals, making audits, determining allowability of cost, and establishing fund availability.

### § 32.21 Standards for financial management systems.

(a) DoD Components shall require recipients to relate financial data to performance data and develop unit cost information whenever practical. For awards that support research, it should be noted that it is generally not appropriate to develop unit cost information.

(b) Recipients' financial management systems shall provide for the following.

(1) Accurate, current and complete disclosure of the financial results of each federally-sponsored project or program in accordance with the reporting requirements set forth in § 32.52. If a DoD Component requires reporting on an accrual basis from a recipient that maintains its records on other than an accrual basis, the recipient shall not be required to establish an accrual accounting system. These recipients may develop such accrual data for its reports on the basis of an analysis of the documentation on hand.

(2) Records that identify adequately the source and application of funds for federally-sponsored activities. These records shall contain information pertaining to Federal awards, authorizations, obligations, unobligated balances, assets, outlays, income and interest.

(3) Effective control over and accountability for all funds, property and other assets. Recipients shall adequately safeguard all such assets and assure they are used solely for authorized purposes.

(4) Comparison of outlays with budget amounts for each award. Whenever appropriate, financial information should be related to performance and unit cost data. As discussed in paragraph (a) of this section, unit cost data is generally not appropriate for awards that support research.

(5) Written procedures to minimize the time elapsing between the transfer of funds to the recipient from the U.S. Treasury and the issuance or redemption of checks, warrants or payments by other means for program purposes by the recipient. To the extent that the provisions of the Cash Management Improvement Act (CMIA) (Pub. L. 101–453) govern, payment methods of State agencies, instrumentalities, and fiscal agents should be consistent with CMIA Treasury-State Agreements or the CMIA default procedures codified at 31 CFR part 205, ''Withdrawal of Cash from the Treasury for Advances under Federal Grant and Other Programs.''

(6) Written procedures for determining the reasonableness, allocability and allowability of costs in accordance with the provisions of the applicable Federal cost principles (see § 32.27) and the terms and conditions of the award.

(7) Accounting records including cost accounting records that are supported by source documentation.

(c) Where the Federal Government guarantees or insures the repayment of money borrowed by the recipient, the DoD Component, at its discretion, may require adequate bonding and insurance if the bonding and insurance requirements of the recipient are not deemed adequate to protect the interest of the Federal Government.

(d) The DoD Component may require adequate fidelity bond coverage where the recipient lacks sufficient coverage to protect the Federal Government's interest.

(e) Where bonds are required in the situations described above, the bonds shall be obtained from companies holding certificates of authority as acceptable sureties, as prescribed in 31 CFR part 223, ''Surety Companies Doing Business with the United States.''

**§ 32.22 Payment.**

(a) Payment methods shall minimize the time elapsing between the transfer of funds from the United States Treasury and the issuance or redemption of checks, warrants, or payment by other means by the recipients. Payment methods of State agencies or instrumentalities shall be consistent with Treasury-State agreements under the Cash Management Improvement Act (CMIA) (31 U.S.C. 3335 and 6503) or default procedures in 31 CFR part 205.

(b) Recipients are to be paid in advance, provided they maintain or demonstrate the willingness to maintain:

(1) Written procedures that minimize the time elapsing between the transfer of funds and disbursement by the recipient; and

(2) Financial management systems that meet the standards for fund control and accountability as established in § 32.21. Cash advances to a recipient organization shall be limited to the minimum amounts needed and be timed to be in accordance with the actual, immediate cash requirements of the recipient organization in carrying out the purpose of the approved program or project. The timing and amount of cash advances shall be as close as is administratively feasible to the actual disbursements by the recipient organization for direct program or project costs and the proportionate share of any allowable indirect costs.

(c) Whenever possible, advances shall be consolidated to cover anticipated cash needs for all awards made by the DoD Component to the recipient.

(1) Advance payment mechanisms include, but are not limited to, Treasury check and electronic funds transfer.

(2) Advance payment mechanisms are subject to 31 CFR part 205.

(3) Recipients shall be authorized to submit requests for advances and reimbursements at least monthly when electronic fund transfers are not used.

(d) Requests for Treasury check advance payment shall be submitted on SF–270,[3] ''Request for Advance or Reimbursement,'' or other forms as may be authorized by OMB. This form is not to be used when Treasury check advance payments are made to the recipient automatically through the use of a predetermined payment schedule or if inconsistent with DoD procedures for electronic funds transfer.

(e) Reimbursement is the preferred method when the requirements in paragraph (b) of this section cannot be met. DoD Components may also use this method on any construction agreement, or if the major portion of the construction project is accomplished through private market financing or Federal loans, and the Federal assistance constitutes a minor portion of the project.

(1) When the reimbursement method is used, the responsible DoD payment office generally makes payment within 30 calendar days after receipt of the billing by the office designated to receive the billing, unless the billing is improper (for further information about timeframes for payments, see 32 CFR 22.810(c)(3)(ii)).

(2) Recipients shall be authorized to submit requests for reimbursement at least monthly when electronic funds transfers are not used.

(f) If a recipient cannot meet the criteria for advance payments and the grants officer, in consultation with the program manager, has determined that reimbursement is not feasible because the recipient lacks sufficient working capital, the award may provide for cash on a working capital advance basis. Under this procedure, the award shall provide for advancing cash to the recipient to cover its estimated disbursement needs for an initial period generally geared to the awardee's disbursing cycle. Thereafter, the award shall provide for reimbursing the recipient for its actual cash disbursements. The working capital advance method of payment shall not be used for recipients unwilling or unable to provide timely advances to their subrecipient to meet the subrecipient's actual cash disbursements.

(g) To the extent available, recipients shall disburse funds available from repayments to and interest earned on a revolving fund, program income, rebates, refunds, contract settlements, audit recoveries and interest earned on such funds before requesting additional cash payments.

[3] See footnote 2 to § 32.12(a).

(h) Unless otherwise required by statute, grants officers shall not withhold payments for proper charges made by recipients at any time during the project period unless:

(1) A recipient has failed to comply with the project objectives, the terms and conditions of the award, or Federal reporting requirements; or

(2) The recipient or subrecipient is delinquent in a debt to the United States under OMB Circular A–129, ''Managing Federal Credit Programs'' (see definitions of ''debt'' and ''delinquent debt,'' at 32 CFR 22.105). Under such conditions, the grants officer may, upon reasonable notice, inform the recipient that payments shall not be made for obligations incurred after a specified date until the conditions are corrected or the indebtedness to the Federal Government is liquidated (also see 32 CFR 22.420(b)(2) and 22.820).

(i) Standards governing the use of banks and other institutions as depositories of funds advanced under awards are as follows:

(1) Except for situations described in paragraph (i)(2) of this section, DoD Components shall not require separate depository accounts for funds provided to a recipient or establish any eligibility requirements for depositories for funds provided to a recipient. However, recipients must be able to account for the receipt, obligation and expenditure of funds.

(2) Advances of Federal funds shall be deposited and maintained in insured accounts whenever possible.

(j) Consistent with the national goal of expanding the opportunities for women-owned and minority-owned business enterprises, recipients shall be encouraged to use women-owned and minority-owned banks (a bank which is owned at least 50 percent by women or minority group members).

(k) Recipients shall maintain advances of Federal funds in interest bearing accounts, unless:

(1) The recipient receives less than $120,000 in Federal awards per year;

(2) The best reasonably available interest bearing account would not be expected to earn interest in excess of $250 per year on Federal cash balances; or

(3) The depository would require an average or minimum balance so high that it would not be feasible within the expected Federal and non-Federal cash resources.

(l)(1) Interest earned on Federal advances deposited in interest bearing accounts shall be remitted annually to Department of Health and Human Services, Payment Management System, PO Box 6021, Rockville, MD 20852.

(2) In keeping with Electronic Funds Transfer rules (31 CFR part 206), interest should be remitted to the HHS Payment Management System through an electronic medium such as the FEDWIR Deposit System. Electronic remittances should be in the format and should include any data that are specified by the grants officer as being necessary to facilitate direct deposit in HHS' account at the Department of the Treasury.

(3) Recipients that do not have electronic remittance capability should use a check.

(4) Interest amounts up to $250 per year may be retained by the recipient for administrative expense.

(m) Except as noted elsewhere in this part, only the following forms shall be authorized for the recipients in requesting advances and reimbursements. DoD Components shall not require more than an original and two copies of these forms.

(1) SF–270, Request for Advance or Reimbursement. Each DoD Component shall adopt the SF–270 as a standard form for all nonconstruction programs when electronic funds transfer or predetermined advance methods are not used. DoD Components, however, have the option of using this form for construction programs in lieu of the SF–271,[4] ''Outlay Report and Request for Reimbursement for Construction Programs.''

(2) SF–271, Outlay Report and Request for Reimbursement for Construction Programs. Each DoD Component shall adopt the SF–271 as the standard form to be used for requesting reimbursement for construction programs. However, a DoD Component may substitute the SF–270 when the DoD Component determines that it provides adequate information to meet Federal needs.

[4] See footnote 2 to § 32.12(a).

**§ 32.23 Cost sharing or matching.**

(a) All contributions, including cash and third party in-kind, shall be accepted as part of the recipient's cost sharing or matching when such contributions meet all of the following criteria:

(1) Are verifiable from the recipient's records.

(2) Are not included as contributions for any other federally-assisted project or program.

(3) Are necessary and reasonable for proper and efficient accomplishment of project or program objectives.

(4) Are allowable under the applicable cost principles.

(5) Are not paid by the Federal Government under another award, except where authorized by Federal statute to be used for cost sharing or matching.

(6) Are provided for in the approved budget when required by the DoD Component.

(7) Conform to other provisions of this part, as applicable.

(b) Unrecovered indirect costs (see definition in § 32.2) may be included as part of cost sharing or matching.

(c) Values for recipient contributions of services and property shall be established in accordance with the applicable cost principles. If a DoD Component authorizes recipients to donate buildings or land for construction/facilities acquisition projects or long-term use, the value of the donated property for cost sharing or matching shall be the lesser of:

(1) The certified value of the remaining life of the property recorded in the recipient's accounting records at the time of donation; or

(2) The current fair market value. However, when there is sufficient justification, the DoD Component may approve the use of the current fair market value of the donated property, even if it exceeds the certified value at the time of donation to the project. The DoD Component may accept the use of any reasonable basis for determining the fair market value of the property.

(d) Volunteer services furnished by professional and technical personnel, consultants, and other skilled and unskilled labor may be counted as cost sharing or matching if the service is an integral and necessary part of an approved project or program. Rates for volunteer services shall be consistent with those paid for similar work in the recipient's organization. In those instances in which the required skills are not found in the recipient organization, rates shall be consistent with those paid for similar work in the labor market in which the recipient competes for the kind of services involved. In either case, paid fringe benefits that are reasonable, allowable, and allocable may be included in the valuation.

(e) When an employer other than the recipient furnishes the services of an employee, these services shall be valued at the employee's regular rate of pay (plus an amount of fringe benefits that are reasonable, allowable, and allocable, but exclusive of overhead costs), provided these services are in the same skill for which the employee is normally paid.

(f) Donated supplies may include such items as office supplies, laboratory supplies or workshop and classroom supplies. Value assessed to donated supplies included in the cost sharing or matching share shall be reasonable and shall not exceed the fair market value of the property at the time of the donation.

(g) The method used for determining cost sharing or matching for donated equipment, buildings and land for which title passes to the recipient may differ according to the purpose of the award, if the purpose of the award is to:

(1) Assist the recipient in the acquisition of equipment, buildings or land, the total value of the donated property may be claimed as cost sharing or matching; or

(2) Support activities that require the use of equipment, buildings or land, normally only depreciation or use charges for equipment and buildings may be made. However, the full value of equipment or other capital assets and fair rental charges for land may be allowed, provided that the DoD Component has approved the charges.

(h) The value of donated property shall be determined in accordance with the usual accounting policies of the recipient, with the following qualifications.

(1) The value of donated land and buildings shall not exceed its fair market value at the time of donation to the recipient as established by an independent appraiser (e.g., certified real property appraiser or General Services Administration representative) and certified by a responsible official of the recipient.

(2) The value of donated equipment shall not exceed the fair market value of equipment of the same age and condition at the time of donation.

(3) The value of donated space shall not exceed the fair rental value of comparable space as established by an independent appraisal of comparable space and facilities in a privately-owned building in the same locality.

(4) The value of loaned equipment shall not exceed its fair rental value.

(i) The following requirements pertain to the recipient's supporting records for in-kind contributions from third parties:

(1) Volunteer services shall be documented and, to the extent feasible, supported by the same methods used by the recipient for its own employees.

(2) The basis for determining the valuation for personal service and property shall be documented.

### § 32.24 Program income.

(a) DoD Components shall apply the standards set forth in this section in requiring recipient organizations to account for program income related to projects financed in whole or in part with Federal funds.

(b) Except as provided in paragraph (h) of this section, program income earned during the project period shall be retained by the recipient and, in accordance with the terms and conditions of the award, shall be used in one or more of the following ways:

(1) Added to funds committed to the project by the DoD Component and recipient and used to further eligible project or program objectives.

(2) Used to finance the non-Federal share of the project or program.

(3) Deducted from the total project or program allowable cost in determining the net allowable costs on which the Federal share of costs is based.

(c) When a program regulation or award authorizes the disposition of program income as described in paragraphs (b)(1) or (b)(2) of this section, program income in excess of any limits stipulated shall be used in accordance with paragraph (b)(3) of this section.

(d) In the event that program regulations or the terms and conditions of the award do not specify how program income is to be used, paragraph (b)(3) of this section shall apply automatically to all projects or programs except research. For awards that support research, paragraph (b)(1) of this section shall apply automatically unless the terms and conditions specify another alternative or the recipient is subject to special award conditions, as indicated in § 32.14.

(e) Unless program regulations or the terms and conditions of the award provide otherwise, recipients shall have no obligation to the Federal Government regarding program income earned after the end of the project period.

(f) If authorized by program regulations or the terms and conditions of the award, costs incident to the generation of program income may be deducted from gross income to determine program income, provided these costs have not been charged to the award.

(g) Proceeds from the sale of property shall be handled in accordance with the requirements of the Property Standards (see §§ 32.30 through 32.37).

(h) Unless program regulations or the terms and condition of the award provide otherwise, recipients shall have no obligation to the Federal Government with respect to program income earned from license fees and royalties for copyrighted material, patents, patent applications, trademarks, and inventions produced under an award. Note that the Patent and Trademark Amendments (35 U.S.C. chapter 18) apply to inventions made under an experimental, developmental, or research award.

### § 32.25 Revision of budget and program plans.

(a) The budget plan is the financial expression of the project or program as approved during the award process. It may include either the sum of the Federal and non-Federal shares, or only the Federal share, depending upon DoD Component requirements. It shall be

related to performance for program evaluation purposes whenever appropriate.

(b) Recipients are required to report deviations from budget and program plans, and request prior approvals for budget and program plan revisions, in accordance with this section.

(c) For nonconstruction awards, recipients shall request prior approvals from the cognizant grants officer for one or more of the following program or budget related reasons.

(1) Change in the scope or the objective of the project or program (even if there is no associated budget revision requiring prior written approval).

(2) Change in a key person specified in the application or award document.

(3) The absence for more than three months, or a 25 percent reduction in time devoted to the project, by the approved project director or principal investigator.

(4) The need for additional Federal funding.

(5) The transfer of amounts budgeted for indirect costs to absorb increases in direct costs, or vice versa, if approval is required by the DoD Component. DoD Components should require this prior approval only in exceptional circumstances. The requirement in each such case must be stated in the award document.

(6) The inclusion, unless waived by the DoD Component, of costs that require prior approval in accordance with OMB Circular A–21,[5] ''Cost Principles for Institutions of Higher Education,'' OMB Circular A–122,[6] ''Cost Principles for Non-Profit Organizations,'' or Appendix E to 45 CFR part 74, ''Principles for Determining Costs Applicable to Research and Development under Grants and Contracts with Hospitals,'' or 48 CFR part 31, ''Contract Cost Principles and Procedures,'' as applicable. However, it should be noted that many of the prior approvals in these cost principles are appropriately waived only after consultation with the cognizant federal agency responsible for negotiating the recipient's indirect costs.

(7) The transfer of funds allotted for training allowances (direct payment to trainees) to other categories of expense.

(8) Unless described in the application and funded in the approved awards, the subaward, transfer or contracting out of any work under an award. This provision does not apply to the purchase of supplies, material, equipment or general support services.

(9) If required by the DoD Component, the transfer of funds among direct cost categories that is described in paragraph (e) of this section.

(d) (1) Except for requirements listed in paragraphs (c)(1) and (c)(4) of this section, OMB Circular A–110 authorizes DoD Components, at their option, to waive cost-related and administrative prior written approvals required by this part and OMB Circulars A–21 and A–122 (but see cautionary note at end of paragraph (c)(5) of this section).

(2) The two prior approvals listed in paragraphs (d)(2)(i) and (ii) of this section are automatically waived unless the award document states otherwise. DoD Components should override this automatic waiver and require the prior approvals, especially for research awards, only in exceptional circumstances. Absent an override in the award terms and conditions, recipients need not obtain prior approvals before:

(i) Incurring pre-award costs 90 calendar days prior to award (incurring pre-award costs more than 90 calendar days prior to award would still require the prior approval of the DoD Component). All pre-award costs are incurred at the recipient's risk (i.e., the DoD Component is under no obligation to reimburse such costs if for any reason the recipient does not receive an award or if the award is less than anticipated and inadequate to cover such costs).

(ii) Carrying forward unobligated balances to subsequent funding periods.

(3) Under certain conditions, a DoD Component may authorize a recipient to initiate, without prior approval, a one-time, no-cost extension (i.e., an extension in the expiration date of an award that does not require additional Federal funds) for a period of up to twelve months, as long as the no-cost extension does not involve a change in the approved objectives or scope of the

[5] See footnote 1 to § 32.1(a).

[6] See footnote 1 to § 32.1(a).

project. The conditions for waiving this prior approval requirement are that the DoD Component must:

(i) Judge that the recipient's subsequently initiating a one-time, no-cost extension would not cause the DoD Component to fail to comply with DoD funding policies (for further information on the location of DoD funding policies, grants officers may refer to Appendix C to 32 CFR part 22).

(ii) Require a recipient that wishes to initiate a one-time, no-cost extension to so notify the office that made the award at least 10 calendar days before the original expiration date of the award.

(e) The DoD Component may, at its option, restrict the transfer of funds among direct cost categories, functions and activities for awards in which the Federal share of the project exceeds $100,000 and the cumulative amount of such transfers exceeds or is expected to exceed 10 percent of the total budget as last approved by the DoD Component. As a matter of DoD policy, requiring prior approvals for such transfers generally is not appropriate for grants to support research. No DoD Component shall permit a transfer that would cause any Federal appropriation or part thereof to be used for purposes other than those consistent with the original intent of the appropriation.

(f) For construction awards, recipients shall request prior written approval promptly from grants officers for budget revisions whenever:

(1) The revision results from changes in the scope or the objective of the project or program;

(2) The need arises for additional Federal funds to complete the project; or

(3) A revision is desired which involves specific costs for which prior written approval requirements may be imposed consistent with applicable OMB cost principles listed in § 32.27.

(g) When a DoD Component makes an award that provides support for both construction and nonconstruction work, the DoD Component may require the recipient to request prior approval from the grants officer before making any fund or budget transfers between the two types of work supported.

(h) No other prior approval requirements for specific items may be imposed unless a deviation has been approved, in accordance with the deviation procedures in § 32.4(c).

(i) For both construction and nonconstruction awards, DoD Components shall require recipients to notify the grants officer in writing promptly whenever the amount of Federal authorized funds is expected to exceed the needs of the recipient for the project period by more than $5000 or five percent of the Federal award, whichever is greater. This notification shall not be required if an application for additional funding is submitted for a continuation award.

(j) When requesting approval for budget revisions, recipients shall use the budget forms that were used in the application unless the grants officer indicates a letter of request suffices.

(k) Within 30 calendar days from the date of receipt of the request for budget revisions, the grants officer shall review the request and notify the recipient whether the budget revisions have been approved. If the revision is still under consideration at the end of 30 calendar days, the grants officer shall inform the recipient in writing of the date when the recipient may expect the decision.

### § 32.26 Non-Federal audits.

(a) Recipients and subrecipients that are institutions of higher education or other non-profit organizations (including hospitals) shall be subject to the audit requirements contained in the Single Audit Act Amendments of 1996 (31 U.S.C. 7501–7507) and revised OMB Circular A–133,[7] ''Audits of States, Local Governments, and Non-Profit Organizations.''

(b) State and local governments that are subrecipients shall be subject to the audit requirements contained in the Single Audit Act Amendments of 1996 (31 U.S.C. 7501–7507) and revised OMB Circular A–133, ''Audits of States, Local Governments, and Non-Profit Organizations.''

(c) Hospitals that are subrecipients and are not covered by the audit provisions of revised OMB Circular A–133

[7] See footnote 1 to § 32.1(a).

shall be subject to the audit requirements specified in award terms and conditions.

(d) For-profit organizations that are subrecipients shall be subject to the audit requirements specified in 32 CFR 34.16.

### § 32.27 Allowable costs.

(a) *General.* For each kind of recipient or subrecipient of a cost-type assistance award, or each contractor receiving a. cost-type contract under an assistance award, there is a set of Federal principles for determining allowable costs. Allowability of costs shall be determined in accordance with the cost principles applicable to the entity incurring the costs.

(b) *Governmental organizations.* Allowability of costs incurred by State, local or federally-recognized Indian tribal governments that may be subrecipients or contractors under awards subject to this part is determined in accordance with the provisions of OMB Circular A–87,[8] ''Cost Principles for State and Local Governments.''

(c) *Non-profit organizations.* The allowability of costs incurred by non-profit organizations that may be recipients or subrecipients of awards subject to this part, or contractors under such awards, is determined in accordance with the provisions of OMB Circular A–122, ''Cost Principles for Non-Profit Organizations.''

(d) *Higher educational institutions.* The allowability of costs incurred by institutions of higher education that may be recipients, subrecipients, or contractors is determined in accordance with the provisions of OMB Circular A–21, ''Cost Principles for Educational Institutions.''

(e) *Hospitals.* The allowability of costs incurred by hospitals that are recipients, subrecipients, or contractors is determined in accordance with the provisions of Appendix E to 45 CFR part 74, ''Principles for Determining Costs Applicable to Research and Development Under Grants and Contracts with Hospitals.''

(f) *For-profit organizations.* The allowability of costs incurred by subrecipients or contractors that are either for-profit organizations or non-profit organizations listed in Attachment C to Circular A–122 is determined in accordance with the provisions of the Federal Acquisition Regulation (FAR) at 48 CFR part 31; however, the grants officer or the award terms and conditions may in rare cases authorize a determination of allowable costs that are in accordance with uniform cost accounting standards and comply with cost principles acceptable to the Department of Defense.

[8] See footnote 1 to § 32.1(a).

### § 32.28 Period of availability of funds.

Where a funding period is specified, a recipient may charge to the award only allowable costs resulting from obligations incurred during the funding period and any pre-award costs (see § 32.25(d)(2)(i)) authorized by the DoD Component.

## PROPERTY STANDARDS

### § 32.30 Purpose of property standards.

Sections 32.31 through 32.37 set forth uniform standards governing management and disposition of property furnished by the Federal Government and property whose cost was charged to a project supported by a Federal award. DoD Components shall require recipients to observe these standards under awards and shall not impose additional requirements, unless specifically required by Federal statute. The recipient may use its own property management standards and procedures provided it observes the provisions of §§ 32.31 through 32.37.

### § 32.31 Insurance coverage.

Recipients shall, at a minimum, provide the equivalent insurance coverage for real property and equipment acquired with Federal funds as provided to property owned by the recipient. Federally-owned property need not be insured unless required by the terms and conditions of the award.

### § 32.32 Real property.

Each DoD Component that makes awards under which real property is acquired in whole or in part with Federal funds shall prescribe requirements for

recipients concerning the use and disposition of such property. Unless otherwise provided by statute, such requirements, at a minimum, shall contain the following:

(a) Title to real property shall vest in the recipient subject to the condition that the recipient shall use the real property for the authorized purpose of the project as long as it is needed and shall not encumber the property without approval of the DoD Component.

(b) The recipient shall obtain written approval by the grants officer for the use of real property in other federally sponsored projects when the recipient determines that the property is no longer needed for the purpose of the original project. Use in other projects shall be limited to those under federally sponsored projects (i.e., awards) or programs that have purposes consistent with those authorized for support by the DoD Component.

(c) When the real property is no longer needed as provided in paragraphs (a) and (b) of this section, the recipient shall request disposition instructions from the DoD Component or its successor Federal agency. The responsible Federal agency shall observe one or more of the following disposition instructions:

(1) The recipient may be permitted to retain title without further obligation to the Federal Government after it compensates the Federal Government for that percentage of the current fair market value of the property attributable to the Federal participation in the project.

(2) The recipient may be directed to sell the property under guidelines provided by the DoD Component and pay the Federal Government for that percentage of the current fair market value of the property attributable to the Federal participation in the project (after deducting actual and reasonable selling and fix-up expenses, if any, from the sales proceeds). When the recipient is authorized or required to sell the property, proper sales procedures shall be established that provide for competition to the extent practicable and result in the highest possible return.

(3) The recipient may be directed to transfer title to the property to the Federal Government or to an eligible third party provided that, in such cases, the recipient shall be entitled to compensation for its attributable percentage of the current fair market value of the property.

### § 32.33 Federally-owned and exempt property.

(a) *Federally-owned property*. (1) Title to federally-owned property remains vested in the Federal Government. Recipients shall submit annually an inventory listing of federally-owned property in their custody to the DoD Component that made the award. Upon completion of the award or when the property is no longer needed, the recipient shall report the property to the DoD Component for further Federal agency utilization.

(2) If the DoD Component that made the award has no further need for the property, it shall be declared excess and either:

(i) Reported to the General Services Administration, in accordance with the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 483(b)(2)), as implemented by General Services Administration regulations at 41 CFR 101–47.202; or

(ii) Disposed of by alternative methods pursuant to other specific statutory authority. For example, DoD Components are authorized by the Federal Technology Transfer Act (15 U.S.C. 3710(i)), to donate research equipment to educational and non-profit organizations for the conduct of technical and scientific education and research activities—donations under this Act shall be in accordance with the DoD implementation of E.O. 12999 (3 CFR, 1996 Comp., p. 180), ''Educational Technology: Ensuring Opportunity for All Children in the Next Century,'' as applicable. Appropriate instructions shall be issued to the recipient by the DoD Component.

(b) *Exempt property*. (1) When statutory authority exists, a DoD Component may vest title to property acquired with Federal funds in the recipient without further obligation to the Federal Government and under conditions the DoD Component considers appropriate. For example, under 31 U.S.C. 6306, DoD Components may so vest title to tangible personal property

under a grant or cooperative agreement for basic or applied research in a nonprofit institution of higher education or a nonprofit organization whose primary purpose is conducting scientific research. Such property is ''exempt property.''

(2) As a matter of policy, DoD Components shall make maximum use of the authority of 31 U.S.C. 6306 to vest title to exempt property in institutions of higher education, without further obligation to the Government, to enhance the university infrastructure for future performance of defense research and related, science and engineering education.

(3) DoD Components may establish conditions, in regulation or in award terms and conditions, for vesting title to exempt property. Should a DoD Component not establish conditions, title to exempt property upon acquisition shall vest in the recipient without further obligation to the Federal Government.

**§ 32.34 Equipment.**

(a) Title to equipment acquired by a recipient with Federal funds shall vest in the recipient, subject to conditions of this section.

(b) The recipient shall not use equipment acquired with Federal funds to provide services to non-Federal outside organizations for a fee that is less than private companies charge for equivalent services, unless specifically authorized by Federal statute, for as long as the Federal Government retains an interest in the equipment.

(c) The recipient shall use the equipment in the project or program for which it was acquired as long as needed, whether or not the project or program continues to be supported by Federal funds and shall not encumber the property without approval of the DoD Component that made the award. When no longer needed for the original project or program, the recipient shall use the equipment in connection with its other federally-sponsored activities, in the following order of priority:

(1) First, activities sponsored by the DoD Component that funded the original project.

(2) Second, activities sponsored by other DoD Components.

(3) Then, activities sponsored by other Federal agencies.

(d) During the time that equipment is used on the project or program for which it was acquired, the recipient shall make it available for use on other projects or programs if such other use will not interfere with the work on the project or program for which the equipment was originally acquired. First preference for such other use shall be given to other projects or programs sponsored by the DoD Component that financed the equipment; second preference shall be given to projects or programs sponsored by other DoD Components; and third preference shall be given to projects or programs sponsored by other Federal agencies. If the property is owned by the Federal Government, use on other activities not sponsored by the Federal Government shall be permissible if authorized by the DoD Component that financed the property. User charges shall be treated as program income.

(e) When acquiring replacement equipment, the recipient may use the equipment to be replaced as trade-in or sell the equipment and use the proceeds to offset the costs of the replacement equipment subject to the approval of the DoD Component that financed the equipment.

(f) The recipient's property management standards for equipment acquired with Federal funds and federally-owned property shall include all of the following:

(1) Records for equipment and federally-owned property shall be maintained accurately and shall include the following information:

(i) A description of the equipment or federally-owned property.

(ii) Manufacturer's serial number, model number, Federal stock number, national stock number, or other identification number.

(iii) Source of the equipment or federally-owned property, including the award number.

(iv) Whether title vests in the recipient or the Federal Government.

(v) Acquisition date (or date received, if the property was furnished by the Federal Government) and cost.

(vi) Information from which one can calculate the percentage of Federal

participation in the cost of the equipment (not applicable to property furnished by the Federal Government).

(vii) Location and condition of the equipment or federally-owned property and the date the information was reported.

(viii) Unit acquisition cost.

(ix) Ultimate disposition data, including date of disposal and sales price or the method used to determine current fair market value where a recipient compensates the DoD Component that made the award for its share.

(2) Property owned by the Federal Government shall be identified to indicate Federal ownership.

(3) A physical inventory of equipment and federally-owned property shall be taken and the results reconciled with the equipment records at least once every two years. Any differences between quantities determined by the physical inspection and those shown in the accounting records shall be investigated to determine the causes of the difference. The recipient shall, in connection with the inventory, verify the existence, current utilization, and continued need for the equipment or federally-owned property.

(4) A control system shall be in effect to insure adequate safeguards to prevent loss, damage, or theft of the equipment or federally-owned property. Any loss, damage, or theft of equipment or federally-owned property shall be investigated and fully documented; if the property was owned by the Federal Government, the recipient shall promptly notify the DoD Component.

(5) Adequate maintenance procedures shall be implemented to keep the equipment or federally-owned property in good condition.

(6) Where the recipient is authorized or required to sell the equipment, proper sales procedures shall be established which provide for competition to the extent practicable and result in the highest possible return.

(g) When the recipient no longer needs the equipment, the equipment may be used for other activities in accordance with the following standards.

(1) For equipment with a current per unit fair market value of $5,000 or more, the recipient may retain the equipment for other uses provided that compensation is made to the DoD Component that originally made the award or its successor. The amount of compensation shall be computed by applying the percentage of Federal participation in the cost of the original project or program to the current fair market value of the equipment.

(2) If the recipient has no need for the equipment, the recipient shall request disposition instructions from the DoD Component. The DoD Component shall issue instructions to the recipient no later than 120 calendar days after the recipient's request and the following procedures shall govern:

(i) The grants officer, in consultation with the program manager, shall judge whether the age and nature of the equipment warrant a screening procedure to determine whether the equipment is useful to a DoD Component or other Federal agency. If a screening procedure is warranted:

(A) The DoD Component shall determine whether the equipment can be used to meet DoD requirements.

(B) If no DoD requirement exists, the availability of the equipment shall be reported to the General Services Administration by the DoD Component to determine whether a requirement for the equipment exists in other Federal agencies.

(ii) If so instructed or if disposition instructions are not issued within 120 calendar days after the recipient's request, the recipient shall sell the equipment and reimburse the DoD Component that made the award an amount computed by applying to the sales proceeds the percentage of Federal participation in the cost of the original project or program. However, the recipient shall be permitted to deduct and retain from the Federal share $500 or ten percent of the proceeds, whichever is less, for the recipient's selling and handling expenses.

(iii) If the recipient is instructed to ship the equipment elsewhere, the recipient shall be reimbursed by the Federal Government by an amount which is computed by applying the percentage of the recipient's participation in the cost of the original project or program to the current fair market value of the equipment, plus any reasonable

shipping or interim storage costs incurred.

(iv) If the recipient is instructed to otherwise dispose of the equipment, the recipient shall be reimbursed by the DoD Component that made the award for such costs incurred in its disposition.

(h) The DoD Component may reserve the right to transfer the title to the Federal Government or to a third party named by the Federal Government when such third party is otherwise eligible under existing statutes. Such transfer shall be subject to the following standards.

(1) The equipment shall be appropriately identified in the award or otherwise made known to the recipient in writing. For exempt property, in accordance with § 32.33(b)(3), note that this identification must occur by the time of award, or title to the property vests in the recipient without further obligation to the Government.

(2) The DoD Component shall issue disposition instructions within 120 calendar days after receipt of a final inventory. The final inventory shall list all equipment acquired with award funds and federally-owned property. If the DoD Component fails to issue disposition instructions for equipment within the 120 calendar day period, the recipient shall apply the standards of paragraph (g) of this section.

(3) When the DoD Component exercises its right to take title, the equipment shall be subject to the provisions for federally-owned property.

### § 32.35 Supplies.

(a) Title to supplies shall vest in the recipient upon acquisition. If there is a residual inventory of unused supplies exceeding $5,000 in total aggregate value upon termination or completion of the project or program and the supplies are not needed for any other federally-sponsored project or program, the recipient shall retain the supplies for use on non-Federal sponsored activities or sell them, but shall, in either case, compensate the Federal Government for its share. The amount of compensation shall be computed in the same manner as for equipment.

(b) The recipient shall not use supplies acquired with Federal funds to provide services to non-Federal outside organizations for a fee that is less than private companies charge for equivalent services, unless specifically authorized by Federal statute as long as the Federal Government retains an interest in the supplies.

### § 32.36 Intangible property.

(a) The recipient may copyright any work that is subject to copyright and was developed, or for which ownership was purchased, under an award. DoD Components reserve a royalty-free, nonexclusive and irrevocable right to reproduce, publish, or otherwise use the work for Federal purposes, and to authorize others to do so.

(b) Recipients are subject to applicable regulations governing patents and inventions, including Governmentwide regulations issued by the Department of Commerce at 37 CFR part 401, ''Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements.''

(c) The Federal Government has the right to:

(1) Obtain, reproduce, publish or otherwise use the data first produced under an award; and

(2) Authorize others to receive, reproduce, publish, or otherwise use such data for Federal purposes.

(d)(1) In addition, in response to a Freedom of Information Act (FOIA) request for research data relating to published research findings produced under an award that were used by the Federal Government in developing an agency action that has the force and effect of law, the DoD Component that made the award shall request, and the recipient shall provide, within a reasonable time, the research data so that they can be made available to the public through the procedures established under the FOIA. If the DoD Component that made the award obtains the research data solely in response to a FOIA request, the agency may charge the requester a reasonable fee equaling the full incremental cost of obtaining the research data. This fee should reflect costs incurred by the agency, the recipient, and applicable subrecipients. This fee is in addition to any fees the

agency may assess under the FOIA (5 U.S.C. 552(a)(4)(A)).

(2) The following definitions apply for purposes of this paragraph (d):

(i) *Research data* is defined as the recorded factual material commonly accepted in the scientific community as necessary to validate research findings, but not any of the following: preliminary analyses, drafts of scientific papers, plans for future research, peer reviews, or communications with colleagues. This ''recorded'' material excludes physical objects (*e.g.*, laboratory samples). *Research data* also do not include:

(A) Trade secrets, commercial information, materials necessary to be held confidential by a researcher until they are published, or similar information which is protected under law; and

(B) Personnel and medical information and similar information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, such as information that could be used to identify a particular person in a research study.

(ii) *Published* is defined as either when:

(A) Research findings are published in a peer-reviewed scientific or technical journal; or

(B) A Federal agency publicly and officially cites the research findings in support of an agency action that has the force and effect of law.

(iii) *Used by the Federal Government in developing an agency action that has the force and effect of law* is defined as when an agency publicly and officially cites the research findings in support of an agency action that has the force and effect of law.

(e) Title to intangible property and debt instruments acquired under an award or subaward (rather than developed or produced under the award or subaward) vests upon acquisition in the recipient. The recipient shall use that property for the originally-authorized purpose, and the recipient shall not encumber the property without approval of the DoD Component that made the award. When no longer needed for the originally authorized purpose, disposition of the intangible property shall occur in accordance with the provisions of § 32.34(g).

[63 FR 12188, Mar. 12, 1998, as amended at 65 FR 14407, 14416, Mar. 16, 2000]

### § 32.37 Property trust relationship.

Real property, equipment, intangible property and debt instruments that are acquired or improved with Federal funds shall be held in trust by the recipient as trustee for the beneficiaries of the project or program under which the property was acquired or improved. DoD Components may require recipients to record liens or other appropriate notices of record to indicate that personal or real property has been acquired or improved with Federal funds and that use and disposition conditions apply to the property.

## PROCUREMENT STANDARDS

### § 32.40 Purpose of procurement standards.

Sections 32.41 through 32.48 set forth standards for use by recipients in establishing procedures for the procurement of supplies and other expendable property, equipment, real property and other services with Federal funds. These standards are furnished to ensure that such materials and services are obtained in an effective manner and in compliance with the provisions of applicable Federal statutes and executive orders.

### § 32.41 Recipient responsibilities.

The standards contained in this section do not relieve the recipient of the contractual responsibilities arising under its contract(s). The recipient is the responsible authority, without recourse to the DoD Component that made the award, regarding the settlement and satisfaction of all contractual and administrative issues arising out of procurements entered into in support of an award or other agreement. This includes disputes, claims, protests of award, source evaluation or other matters of a contractual nature. Matters concerning violation of statute are to be referred to such Federal, State or local authority as may have proper jurisdiction.

**§ 32.42 Codes of conduct.**

The recipient shall maintain written standards of conduct governing the performance of its employees engaged in the award and administration of contracts. No employee, officer, or agent shall participate in the selection, award, or administration of a contract supported by Federal funds if a real or apparent conflict of interest would be involved. Such a conflict would arise when the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of the parties indicated herein, has a financial or other interest in the firm selected for an award. The officers, employees, and agents of the recipient shall neither solicit nor accept gratuities, favors, or anything of monetary value from contractors, or parties to subagreements. However, recipients may set standards for situations in which the financial interest is not substantial or the gift is an unsolicited item of nominal value. The standards of conduct shall provide for disciplinary actions to be applied for violations of such standards by officers, employees, or agents of the recipient.

**§ 32.43 Competition.**

All procurement transactions shall be conducted in a manner to provide, to the maximum extent practical, open and free competition. The recipient shall be alert to organizational conflicts of interest as well as noncompetitive practices among contractors that may restrict or eliminate competition or otherwise restrain trade. In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, invitations for bids and/or requests for proposals shall be excluded from competing for such procurements. Awards shall be made to the bidder or offeror whose bid or offer is responsive to the solicitation and is most advantageous to the recipient, price, quality and other factors considered. Solicitations shall clearly set forth all requirements that the bidder or offeror shall fulfill in order for the bid or offer to be evaluated by the recipient. Any and all bids or offers may be rejected when it is in the recipient's interest to do so.

**§ 32.44 Procurement procedures.**

(a) All recipients shall establish written procurement procedures. These procedures shall provide, at a minimum, that:

(1) Recipients avoid purchasing unnecessary items;

(2) Where appropriate, an analysis is made of lease and purchase alternatives to determine which would be the most economical and practical procurement; and

(3) Solicitations for goods and services provide for all of the following:

(i) A clear and accurate description of the technical requirements for the material, product or service to be procured. In competitive procurements, such a description shall not contain features which unduly restrict competition.

(ii) Requirements which the bidder/offeror must fulfill and all other factors to be used in evaluating bids or proposals.

(iii) A description, whenever practicable, of technical requirements in terms of functions to be performed or performance required, including the range of acceptable characteristics or minimum acceptable standards.

(iv) The specific features of ''brand name or equal'' descriptions that bidders are required to meet when such items are included in the solicitation.

(v) The acceptance, to the extent practicable and economically feasible, of products and services dimensioned in the metric system of measurement.

(vi) Preference, to the extent practicable and economically feasible, for products and services that conserve natural resources and protect the environment and are energy efficient.

(b) Positive efforts shall be made by recipients to utilize small businesses, minority-owned firms, and women's business enterprises, whenever possible. Recipients of Federal awards shall take all of the following steps to further this goal:

(1) Ensure that small businesses, minority-owned firms, and women's business enterprises are used to the fullest extent practicable.

(2) Make information on forthcoming opportunities available and arrange time frames for purchases and contracts to encourage and facilitate participation by small businesses, minority-owned firms, and women's business enterprises.

(3) Consider in the contract process whether firms competing for larger contracts intend to subcontract with small businesses, minority-owned firms, and women's business enterprises.

(4) Encourage contracting with consortiums of small businesses, minority-owned firms and women's business enterprises when a contract is too large for one of these firms to handle individually.

(5) Use the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Department of Commerce's Minority Business Development Agency in the solicitation and utilization of small businesses, minority-owned firms and women's business enterprises.

(c) The type of procuring instruments used (e.g., fixed price contracts, cost reimbursable contracts, purchase orders, and incentive contracts) shall be determined by the recipient but shall be appropriate for the particular procurement and for promoting the best interest of the program or project involved. The ''cost-plus-a-percentage-of-cost'' or ''percentage of construction cost'' methods of contracting shall not be used.

(d) Contracts shall be made only with responsible contractors who possess the potential ability to perform successfully under the terms and conditions of the proposed procurement. Consideration shall be given to such matters as contractor integrity, record of past performance, financial and technical resources or accessibility to other necessary resources. In certain circumstances, contracts with certain parties are restricted by the DoD implementation, in 2 CFR part 1125, of OMB guidance on nonprocurement debarment and suspension (2 CFR part 180)

(e) Recipients shall, on request, make available for the DoD Component's pre-award review, procurement documents such as request for proposals or invitations for bids, independent cost estimates, etc., when any of the following conditions apply:

(1) A recipient's procurement procedures or operation fails to comply with the procurement standards in this part.

(2) The procurement is expected to exceed the simplified acquisition threshold fixed at 41 U.S.C. 403 (11) (currently $100,000) and is to be awarded without competition or only one bid or offer is received in response to a solicitation.

(3) The procurement, which is expected to exceed the simplified acquisition threshold, specifies a ''brand name'' product.

(4) The proposed award over the simplified acquisition threshold is to be awarded to other than the apparent low bidder under a sealed bid procurement.

(5) A proposed contract modification changes the scope of a contract or increases the contract amount by more than the amount of the simplified acquisition threshold.

[63 FR 12188, Mar. 12, 1998, as amended at 72 FR 34998, June 26, 2007]

### § 32.45 Cost and price analysis.

Some form of cost or price analysis shall be made and documented in the procurement files in connection with every procurement action. Price analysis may be accomplished in various ways, including the comparison of price quotations submitted, market prices and similar indicia, together with discounts. Cost analysis is the review and evaluation of each element of cost to determine reasonableness, allocability and allowability.

### § 32.46 Procurement records.

Procurement records and files for purchases in excess of the simplified acquisition threshold shall include the following at a minimum:

(a) Basis for contractor selection;

(b) Justification for lack of competition when competitive bids or offers are not obtained; and

(c) Basis for award cost or price.

### § 32.47 Contract administration.

A system for contract administration shall be maintained to ensure contractor conformance with the terms,

conditions and specifications of the contract and to ensure adequate and timely follow up of all purchases. Recipients shall evaluate contractor performance and document, as appropriate, whether contractors have met the terms, conditions and specifications of the contract.

### § 32.48 Contract provisions.

The recipient shall include, in addition to provisions to define a sound and complete agreement, the following provisions in all contracts. The following provisions shall also be applied to subcontracts:

(a) Contracts in excess of the simplified acquisition threshold shall contain contractual provisions or conditions that allow for administrative, contractual, or legal remedies in instances in which a contractor violates or breaches the contract terms, and provide for such remedial actions as may be appropriate.

(b) All contracts in excess of the simplified acquisition threshold shall contain suitable provisions for termination by the recipient, including the manner by which termination shall be effected and the basis for settlement. In addition, such contracts shall describe conditions under which the contract may be terminated for default as well as conditions where the contract may be terminated because of circumstances beyond the control of the contractor.

(c) Except as otherwise required by statute, an award that requires the contracting (or subcontracting) for construction or facility improvements shall provide for the recipient to follow its own requirements relating to bid guarantees, performance bonds, and payment bonds unless the construction contract or subcontract exceeds $100,000. For those contracts or subcontracts exceeding $100,000, the DoD Component may accept the bonding policy and requirements of the recipient, provided the grants officer has made a determination that the Federal Government's interest is adequately protected. If such a determination has not been made, the minimum requirements shall be as follows:

(1) A bid guarantee from each bidder equivalent to five percent of the bid price. The ''bid guarantee'' shall consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder shall, upon acceptance of his bid, execute such contractual documents as may be required within the time specified.

(2) A performance bond on the part of the contractor for 100 percent of the contract price. A ''performance bond'' is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract.

(3) A payment bond on the part of the contractor for 100 percent of the contract price. A ''payment bond'' is one executed in connection with a contract to assure payment as required by statute of all persons supplying labor and material in the execution of the work provided for in the contract.

(4) Where bonds are required in the situations described in §§ 32.40 through 32.49, the bonds shall be obtained from companies holding certificates of authority as acceptable sureties pursuant to 31 CFR part 223, ''Surety Companies Doing Business with the United States.''

(d) All negotiated contracts (except those for less than the simplified acquisition threshold) awarded by recipients shall include a provision to the effect that the recipient, the Department of Defense, the Comptroller General of the United States, or any of their duly authorized representatives, shall have access to any books, documents, papers and records of the contractor which are directly pertinent to a specific program for the purpose of making audits, examinations, excerpts and transcriptions.

(e) All contracts, including those for amounts less than the simplified acquisition threshold, by recipients and their contractors shall contain the procurement provisions of Appendix A to this part, as applicable.

### § 32.49 Resource Conservation and Recovery Act.

Under the Resource Conservation and Recovery Act (RCRA) (section 6002, Pub. L. 94–580, 42 U.S.C. 6962), any State agency or agency of a political subdivision of a State which is using

appropriated Federal funds must comply with section 6002. Section 6002 requires that preference be given in procurement programs to the purchase of specific products containing recycled materials identified in guidelines developed by the Environmental Protection Agency (EPA) (40 CFR parts 247–254). Accordingly, State and local institutions of higher education, hospitals, and non-profit organizations that receive direct Federal awards or other Federal funds shall give preference in their procurement programs funded with Federal funds to the purchase of recycled products pursuant to the EPA guidelines.

REPORTS AND RECORDS

### § 32.50 Purpose of reports and records.

Sections 32.51 through 32.53 set forth the procedures for monitoring and reporting on the recipient's financial and program performance and the necessary standard reporting forms. They also set forth record retention requirements.

### § 32.51 Monitoring and reporting program performance.

(a) Recipients are responsible for managing and monitoring each project, program, subaward, function or activity supported by the award. Recipients shall monitor subawards to ensure subrecipients have met the audit requirements as delineated in § 32.26.

(b) The award terms and conditions shall prescribe the frequency with which the performance reports shall be submitted. Except as provided in paragraph (f) of this section, performance reports shall not be required more frequently than quarterly or less frequently than annually. Annual reports shall be due 90 calendar days after the award year; quarterly or semi-annual reports shall be due 30 calendar days after the reporting period. DoD Components may require annual reports before the anniversary dates of multiple year awards in lieu of these requirements. The final performance reports are due 90 calendar days after the expiration or termination of the award.

(c) If inappropriate, a final technical or performance report shall not be required after completion of the project.

(d) When required, performance reports shall generally contain, for each award, brief information on each of the following:

(1) A comparison of actual accomplishments with the goals and objectives established for the period, the findings of the investigator, or both. Whenever appropriate and the output of programs or projects can be readily quantified, such quantitative data should be related to cost data for computation of unit costs. However, unit costs are generally inappropriate for research (see § 32.21 (a) and (b)(4)).

(2) Reasons why established goals were not met, if appropriate.

(3) Other pertinent information including, when appropriate, analysis and explanation of cost overruns or high unit costs.

(e) Recipients shall not be required to submit more than the original and two copies of performance reports.

(f) Recipients shall immediately notify the grants officer of developments that have a significant impact on the award-supported activities. Also, notification shall be given in the case of problems, delays, or adverse conditions which materially impair the ability to meet the objectives of the award. This notification shall include a statement of the action taken or contemplated, and any assistance needed to resolve the situation.

(g) DoD Components' representatives may make site visits, as needed.

(h) DoD Components shall comply with applicable clearance requirements of 5 CFR part 1320 when requesting performance data from recipients.

### § 32.52 Financial reporting.

(a) The following forms or such other forms as may be approved by OMB are authorized for obtaining financial information from recipients:

(1) *SF–269*[9] *or SF–269A,*[10] *Financial Status Report.* (i) DoD Components shall require recipients to use the SF–269 or SF–269A to report the status of funds for all nonconstruction projects or programs. A DoD Component may, however, have the option of not requiring the SF–269 or SF–269A when the SF–270,

[9] See footnote 2 to § 32.12(a).

[10] See footnote 2 to § 32.12(a).

Request for Advance or Reimbursement, or SF–272,[11] Report of Federal Cash Transactions, is determined to provide adequate information to meet agency needs, except that a final SF–269 or SF–269A shall be required at the completion of the project when the SF–270 is used only for advances.

(ii) The DoD Component shall prescribe whether the report shall be on a cash or accrual basis. If the award requires accrual information and the recipient's accounting records are not normally kept on the accrual basis, the recipient shall not be required to convert its accounting system, but shall develop such accrual information through best estimates based on an analysis of the documentation on hand.

(iii) The DoD Component shall determine the frequency of the Financial Status Report for each project or program, considering the size and complexity of the particular project or program. However, the report shall not be required more frequently than quarterly or less frequently than annually. A final report shall be required at the completion of the award.

(iv) The DoD Component shall require recipients to submit the SF–269 or SF–269A (an original and no more than two copies) no later than 30 calendar days after the end of each specified reporting period for quarterly and semi-annual reports, and 90 calendar days for annual and final reports. Extensions of reporting due dates may be approved by the grants officer upon request of the recipient.

(2) *SF–272, Report of Federal Cash Transactions.* (i) When funds are advanced to recipients the DoD Component shall require each recipient to submit the SF–272 and, when necessary, its continuation sheet, SF–272a.[12] The grants officer shall use this report to monitor cash advanced to recipients and to obtain disbursement information for each award to the recipients.

(ii) DoD Components may require forecasts of Federal cash requirements in the ''Remarks'' section of the report.

(iii) When practical and deemed necessary, DoD Components may require recipients to report in the ''Remarks'' section the amount of cash advances received in excess of three working days. Recipients shall provide short narrative explanations of actions taken to reduce the excess balances.

(iv) Recipients shall be required to submit not more than the original and two copies of the SF–272 15 calendar days following the end of each quarter. DoD Components may require a monthly report from those recipients receiving advances totaling $1 million or more per year.

(v) DoD Components may waive the requirement for submission of the SF–272 for any one of the following reasons:

(A) When monthly advances do not exceed $25,000 per recipient, provided that such advances are monitored through other forms contained in this section;

(B) If, in the grants officer's opinion, the recipient's accounting controls are adequate to minimize excessive Federal advances; or

(C) When electronic payment mechanisms or SF–270 forms provide adequate data.

(b) When the DoD Component needs additional information or more frequent reports, the following shall be observed:

(1) When additional information is needed to comply with legislative requirements, grants officers shall issue instructions to require recipients to submit such information under the ''Remarks'' section of the reports.

(2) When a grants officer, after consultation with the Federal agency assigned cognizance for a recipient's audit and audit resolution, determines that the recipient's accounting system does not meet the standards in § 32.21, additional pertinent information to further monitor awards may be obtained upon written notice to the recipient until such time as the system is brought up to standard. The grants officer, in obtaining this information, shall comply with applicable report clearance requirements of 5 CFR part 1320.

[11] See footnote 2 to § 32.12(a).

[12] See footnote 2 to § 32.12(a).

(3) Grants officers are encouraged to shade out any line item on any report if not necessary.

(4) DoD Components are encouraged to accept the identical information from the recipients in machine readable format or computer printouts or electronic outputs in lieu of prescribed formats.

(5) DoD Components may provide computer or electronic outputs to recipients when it expedites or contributes to the accuracy of reporting.

**§ 32.53 Retention and access requirements for records.**

(a) This section sets forth requirements for record retention and access to records for awards to recipients. DoD Components shall not impose any other record retention or access requirements upon recipients.

(b) Financial records, supporting documents, statistical records, and all other records pertinent to an award shall be retained for a period of three years from the date of submission of the final expenditure report. The only exceptions are the following:

(1) If any litigation, claim, or audit is started before the expiration of the 3-year period, the records shall be retained until all litigation, claims or audit findings involving the records have been resolved and final action taken.

(2) Records for real property and equipment acquired with Federal funds shall be retained for 3 years after final disposition.

(3) When records are transferred to or maintained by the DoD Component that made the award, the 3-year retention requirement is not applicable to the recipient.

(4) Indirect cost rate proposals, cost allocations plans, and related records, for which retention requirements are specified in paragraph (g) of this section.

(c) Copies of original records may be substituted for the original records if authorized by the grants officer.

(d) The grants officer shall request that recipients transfer certain records to DoD Component custody when he or she determines that the records possess long term retention value. However, in order to avoid duplicate recordkeeping, a grants officer may make arrangements for recipients to retain any records that are continuously needed for joint use.

(e) DoD Components, the Inspector General, Comptroller General of the United States, or any of their duly authorized representatives, have the right of timely and unrestricted access to any books, documents, papers, or other records of recipients that are pertinent to the awards, in order to make audits, examinations, excerpts, transcripts and copies of such documents. This right also includes timely and reasonable access to a recipient's personnel for the purpose of interview and discussion related to such documents. The rights of access in this paragraph are not limited to the required retention period, but shall last as long as records are retained.

(f) Unless required by statute, no DoD Component shall place restrictions on recipients that limit public access to the records of recipients that are pertinent to an award, except when the DoD Component can demonstrate that such records shall be kept confidential and would have been exempted from disclosure pursuant to the Freedom of Information Act (5 U.S.C. 552) if the records had belonged to the DoD Component making the award.

(g) Indirect cost rate proposals, cost allocations plans, etc. Paragraphs (g)(1) and (g)(2) of this section apply to the following types of documents, and their supporting records: indirect cost rate computations or proposals, cost allocation plans, and any similar accounting computations of the rate at which a particular group of costs is chargeable (such as computer usage chargeback rates or composite fringe benefit rates).

(1) *If submitted for negotiation*. If the recipient submits an indirect-cost proposal, plan, or other computation to the Federal agency responsible for negotiating the recipient's indirect cost rate, as the basis for negotiation of the rate, or the subrecipient submits such a proposal, plan, or computation to the recipient, then the 3-year retention period for its supporting records starts on the date of such submission.

(2) *If not submitted for negotiation*. If the recipient is not required to submit

to the cognizant Federal agency or the subrecipient is not required to submit to the recipient the proposal, plan, or other computation for negotiation purposes, then the 3-year retention period for the proposal, plan, or other computation and its supporting records starts at the end of the fiscal year (or other accounting period) covered by the proposal, plan, or other computation.

(h) If the information described in this section is maintained on a computer, recipients shall retain the computer data on a reliable medium for the time periods prescribed. Recipients may transfer computer data in machine readable form from one reliable computer medium to another. Recipients' computer data retention and transfer procedures shall maintain the integrity, reliability, and security of the original computer data. Recipients shall also maintain an audit trail describing the data transfer. For the record retention time periods prescribed in this section, recipients shall not destroy, discard, delete, or write over such computer data.

TERMINATION AND ENFORCEMENT

### § 32.60 Purpose of termination and enforcement.

Sections 32.61 and 32.62 set forth uniform suspension, termination and enforcement procedures.

### § 32.61 Termination.

(a) Awards may be terminated in whole or in part only as follows:

(1) By the grants officer, if a recipient materially fails to comply with the terms and conditions of an award;

(2) By the grants officer with the consent of the recipient, in which case the two parties shall agree upon the termination conditions, including the effective date and, in the case of partial termination, the portion to be terminated; or

(3) By the recipient upon sending to the grants officer written notification setting forth the reasons for such termination, the effective date, and, in the case of partial termination, the portion to be terminated. The recipient must provide such notice at least 30 calendar days prior to the effective date of the termination. However, if the grants officer determines in the case of partial termination that the reduced or modified portion of the award will not accomplish the purposes for which the award was made, he or she may terminate the award in its entirety.

(b) If costs are allowed under an award, the responsibilities of the recipient referred to in § 32.71, including those for property management as applicable, shall be considered in the termination of the award, and provision shall be made for continuing responsibilities of the recipient after termination, as appropriate.

### § 32.62 Enforcement.

(a) *Remedies for noncompliance*. If a recipient materially fails to comply with the terms and conditions of an award, whether stated in a Federal statute, regulation, assurance, application, or notice of award, the grants officer may, in addition to imposing any of the special conditions outlined in § 32.14, take one or more of the following actions, as appropriate in the circumstances:

(1) Temporarily withhold cash payments pending correction of the deficiency by the recipient or more severe enforcement action by the grants officer and DoD Component.

(2) Disallow (that is, deny both use of funds and any applicable matching credit for) all or part of the cost of the activity or action not in compliance.

(3) Wholly or partly suspend or terminate the current award.

(4) Withhold further awards for the project or program.

(5) Take other remedies that may be legally available.

(b) *Hearings and appeals*. In taking an enforcement action, the DoD Component shall provide the recipient an opportunity for hearing, appeal, or other administrative proceeding to which the recipient is entitled under any statute or regulation applicable to the action involved. Award terms or conditions will incorporate the procedures of 32 CFR 22.815 for processing recipient claims and disputes and for deciding appeals of grants officers' decisions.

(c) *Effects of suspension and termination*. Costs of a recipient resulting

from obligations incurred by the recipient during a suspension or after termination of an award are not allowable unless the grants officer expressly authorizes them in the notice of suspension or termination or subsequently. Other recipient costs during suspension or after termination which are necessary and not reasonably avoidable are allowable if the costs:

(1) Result from obligations which were properly incurred by the recipient before the effective date of suspension or termination, are not in anticipation of it, and in the case of a termination, are noncancellable; and

(2) Would be allowable if the award were not suspended or expired normally at the end of the funding period in which the termination takes effect.

(d) *Relationship to debarment and suspension*. The enforcement remedies identified in this section, including suspension and termination, do not preclude a recipient from being subject to debarment and suspension under 2 CFR part 1125.

[63 FR 12188, Mar. 12, 1998, as amended at 72 FR 34998, June 26, 2007]

## Subpart D—After-the-Award Requirements

### § 32.70 Purpose.

Sections 32.71 through 32.73 contain closeout procedures and other procedures for subsequent disallowances and adjustments.

### § 32.71 Closeout procedures.

(a) Recipients shall submit, within 90 calendar days after the date of completion of the award, all financial, performance, and other reports required by the terms and conditions of the award. The grants officer may approve extensions when requested by the recipient.

(b) Unless the grants officer authorizes an extension, a recipient shall liquidate all obligations incurred under the award not later than 90 calendar days after the funding period or the date of completion as specified in the terms and conditions of the award or in agency implementing instructions.

(c) The responsible grants officer and payment office shall expedite completion of steps needed to close out awards and make prompt, final payments to a recipient for allowable reimbursable costs under the award being closed out.

(d) The recipient shall promptly refund any balances of unobligated cash that the DoD Component has advanced or paid and that is not authorized to be retained by the recipient for use in other projects. OMB Circular A–129[13] governs unreturned amounts that become delinquent debts (see 32 CFR 22.820).

(e) When authorized by the terms and conditions of the award, the grants officer shall make a settlement for any upward or downward adjustments to the Federal share of costs after closeout reports are received.

(f) The recipient shall account for any real and personal property acquired with Federal funds or received from the Federal Government in accordance with §§ 32.31 through 32.37.

(g) In the event a final audit has not been performed prior to the closeout of an award, the DoD Component shall retain the right to recover an appropriate amount after fully considering the recommendations on disallowed costs resulting from the final audit.

### § 32.72 Subsequent adjustments and continuing responsibilities.

(a) The closeout of an award does not affect any of the following:

(1) The right of the Department of Defense to disallow costs and recover funds on the basis of a later audit or other review.

(2) The obligation of the recipient to return any funds due as a result of later refunds, corrections, or other transactions.

(3) Audit requirements in § 32.26.

(4) Property management requirements in §§ 32.31 through 32.37.

(5) Records retention as required in § 32.53.

(b) After closeout of an award, a relationship created under an award may be modified or ended in whole or in part with the consent of the grants officer and the recipient, provided the responsibilities of the recipient referred to in § 32.73(a), including those for property management as applicable, are

[13] See footnote 1 to § 32.1(a).

considered and provisions made for continuing responsibilities of the recipient, as appropriate.

### § 32.73 Collection of amounts due.

(a) Any funds paid to a recipient in excess of the amount to which the recipient is finally determined to be entitled under the terms and conditions of the award constitute a debt to the Federal Government.

(b) OMB Circular A–110 informs each Federal agency that:

(1) If a debt is not paid within a reasonable period after the demand for payment, the Federal agency may reduce the debt by:

(i) Making administrative offset against other requests for reimbursement.

(ii) Withholding advance payments otherwise due to the recipient.

(iii) Taking other action permitted by statute.

(2) Except as otherwise provided by law, the Federal awarding agency shall charge interest on an overdue debt in accordance with 4 CFR Chapter II, ''Federal Claims Collection Standards.''

(c) DoD grants officers shall follow the procedures in 32 CFR 22.820 for issuing demands for payment and transferring debts to DoD payment offices for collection. Recipients will be informed about pertinent procedures and timeframes through the written notices of grants officers' decisions and demands for payment.

## APPENDIX A TO PART 32—CONTRACT PROVISIONS

All contracts awarded by a recipient, including those for amounts less than the simplified acquisition threshold, shall contain the following provisions as applicable:

1. *Equal Employment Opportunity*—All contracts shall contain a provision requiring compliance with E.O. 11246 (3 CFR, 1964–1965 Comp., p. 339), ''Equal Employment Opportunity,'' as amended by E.O. 11375 (3 CFR, 1966–1970 Comp., p. 684), ''Amending Executive Order 11246 Relating to Equal Employment Opportunity,'' and as supplemented by regulations at 41 CFR ch. 60, ''Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor.''

2. *Copeland ''Anti-Kickback'' Act (18 U.S.C. 874 and 40 U.S.C. 276c)*—All contracts and subawards in excess of $2000 for construction or repair awarded by recipients and subrecipients shall include a provision for compliance with the Copeland ''Anti-Kickback'' Act (18 U.S.C. 874), as supplemented by Department of Labor regulations (29 CFR part 3, ''Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or Grants from the United States''). The Act provides that each contractor or subrecipient shall be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he is otherwise entitled. The recipient shall report all suspected or reported violations to the responsible DoD Component.

3. *Davis-Bacon Act, as amended (40 U.S.C. 276a to a–7)*—This Act applies to procurements under awards only when the Federal program legislation specifically makes it apply (i.e., Davis-Bacon does not by itself apply to procurements under awards). In cases where another statute does make the Davis-Bacon Act apply, all construction contracts awarded by the recipients and subrecipients of more than $2,000 shall include a provision for compliance with the Davis-Bacon Act (40 U.S.C. 276a to a–7) and as supplemented by Department of Labor regulations (29 CFR part 5, ''Labor Standards Provisions Applicable to Contracts Governing Federally Financed and Assisted Construction''). Under this Act, contractors shall be required to pay wages to laborers and mechanics at a rate not less than the minimum wages specified in a wage determination made by the Secretary of Labor. In addition, contractors shall be required to pay wages not less than once a week. The recipient shall place a copy of the current prevailing wage determination issued by the Department of Labor in each solicitation and the award of a contract shall be conditioned upon the acceptance of the wage determination. The recipient shall report all suspected or reported violations to the Federal awarding agency.

4. *Contract Work Hours and Safety Standards Act (40 U.S.C. 327–333)*—Where applicable, all contracts awarded by recipients in excess of $100,000 for construction or other purposes that involve the employment of mechanics or laborers shall include a provision for compliance with sections 102 and 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327–333), as supplemented by Department of Labor regulations (29 CFR part 5). Under section 102 of the Act, each contractor shall be required to compute the wages of every mechanic and laborer on the basis of a standard work week of 40 hours. Work in excess of the standard work week is permissible provided that the worker is compensated at a rate of not less than 1½ times the basic rate of pay for all hours worked in excess of 40 hours in the work week. Section

107 of the Act is applicable to construction work and provides that no laborer or mechanic shall be required to work in surroundings or under working conditions which are unsanitary, hazardous or dangerous. These requirements do not apply to the purchases of supplies or materials or articles ordinarily available on the open market, or contracts for transportation or transmission of intelligence.

5. *Rights to Inventions Made Under a Contract, Grant or Cooperative Agreement*—Contracts, grants, or cooperative agreements for the performance of experimental, developmental, or research work shall provide for the rights of the Federal Government and the recipient in any resulting invention in accordance with 37 CFR part 401, ''Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements.''

6. *Clean Air Act* (42 U.S.C. 7401 *et seq.*) and the Federal Water Pollution Control Act (33 U.S.C. 1251 *et seq.*), as amended—Contracts and subawards of amounts in excess of $100,000 shall contain a provision that requires the recipient to agree to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act (42 U.S.C. 7401 *et seq.*) and the Federal Water Pollution Control Act as amended (33 U.S.C. 1251 *et seq.*). Violations shall be reported to the responsible DoD Component and the Regional Office of the Environmental Protection Agency (EPA).

7. *Byrd Anti-Lobbying Amendment (31 U.S.C. 1352)*—Contractors who apply or bid for an award of $100,000 or more shall file the required certification. Each tier certifies to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 U.S.C. 1352. Each tier shall also disclose any lobbying with non-Federal funds that takes place in connection with obtaining any Federal award. Such disclosures are forwarded from tier to tier up to the recipient.

8. *Debarment and Suspension (E.O.s 12549 and 12689)*—A contract award with an amount expected to equal or exceed $25,000 and certain other contract awards (see 2 CFR 1125.220, which implements OMB guidance at 2 CFR 180.220) shall not be made to parties listed on the Governmentwide Excluded Parties List System, in accordance with the DoD adoption at 2 CFR part 1125 of the OMB guidance implementing E.O.s 12549 (3 CFR, 1986 Comp., p. 189) and 12689 (3 CFR, 1989 Comp., p. 235), ''Debarment and Suspension.'' The Excluded Parties List System accessible on the Internet at www.epls.gov contains the names of parties debarred, suspended, or otherwise excluded by agencies, as well as parties declared ineligible under statutory or regulatory authority other than E.O. 12549.

[63 FR 12188, Mar. 12, 1998, as amended at 70 FR 49477, Aug. 23, 2005; 72 FR 34998, June 26, 2007]

# PART 33—UNIFORM ADMINISTRATIVE REQUIREMENTS FOR GRANTS AND COOPERATIVE AGREEMENTS TO STATE AND LOCAL GOVERNMENTS

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### Subpart E—Entitlements [Reserved]

AUTHORITY: 5 U.S.C. 301; 10 U.S.C. 113.

SOURCE: 53 FR 8070, 8087, Mar. 11, 1988, unless otherwise noted. Redesignated at 57 FR 6200, Feb. 21, 1992.

## Subpart A—General

### § 33.1 Purpose and scope of this part.

This part establishes uniform administrative rules for Federal grants and cooperative agreements and subawards to State, local and Indian tribal governments.

### § 33.2 Scope of subpart.

This subpart contains general rules pertaining to this part and procedures for control of exceptions from this part.

### § 33.3 Definitions.

As used in this part:

*Accrued expenditures* mean the charges incurred by the grantee during a given period requiring the provision of funds for:

(1) Goods and other tangible property received;

(2) Services performed by employees, contractors, subgrantees, subcontractors, and other payees; and

(3) Other amounts becoming owed under programs for which no current services or performance is required, such as annuities, insurance claims, and other benefit payments.

*Accrued income* means the sum of:

(1) Earnings during a given period from services performed by the grantee and goods and other tangible property delivered to purchasers, and

(2) Amounts becoming owed to the grantee for which no current services or performance is required by the grantee.

*Acquisition cost* of an item of purchased equipment means the net invoice unit price of the property including the cost of modifications, attachments, accessories, or auxiliary apparatus necessary to make the property usable for the purpose for which it was acquired. Other charges such as the cost of installation, transportation, taxes, duty or protective in-transit insurance, shall be included or excluded from the unit acquisition cost in accordance with the grantee's regular accounting practices.

*Administrative* requirements mean those matters common to grants in general, such as financial management, kinds and frequency of reports, and retention of records. These are distinguished from ''*programmatic*'' requirements, which concern matters that can be treated only on a program-by-program or grant-by-grant basis, such as kinds of activities that can be supported by grants under a particular program.

*Awarding agency* means:

(1) With respect to a grant, the Federal agency, and

(2) With respect to a subgrant, the party that awarded the subgrant.

*Cash contributions* means the grantee's cash outlay, including the outlay of money contributed to the grantee or subgrantee by other public agencies and institutions, and private organizations and individuals. When authorized by Federal legislation, Federal funds received from other assistance agreements may be considered as grantee or subgrantee cash contributions.

*Contract* means (except as used in the definitions for ''*grant*'' and ''*subgrant*'' in this section and except where qualified by ''*Federal*'') a procurement contract under a grant or subgrant, and means a procurement subcontract under a contract.

*Cost sharing or matching* means the value of the third party in-kind contributions and the portion of the costs of a federally assisted project or program not borne by the Federal Government.

*Cost-type contract* means a contract or subcontract under a grant in which the contractor or subcontractor is paid on the basis of the costs it incurs, with or without a fee.

*Equipment* means tangible, nonexpendable, personal property having a useful life of more than one year and an acquisition cost of $5,000 or more per unit. A grantee may use its own definition of equipment provided that

such definition would at least include all equipment defined above.

*Expenditure report* means:

(1) For nonconstruction grants, the SF–269 ''Financial Status Report'' (or other equivalent report);

(2) For construction grants, the SF–271 ''Outlay Report and Request for Reimbursement'' (or other equivalent report).

*Federally recognized Indian tribal government* means the governing body or a governmental agency of any Indian tribe, band, nation, or other organized group or community (including any Native village as defined in section 3 of the Alaska Native Claims Settlement Act, 85 Stat. 688) certified by the Secretary of the Interior as eligible for the special programs and services provided by him through the Bureau of Indian Affairs.

*Government* means a State or local government or a federally recognized Indian tribal government.

*Grant* means an award of financial assistance, including cooperative agreements, in the form of money, or property in lieu of money, by the Federal Government to an eligible grantee. The term does not include technical assistance which provides services instead of money, or other assistance in the form of revenue sharing, loans, loan guarantees, interest subsidies, insurance, or direct appropriations. Also, the term does not include assistance, such as a fellowship or other lump sum award, which the grantee is not required to account for.

*Grantee* means the government to which a grant is awarded and which is accountable for the use of the funds provided. The grantee is the entire legal entity even if only a particular component of the entity is designated in the grant award document.

*Local government* means a county, municipality, city, town, township, local public authority (including any public and Indian housing agency under the United States Housing Act of 1937) school district, special district, intrastate district, council of governments (whether or not incorporated as a nonprofit corporation under State law), any other regional or interstate government entity, or any agency or instrumentality of a local government.

*Obligations* means the amounts of orders placed, contracts and subgrants awarded, goods and services received, and similar transactions during a given period that will require payment by the grantee during the same or a future period.

*OMB* means the United States Office of Management and Budget.

*Outlays* (expenditures) mean charges made to the project or program. They may be reported on a cash or accrual basis. For reports prepared on a cash basis, outlays are the sum of actual cash disbursement for direct charges for goods and services, the amount of indirect expense incurred, the value of in-kind contributions applied, and the amount of cash advances and payments made to contractors and subgrantees. For reports prepared on an accrued expenditure basis, outlays are the sum of actual cash disbursements, the amount of indirect expense incurred, the value of inkind contributions applied, and the new increase (or decrease) in the amounts owed by the grantee for goods and other property received, for services performed by employees, contractors, subgrantees, subcontractors, and other payees, and other amounts becoming owed under programs for which no current services or performance are required, such as annuities, insurance claims, and other benefit payments.

*Percentage of completion method* refers to a system under which payments are made for construction work according to the percentage of completion of the work, rather than to the grantee's cost incurred.

*Prior approval* means documentation evidencing consent prior to incurring specific cost.

*Real property* means land, including land improvements, structures and appurtenances thereto, excluding movable machinery and equipment.

*Share*, when referring to the awarding agency's portion of real property, equipment or supplies, means the same percentage as the awarding agency's portion of the acquiring party's total costs under the grant to which the acquisition costs under the grant to which the acquisition cost of the property was charged. Only costs are to be counted—not the value of third-party in-kind contributions.

*State* means any of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency or instrumentality of a State exclusive of local governments. The term does not include any public and Indian housing agency under United States Housing Act of 1937.

*Subgrant* means an award of financial assistance in the form of money, or property in lieu of money, made under a grant by a grantee to an eligible subgrantee. The term includes financial assistance when provided by contractual legal agreement, but does not include procurement purchases, nor does it include any form of assistance which is excluded from the definition of ''*grant*'' in this part.

*Subgrantee* means the government or other legal entity to which a subgrant is awarded and which is accountable to the grantee for the use of the funds provided.

*Supplies* means all tangible personal property other than ''*equipment*'' as defined in this part.

*Suspension* means depending on the context, either:

(1) Temporary withdrawal of the authority to obligate grant funds pending corrective action by the grantee or subgrantee or a decision to terminate the grant, or

(2) An action taken by a suspending official in accordance with agency regulations implementing E.O. 12549 to immediately exclude a person from participating in grant transactions for a period, pending completion of an investigation and such legal or debarment proceedings as may ensue.

*Termination* means permanent withdrawal of the authority to obligate previously-awarded grant funds before that authority would otherwise expire. It also means the voluntary relinquishment of that authority by the grantee or subgrantee. ''*Termination*'' does not include:

(1) Withdrawal of funds awarded on the basis of the grantee's underestimate of the unobligated balance in a prior period;

(2) Withdrawal of the unobligated balance as of the expiration of a grant;

(3) Refusal to extend a grant or award additional funds, to make a competing or noncompeting continuation, renewal, extension, or supplemental award; or

(4) Voiding of a grant upon determination that the award was obtained fraudulently, or was otherwise illegal or invalid from inception.

*Terms of a grant or subgrant* mean all requirements of the grant or subgrant, whether in statute, regulations, or the award document.

*Third party in-kind contributions* mean property or services which benefit a federally assisted project or program and which are contributed by non-Federal third parties without charge to the grantee, or a cost-type contractor under the grant agreement.

*Unliquidated obligations* for reports prepared on a cash basis mean the amount of obligations incurred by the grantee that has not been paid. For reports prepared on an accrued expenditure basis, they represent the amount of obligations incurred by the grantee for which an outlay has not been recorded.

*Unobligated balance* means the portion of the funds authorized by the Federal agency that has not been obligated by the grantee and is determined by deducting the cumulative obligations from the cumulative funds authorized.

**§ 33.4 Applicability.**

(a) *General.* Subparts A through D of this part apply to all grants and subgrants to governments, except where inconsistent with Federal statutes or with regulations authorized in accordance with the exception provision of § 33.6, or:

(1) Grants and subgrants to State and local institutions of higher education or State and local hospitals.

(2) The block grants authorized by the Omnibus Budget Reconciliation Act of 1981 (Community Services; Preventive Health and Health Services; Alcohol, Drug Abuse, and Mental Health Services; Maternal and Child Health Services; Social Services; Low-Income Home Energy Assistance; States' Program of Community Development Block Grants for Small Cities; and Elementary and Secondary Education

other than programs administered by the Secretary of Education under title V, subtitle D, chapter 2, section 583—the Secretary's discretionary grant program) and titles I-III of the Job Training Partnership Act of 1982 and under the Public Health Services Act (section 1921), Alcohol and Drug Abuse Treatment and Rehabilitation Block Grant and part C of title V, Mental Health Service for the Homeless Block Grant).

(3) Entitlement grants to carry out the following programs of the Social Security Act:

(i) Aid to Needy Families with Dependent Children (title IV-A of the Act, not including the Work Incentive Program (WIN) authorized by section 402(a)19(G); HHS grants for WIN are subject to this part);

(ii) Child Support Enforcement and Establishment of Paternity (title IV-D of the Act);

(iii) Foster Care and Adoption Assistance (title IV-E of the Act);

(iv) Aid to the Aged, Blind, and Disabled (titles I, X, XIV, and XVI-AABD of the Act); and

(v) Medical Assistance (Medicaid) (title XIX of the Act) not including the State Medicaid Fraud Control program authorized by section 1903(a)(6)(B).

(4) Entitlement grants under the following programs of The National School Lunch Act:

(i) School Lunch (section 4 of the Act),

(ii) Commodity Assistance (section 6 of the Act),

(iii) Special Meal Assistance (section 11 of the Act),

(iv) Summer Food Service for Children (section 13 of the Act), and

(v) Child Care Food Program (section 17 of the Act).

(5) Entitlement grants under the following programs of The Child Nutrition Act of 1966:

(i) Special Milk (section 3 of the Act), and

(ii) School Breakfast (section 4 of the Act).

(6) Entitlement grants for State Administrative expenses under The Food Stamp Act of 1977 (section 16 of the Act).

(7) A grant for an experimental, pilot, or demonstration project that is also supported by a grant listed in paragraph (a)(3) of this section;

(8) Grant funds awarded under subsection 412(e) of the Immigration and Nationality Act (8 U.S.C. 1522(e)) and subsection 501(a) of the Refugee Education Assistance Act of 1980 (Pub. L. 96–422, 94 Stat. 1809), for cash assistance, medical assistance, and supplemental security income benefits to refugees and entrants and the administrative costs of providing the assistance and benefits;

(9) Grants to local education agencies under 20 U.S.C. 236 through 241–1(a), and 242 through 244 (portions of the Impact Aid program), except for 20 U.S.C. 238(d)(2)(c) and 240(f) (Entitlement Increase for Handicapped Children); and

(10) Payments under the Veterans Administration's State Home Per Diem Program (38 U.S.C. 641(a)).

(b) *Entitlement programs.* Entitlement programs enumerated above in §33.4(a)(3) through (8) are subject to subpart E.

[53 FR 8070 and 8087, Mar. 11, 1988. Redesignated and amended at 57 FR 6199 and 6200, Feb. 21, 1992]

### §33.5 Effect on other issuances.

All other grants administration provisions of codified program regulations, program manuals, handbooks and other nonregulatory materials which are inconsistent with this part are superseded, except to the extent they are required by statute, or authorized in accordance with the exception provision in §33.6.

[53 FR 8070 and 8087, Mar. 11, 1988. Redesignated and amended at 57 FR 6199 and 6200, Feb. 21, 1992]

### §33.6 Additions and exceptions.

(a) For classes of grants and grantees subject to this part, Federal agencies may not impose additional administrative requirements except in codified regulations published in the FEDERAL REGISTER.

(b) Exceptions for classes of grants or grantees may be authorized only by OMB.

(c) Exceptions on a case-by-case basis and for subgrantees may be authorized by the affected Federal agencies.

## Subpart B—Pre-Award Requirements

### § 33.10 Forms for applying for grants.

(a) *Scope.* (1) This section prescribes forms and instructions to be used by governmental organizations (except hospitals and institutions of higher education operated by a government) in applying for grants. This section is not applicable, however, to formula grant programs which do not require applicants to apply for funds on a project basis.

(2) This section applies only to applications to Federal agencies for grants, and is not required to be applied by grantees in dealing with applicants for subgrants. However, grantees are encouraged to avoid more detailed or burdensome application requirements for subgrants.

(b) *Authorized forms and instructions for governmental organizations.* (1) In applying for grants, applicants shall only use standard application forms or those prescribed by the granting agency with the approval of OMB under the Paperwork Reduction Act of 1980.

(2) Applicants are not required to submit more than the original and two copies of preapplications or applications.

(3) Applicants must follow all applicable instructions that bear OMB clearance numbers. Federal agencies may specify and describe the programs, functions, or activities that will be used to plan, budget, and evaluate the work under a grant. Other supplementary instructions may be issued only with the approval of OMB to the extent required under the Paperwork Reduction Act of 1980. For any standard form, except the SF–424 facesheet, Federal agencies may shade out or instruct the applicant to disregard any line item that is not needed.

(4) When a grantee applies for additional funding (such as a continuation or supplemental award) or amends a previously submitted application, only the affected pages need be submitted. Previously submitted pages with information that is still current need not be resubmitted.

### § 33.11 State plans.

(a) *Scope.* The statutes for some programs require States to submit plans before receiving grants. Under regulations implementing Executive Order 12372, ''Intergovernmental Review of Federal Programs,'' States are allowed to simplify, consolidate and substitute plans. This section contains additional provisions for plans that are subject to regulations implementing the Executive order.

(b) *Requirements.* A State need meet only Federal administrative or programmatic requirements for a plan that are in statutes or codified regulations.

(c) *Assurances.* In each plan the State will include an assurance that the State shall comply with all applicable Federal statutes and regulations in effect with respect to the periods for which it receives grant funding. For this assurance and other assurances required in the plan, the State may:

(1) Cite by number the statutory or regulatory provisions requiring the assurances and affirm that it gives the assurances required by those provisions,

(2) Repeat the assurance language in the statutes or regulations, or

(3) Develop its own language to the extent permitted by law.

(d) *Amendments.* A State will amend a plan whenever necessary to reflect: (1) New or revised Federal statutes or regulations or (2) a material change in any State law, organization, policy, or State agency operation. The State will obtain approval for the amendment and its effective date but need submit for approval only the amended portions of the plan.

### § 33.12 Special grant or subgrant conditions for "high-risk" grantees.

(a) A grantee or subgrantee may be considered ''high risk'' if an awarding agency determines that a grantee or subgrantee:

(1) Has a history of unsatisfactory performance, or

(2) Is not financially stable, or

(3) Has a management system which does not meet the management standards set forth in this part, or

(4) Has not conformed to terms and conditions of previous awards, or

(5) Is otherwise not responsible; and if the awarding agency determines that an award will be made, special conditions and/or restrictions shall correspond to the high risk condition and shall be included in the award.

(b) Special conditions or restrictions may include:

(1) Payment on a reimbursement basis;

(2) Withholding authority to proceed to the next phase until receipt of evidence of acceptable performance within a given funding period;

(3) Requiring additional, more detailed financial reports;

(4) Additional project monitoring;

(5) Requiring the grantee or subgrantee to obtain technical or management assistance; or

(6) Establishing additional prior approvals.

(c) If an awarding agency decides to impose such conditions, the awarding official will notify the grantee or subgrantee as early as possible, in writing, of:

(1) The nature of the special conditions/restrictions;

(2) The reason(s) for imposing them;

(3) The corrective actions which must be taken before they will be removed and the time allowed for completing the corrective actions and

(4) The method of requesting reconsideration of the conditions/restrictions imposed.

## Subpart C—Post-Award Requirements

FINANCIAL ADMINISTRATION

### § 33.20 Standards for financial management systems.

(a) A State must expand and account for grant funds in accordance with State laws and procedures for expending and accounting for its own funds. Fiscal control and accounting procedures of the State, as well as its subgrantees and cost-type contractors, must be sufficient to—

(1) Permit preparation of reports required by this part and the statutes authorizing the grant, and

(2) Permit the tracing of funds to a level of expenditures adequate to establish that such funds have not been used in violation of the restrictions and prohibitions of applicable statutes.

(b) The financial management systems of other grantees and subgrantees must meet the following standards:

(1) *Financial reporting*. Accurate, current, and complete disclosure of the financial results of financially assisted activities must be made in accordance with the financial reporting requirements of the grant or subgrant.

(2) *Accounting records*. Grantees and subgrantees must maintain records which adequately identify the source and application of funds provided for financially-assisted activities. These records must contain information pertaining to grant or subgrant awards and authorizations, obligations, unobligated balances, assets, liabilities, outlays or expenditures, and income.

(3) *Internal control*. Effective control and accountability must be maintained for all grant and subgrant cash, real and personal property, and other assets. Grantees and subgrantees must adequately safeguard all such property and must assure that it is used solely for authorized purposes.

(4) *Budget control*. Actual expenditures or outlays must be compared with budgeted amounts for each grant or subgrant. Financial information must be related to performance or productivity data, including the development of unit cost information whenever appropriate or specifically required in the grant or subgrant agreement. If unit cost data are required, estimates based on available documentation will be accepted whenever possible.

(5) *Allowable cost*. Applicable OMB cost principles, agency program regulations, and the terms of grant and subgrant agreements will be followed in determining the reasonableness, allowability, and allocability of costs.

(6) *Source documentation*. Accounting records must be supported by such source documentation as cancelled checks, paid bills, payrolls, time and attendance records, contract and subgrant award documents, etc.

(7) *Cash management*. Procedures for minimizing the time elapsing between the transfer of funds from the U.S. Treasury and disbursement by grantees and subgrantees must be followed

whenever advance payment procedures are used. Grantees must establish reasonable procedures to ensure the receipt of reports on subgrantees' cash balances and cash disbursements in sufficient time to enable them to prepare complete and accurate cash transactions reports to the awarding agency. When advances are made by letter-of-credit or electronic transfer of funds methods, the grantee must make drawdowns as close as possible to the time of making disbursements. Grantees must monitor cash drawdowns by their subgrantees to assure that they conform substantially to the same standards of timing and amount as apply to advances to the grantees.

(c) An awarding agency may review the adequacy of the financial management system of any applicant for financial assistance as part of a preaward review or at any time subsequent to award.

**§ 33.21 Payment.**

(a) *Scope.* This section prescribes the basic standard and the methods under which a Federal agency will make payments to grantees, and grantees will make payments to subgrantees and contractors.

(b) *Basic standard.* Methods and procedures for payment shall minimize the time elapsing between the transfer of funds and disbursement by the grantee or subgrantee, in accordance with Treasury regulations at 31 CFR part 205.

(c) *Advances.* Grantees and subgrantees shall be paid in advance, provided they maintain or demonstrate the willingness and ability to maintain procedures to minimize the time elapsing between the transfer of the funds and their disbursement by the grantee or subgrantee.

(d) *Reimbursement.* Reimbursement shall be the preferred method when the requirements in paragraph (c) of this section are not met. Grantees and subgrantees may also be paid by reimbursement for any construction grant. Except as otherwise specified in regulation, Federal agencies shall not use the percentage of completion method to pay construction grants. The grantee or subgrantee may use that method to pay its construction contractor, and if it does, the awarding agency's payments to the grantee or subgrantee will be based on the grantee's or subgrantee's actual rate of disbursement.

(e) *Working capital advances.* If a grantee cannot meet the criteria for advance payments described in paragraph (c) of this section, and the Federal agency has determined that reimbursement is not feasible because the grantee lacks sufficient working capital, the awarding agency may provide cash or a working capital advance basis. Under this procedure the awarding agency shall advance cash to the grantee to cover its estimated disbursement needs for an initial period generally geared to the grantee's disbursing cycle. Thereafter, the awarding agency shall reimburse the grantee for its actual cash disbursements. The working capital advance method of payment shall not be used by grantees or subgrantees if the reason for using such method is the unwillingness or inability of the grantee to provide timely advances to the subgrantee to meet the subgrantee's actual cash disbursements.

(f) *Effect of program income, refunds, and audit recoveries on payment.* (1) Grantees and subgrantees shall disburse repayments to and interest earned on a revolving fund before requesting additional cash payments for the same activity.

(2) Except as provided in paragraph (f)(1) of this section, grantees and subgrantees shall disburse program income, rebates, refunds, contract settlements, audit recoveries and interest earned on such funds before requesting additional cash payments.

(g) *Withholding payments.* (1) Unless otherwise required by Federal statute, awarding agencies shall not withhold payments for proper charges incurred by grantees or subgrantees unless—

(i) The grantee or subgrantee has failed to comply with grant award conditions or

(ii) The grantee or subgrantee is indebted to the United States.

(2) Cash withheld for failure to comply with grant award condition, but without suspension of the grant, shall

be released to the grantee upon subsequent compliance. When a grant is suspended, payment adjustments will be made in accordance with § 33.43(c).

(3) A Federal agency shall not make payment to grantees for amounts that are withheld by grantees or subgrantees from payment to contractors to assure satisfactory completion of work. Payments shall be made by the Federal agency when the grantees or subgrantees actually disburse the withheld funds to the contractors or to escrow accounts established to assure satisfactory completion of work.

(h) *Cash depositories.* (1) Consistent with the national goal of expanding the opportunities for minority business enterprises, grantees and subgrantees are encouraged to use minority banks (a bank which is owned at least 50 percent by minority group members). A list of minority owned banks can be obtained from the Minority Business Development Agency, Department of Commerce, Washington, DC 20230.

(2) A grantee or subgrantee shall maintain a separate bank account only when required by Federal-State agreement.

(i) *Interest earned on advances.* Except for interest earned on advances of funds exempt under the Intergovernmental Cooperation Act (31 U.S.C. 6501 et seq.) and the Indian Self-Determination Act (23 U.S.C. 450), grantees and subgrantees shall promptly, but at least quarterly, remit interest earned on advances to the Federal agency. The grantee or subgrantee may keep interest amounts up to $100 per year for administrative expenses.

[53 FR 8070 and 8087, Mar. 11, 1988. Redesignated and amended at 57 FR 6199 and 6200, Feb. 21, 1992]

### § 33.22 Allowable costs.

(a) *Limitation on use of funds.* Grant funds may be used only for:

(1) The allowable costs of the grantees, subgrantees and cost-type contractors, including allowable costs in the form of payments to fixed-price contractors; and

(2) Reasonable fees or profit to cost-type contractors but not any fee or profit (or other increment above allowable costs) to the grantee or subgrantee.

(b) *Applicable cost principles.* For each kind of organization, there is a set of Federal principles for determining allowable costs. Allowable costs will be determined in accordance with the cost principles applicable to the organization incurring the costs. The following chart lists the kinds of organizations and the applicable cost principles.

| For the costs of a— | Use the principles in— |
|---|---|
| State, local or Indian tribal government. | OMB Circular A–87. |
| Private nonprofit organization other than an (1) institution of higher education, (2) hospital, or (3) organization named in OMB Circular A–122 as not subject to that circular. | OMB Circular A–122. |
| Educational institutions. ..... | OMB Circular A–21. |
| For-profit organization other than a hospital and an organization named in OBM Circular A–122 as not subject to that circular. | 48 CFR part 31. Contract Cost Principles and Procedures, or uniform cost accounting standards that comply with cost principles acceptable to the Federal agency. |

### § 33.23 Period of availability of funds.

(a) *General.* Where a funding period is specified, a grantee may charge to the award only costs resulting from obligations of the funding period unless carryover of unobligated balances is permitted, in which case the carryover balances may be charged for costs resulting from obligations of the subsequent funding period.

(b) *Liquidation of obligations.* A grantee must liquidate all obligations incurred under the award not later than 90 days after the end of the funding period (or as specified in a program regulation) to coincide with the submission of the annual Financial Status Report (SF–269). The Federal agency may extend this deadline at the request of the grantee.

### § 33.24 Matching or cost sharing.

(a) *Basic rule: Costs and contributions acceptable.* With the qualifications and exceptions listed in paragraph (b) of this section, a matching or cost sharing requirement may be satisfied by either or both of the following:

(1) Allowable costs incurred by the grantee, subgrantee or a cost-type contractor under the assistance agreement. This includes allowable costs

borne by non-Federal grants or by others cash donations from non-Federal third parties.

(2) The value of third party in-kind contributions applicable to the period to which the cost sharing or matching requirements applies.

(b) *Qualifications and exceptions*—(1) *Costs borne by other Federal grant agreements.* Except as provided by Federal statute, a cost sharing or matching requirement may not be met by costs borne by another Federal grant. This prohibition does not apply to income earned by a grantee or subgrantee from a contract awarded under another Federal grant.

(2) *General revenue sharing.* For the purpose of this section, general revenue sharing funds distributed under 31 U.S.C. 6702 are not considered Federal grant funds.

(3) *Cost or contributions counted towards other Federal costs-sharing requirements.* Neither costs nor the values of third party in-kind contributions may count towards satisfying a cost sharing or matching requirement of a grant agreement if they have been or will be counted towards satisfying a cost sharing or matching requirement of another Federal grant agreement, a Federal procurement contract, or any other award of Federal funds.

(4) *Costs financed by program income.* Costs financed by program income, as defined in § 33.25, shall not count towards satisfying a cost sharing or matching requirement unless they are expressly permitted in the terms of the assistance agreement. (This use of general program income is described in § 33.25(g).)

(5) *Services or property financed by income earned by contractors.* Contractors under a grant may earn income from the activities carried out under the contract in addition to the amounts earned from the party awarding the contract. No costs of services or property supported by this income may count toward satisfying a cost sharing or matching requirement unless other provisions of the grant agreement expressly permit this kind of income to be used to meet the requirement.

(6) *Records.* Costs and third party in-kind contributions counting towards satisfying a cost sharing or matching requirement must be verifiable from the records of grantees and subgrantee or cost-type contractors. These records must show how the value placed on third party in-kind contributions was derived. To the extent feasible, volunteer services will be supported by the same methods that the organization uses to support the allocability of regular personnel costs.

(7) *Special standards for third party in-kind contributions.* (i) Third party in-kind contributions count towards satisfying a cost sharing or matching requirement only where, if the party receiving the contributions were to pay for them, the payments would be allowable costs.

(ii) Some third party in-kind contributions are goods and services that, if the grantee, subgrantee, or contractor receiving the contribution had to pay for them, the payments would have been an indirect costs. Costs sharing or matching credit for such contributions shall be given only if the grantee, subgrantee, or contractor has established, along with its regular indirect cost rate, a special rate for allocating to individual projects or programs the value of the contributions.

(iii) A third party in-kind contribution to a fixed-price contract may count towards satisfying a cost sharing or matching requirement only if it results in:

(A) An increase in the services or property provided under the contract (without additional cost to the grantee or subgrantee) or

(B) A cost savings to the grantee or subgrantee.

(iv) The values placed on third party in-kind contributions for cost sharing or matching purposes will conform to the rules in the succeeding sections of this part. If a third party in-kind contribution is a type not treated in those sections, the value placed upon it shall be fair and reasonable.

(c) *Valuation of donated services*—(1) *Volunteer services.* Unpaid services provided to a grantee or subgrantee by individuals will be valued at rates consistent with those ordinarily paid for similar work in the grantee's or subgrantee's organization. If the grantee or subgrantee does not have employees performing similar work, the rates will

be consistent with those ordinarily paid by other employers for similar work in the same labor market. In either case, a reasonable amount for fringe benefits may be included in the valuation.

(2) *Employees of other organizations.* When an employer other than a grantee, subgrantee, or cost-type contractor furnishes free of charge the services of an employee in the employee's normal line of work, the services will be valued at the employee's regular rate of pay exclusive of the employee's fringe benefits and overhead costs. If the services are in a different line of work, paragraph (c)(1) of this section applies.

(d) *Valuation of third party donated supplies and loaned equipment or space.* (1) If a third party donates supplies, the contribution will be valued at the market value of the supplies at the time of donation.

(2) If a third party donates the use of equipment or space in a building but retains title, the contribution will be valued at the fair rental rate of the equipment or space.

(e) *Valuation of third party donated equipment, buildings, and land.* If a third party donates equipment, buildings, or land, and title passes to a grantee or subgrantee, the treatment of the donated property will depend upon the purpose of the grant or subgrant, as follows:

(1) *Awards for capital expenditures.* If the purpose of the grant or subgrant is to assist the grantee or subgrantee in the acquisition of property, the market value of that property at the time of donation may be counted as cost sharing or matching,

(2) *Other awards.* If assisting in the acquisition of property is not the purpose of the grant or subgrant, paragraphs (e)(2) (i) and (ii) of this section apply:

(i) If approval is obtained from the awarding agency, the market value at the time of donation of the donated equipment or buildings and the fair rental rate of the donated land may be counted as cost sharing or matching. In the case of a subgrant, the terms of the grant agreement may require that the approval be obtained from the Federal agency as well as the grantee. In all cases, the approval may be given only if a purchase of the equipment or rental of the land would be approved as an allowable direct cost. If any part of the donated property was acquired with Federal funds, only the non-Federal share of the property may be counted as cost-sharing or matching.

(ii) If approval is not obtained under paragraph (e)(2)(i) of this section, no amount may be counted for donated land, and only depreciation or use allowances may be counted for donated equipment and buildings. The depreciation or use allowances for this property are not treated as third party in-kind contributions. Instead, they are treated as costs incurred by the grantee or subgrantee. They are computed and allocated (usually as indirect costs) in accordance with the cost principles specified in § 33.22, in the same way as depreciation or use allowances for purchased equipment and buildings. The amount of depreciation or use allowances for donated equipment and buildings is based on the property's market value at the time it was donated.

(f) *Valuation of grantee or subgrantee donated real property for construction/acquisition.* If a grantee or subgrantee donates real property for a construction or facilities acquisition project, the current market value of that property may be counted as cost sharing or matching. If any part of the donated property was acquired with Federal funds, only the non-Federal share of the property may be counted as cost sharing or matching.

(g) *Appraisal of real property.* In some cases under paragraphs (d), (e) and (f) of this section, it will be necessary to establish the market value of land or a building or the fair rental rate of land or of space in a building. In these cases, the Federal agency may require the market value or fair rental value be set by an independent appraiser, and that the value or rate be certified by the grantee. This requirement will also be imposed by the grantee on subgrantees.

[53 FR 8070 and 8087, Mar. 11, 1988. Redesignated and amended at 57 FR 6199 and 6200, Feb. 21, 1992]

### § 33.25 Program income.

(a) *General.* Grantees are encouraged to earn income to defray program costs. Program income includes income

from fees for services performed, from the use or rental of real or personal property acquired with grant funds, from the sale of commodities or items fabricated under a grant agreement, and from payments of principal and interest on loans made with grant funds. Except as otherwise provided in regulations of the Federal agency, program income does not include interest on grant funds, rebates, credits, discounts, refunds, etc. and interest earned on any of them.

(b) *Definition of program income.* Program income means gross income received by the grantee or subgrantee directly generated by a grant supported activity, or earned only as a result of the grant agreement during the grant period. ''During the grant period'' is the time between the effective date of the award and the ending date of the award reflected in the final financial report.

(c) *Cost of generating program income.* If authorized by Federal regulations or the grant agreement, costs incident to the generation of program income may be deducted from gross income to determine program income.

(d) *Governmental revenues.* Taxes, special assessments, levies, fines, and other such revenues raised by a grantee or subgrantee are not program income unless the revenues are specifically identified in the grant agreement or Federal agency regulations as program income.

(e) *Royalties.* Income from royalties and license fees for copyrighted material, patents, and inventions developed by a grantee or subgrantee is program income only if the revenues are specifically identified in the grant agreement or Federal agency regulations as program income. (See § 33.34.)

(f) *Property.* Proceeds from the sale of real property or equipment will be handled in accordance with the requirements of §§ 33.31 and 33.32.

(g) *Use of program income.* Program income shall be deducted from outlays which may be both Federal and non-Federal as described below, unless the Federal agency regulations or the grant agreement specify another alternative (or a combination of the alternatives). In specifying alternatives, the Federal agency may distinguish between income earned by the grantee and income earned by subgrantees and between the sources, kinds, or amounts of income. When Federal agencies authorize the alternatives in paragraphs (g) (2) and (3) of this section, program income in excess of any limits stipulated shall also be deducted from outlays.

(1) *Deduction.* Ordinarily program income shall be deducted from total allowable costs to determine the net allowable costs. Program income shall be used for current costs unless the Federal agency authorizes otherwise. Program income which the grantee did not anticipate at the time of the award shall be used to reduce the Federal agency and grantee contributions rather than to increase the funds committed to the project.

(2) *Addition.* When authorized, program income may be added to the funds committed to the grant agreement by the Federal agency and the grantee. The program income shall be used for the purposes and under the conditions of the grant agreement.

(3) *Cost sharing or matching.* When authorized, program income may be used to meet the cost sharing or matching requirement of the grant agreement. The amount of the Federal grant award remains the same.

(h) *Income after the award period.* There are no Federal requirements governing the disposition of program income earned after the end of the award period (i.e., until the ending date of the final financial report, see paragraph (a) of this section), unless the terms of the agreement or the Federal agency regulations provide otherwise.

[53 FR 8070 and 8087, Mar. 11, 1988. Redesignated and amended at 57 FR 6199 and 6200, Feb. 21, 1992]

### § 33.26 Non-Federal audit.

(a) *Basic rule.* Grantees and subgrantees are responsible for obtaining audits in accordance with the Single Audit Act Amendments of 1996 (31 U.S.C. 7501–7507) and revised OMB Circular A–133, ''Audits of States, Local Governments, and Non-Profit Organizations.'' The audits shall be made by an independent auditor in accordance with generally accepted government

auditing standards covering financial audits.

(b) *Subgrantees.* State or local governments, as those terms are defined for purposes of the Single Audit Act Amendments of 1996, that provide Federal awards to a subgrantee, which expends $500,000 or more (or other amount as specified by OMB) in Federal awards in a fiscal year, shall:

(1) Determine whether State or local subgrantees have met the audit requirements of the Act and whether subgrantees covered by OMB Circular A–110, ''Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations,'' have met the audit requirements of the Act. Commercial contractors (private for-profit and private and governmental organizations) providing goods and services to State and local governments are not required to have a single audit performed. State and local governments should use their own procedures to ensure that the contractor has complied with laws and regulations affecting the expenditure of Federal funds;

(2) Determine whether the subgrantee spent Federal assistance funds provided in accordance with applicable laws and regulations. This may be accomplished by reviewing an audit of the subgrantee made in accordance with the Act, Circular A–110, or through other means (e.g., program reviews) if the subgrantee has not had such an audit;

(3) Ensure that appropriate corrective action is taken within six months after receipt of the audit report in instance of noncompliance with Federal laws and regulations;

(4) Consider whether subgrantee audits necessitate adjustment of the grantee's own records; and

(5) Require each subgrantee to permit independent auditors to have access to the records and financial statements.

(c) *Auditor selection.* In arranging for audit services, § 33.36 shall be followed.

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CHANGES, PROPERTY, AND SUBAWARDS

### § 33.30 Changes.

(a) *General.* Grantees and subgrantees are permitted to rebudget within the approved direct cost budget to meet unanticipated requirements and may make limited program changes to the approved project. However, unless waived by the awarding agency, certain types of post-award changes in budgets and projects shall require the prior written approval of the awarding agency.

(b) *Relation to cost principles.* The applicable cost principles (see § 33.22) contain requirements for prior approval of certain types of costs. Except where waived, those requirements apply to all grants and subgrants even if paragraphs (c) through (f) of this section do not.

(c) *Budget changes*—(1) *Nonconstruction projects.* Except as stated in other regulations or an award document, grantees or subgrantees shall obtain the prior approval of the awarding agency whenever any of the following changes is anticipated under a nonconstruction award:

(i) Any revision which would result in the need for additional funding.

(ii) Unless waived by the awarding agency, cumulative transfers among direct cost categories, or, if applicable, among separately budgeted programs, projects, functions, or activities which exceed or are expected to exceed ten percent of the current total approved budget, whenever the awarding agency's share exceeds $100,000.

(iii) Transfer of funds allotted for training allowances (i.e., from direct payments to trainees to other expense categories).

(2) *Construction projects.* Grantees and subgrantees shall obtain prior written approval for any budget revision which would result in the need for additional funds.

(3) *Combined construction and nonconstruction projects.* When a grant or subgrant provides funding for both construction and nonconstruction activities, the grantee or subgrantee must obtain prior written approval from the awarding agency before making any

fund or budget transfer from nonconstruction to construction or vice versa.

(d) *Programmatic changes.* Grantees or subgrantees must obtain the prior approval of the awarding agency whenever any of the following actions is anticipated:

(1) Any revision of the scope or objectives of the project (regardless of whether there is an associated budget revision requiring prior approval).

(2) Need to extend the period of availability of funds.

(3) Changes in key persons in cases where specified in an application or a grant award. In research projects, a change in the project director or principal investigator shall always require approval unless waived by the awarding agency.

(4) Under nonconstruction projects, contracting out, subgranting (if authorized by law) or otherwise obtaining the services of a third party to perform activities which are central to the purposes of the award. This approval requirement is in addition to the approval requirements of § 33.36 but does not apply to the procurement of equipment, supplies, and general support services.

(e) *Additional prior approval requirements.* The awarding agency may not require prior approval for any budget revision which is not described in paragraph (c) of this section.

(f) *Requesting prior approval.* (1) A request for prior approval of any budget revision will be in the same budget formal the grantee used in its application and shall be accompanied by a narrative justification for the proposed revision.

(2) A request for a prior approval under the applicable Federal cost principles (see § 33.22) may be made by letter.

(3) A request by a subgrantee for prior approval will be addressed in writing to the grantee. The grantee will promptly review such request and shall approve or disapprove the request in writing. A grantee will not approve any budget or project revision which is inconsistent with the purpose or terms and conditions of the Federal grant to the grantee. If the revision, requested by the subgrantee would result in a change to the grantee's approved project which requires Federal prior approval, the grantee will obtain the Federal agency's approval before approving the subgrantee's request.

[53 FR 8070 and 8087, Mar. 11, 1988. Redesignated and amended at 57 FR 6199 and 6200, Feb. 21, 1992]

### § 33.31 Real property.

(a) *Title.* Subject to the obligations and conditions set forth in this section, title to real property acquired under a grant or subgrant will vest upon acquisition in the grantee or subgrantee respectively.

(b) *Use.* Except as otherwise provided by Federal statutes, real property will be used for the originally authorized purposes as long as needed for that purposes, and the grantee or subgrantee shall not dispose of or encumber its title or other interests.

(c) *Disposition.* When real property is no longer needed for the originally authorized purpose, the grantee or subgrantee will request disposition instructions from the awarding agency. The instructions will provide for one of the following alternatives:

(1) *Retention of title.* Retain title after compensating the awarding agency. The amount paid to the awarding agency will be computed by applying the awarding agency's percentage of participation in the cost of the original purchase to the fair market value of the property. However, in those situations where a grantee or subgrantee is disposing of real property acquired with grant funds and acquiring replacement real property under the same program, the net proceeds from the disposition may be used as an offset to the cost of the replacement property.

(2) *Sale of property.* Sell the property and compensate the awarding agency. The amount due to the awarding agency will be calculated by applying the awarding agency's percentage of participation in the cost of the original purchase to the proceeds of the sale after deduction of any actual and reasonable selling and fixing-up expenses. If the grant is still active, the net proceeds from sale may be offset against the original cost of the property. When a grantee or subgrantee is directed to sell property, sales procedures shall be

followed that provide for competition to the extent practicable and result in the highest possible return.

(3) *Transfer of title.* Transfer title to the awarding agency or to a third-party designated/approved by the awarding agency. The grantee or subgrantee shall be paid an amount calculated by applying the grantee or subgrantee's percentage of participation in the purchase of the real property to the current fair market value of the property.

**§ 33.32 Equipment.**

(a) *Title.* Subject to the obligations and conditions set forth in this section, title to equipment acquired under a grant or subgrant will vest upon acquisition in the grantee or subgrantee respectively.

(b) *States.* A State will use, manage, and dispose of equipment acquired under a grant by the State in accordance with State laws and procedures. Other grantees and subgrantees will follow paragraphs (c) through (e) of this section.

(c) *Use.* (1) Equipment shall be used by the grantee or subgrantee in the program or project for which it was acquired as long as needed, whether or not the project or program continues to be supported by Federal funds. When no longer needed for the original program or project, the equipment may be used in other activities currently or previously supported by a Federal agency.

(2) The grantee or subgrantee shall also make equipment available for use on other projects or programs currently or previously supported by the Federal Government, providing such use will not interfere with the work on the projects or program for which it was originally acquired. First preference for other use shall be given to other programs or projects supported by the awarding agency. User fees should be considered if appropriate.

(3) Notwithstanding the encouragement in § 33.25(a) to earn program income, the grantee or subgrantee must not use equipment acquired with grant funds to provide services for a fee to compete unfairly with private companies that provide equivalent services, unless specifically permitted or contemplated by Federal statute.

(4) When acquiring replacement equipment, the grantee or subgrantee may use the equipment to be replaced as a trade-in or sell the property and use the proceeds to offset the cost of the replacement property, subject to the approval of the awarding agency.

(d) *Management requirements.* Procedures for managing equipment (including replacement equipment), whether acquired in whole or in part with grant funds, until disposition takes place will, as a minimum, meet the following requirements:

(1) Property records must be maintained that include a description of the property, a serial number or other identification number, the source of property, who holds title, the acquisition date, and cost of the property, percentage of Federal participation in the cost of the property, the location, use and condition of the property, and any ultimate disposition data including the date of disposal and sale price of the property.

(2) A physical inventory of the property must be taken and the results reconciled with the property records at least once every two years.

(3) A control system must be developed to ensure adequate safeguards to prevent loss, damage, or theft of the property. Any loss, damage, or theft shall be investigated.

(4) Adequate maintenance procedures must be developed to keep the property in good condition.

(5) If the grantee or subgrantee is authorized or required to sell the property, proper sales procedures must be established to ensure the highest possible return.

(e) *Disposition.* When original or replacement equipment acquired under a grant or subgrant is no longer needed for the original project or program or for other activities currently or previously supported by a Federal agency, disposition of the equipment will be made as follows:

(1) Items of equipment with a current per-unit fair market value of less than $5,000 may be retained, sold or otherwise disposed of with no further obligation to the awarding agency.

(2) Items of equipment with a current per unit fair market value in excess of $5,000 may be retained or sold and the awarding agency shall have a right to an amount calculated by multiplying the current market value or proceeds from sale by the awarding agency's share of the equipment.

(3) In cases where a grantee or subgrantee fails to take appropriate disposition actions, the awarding agency may direct the grantee or subgrantee to take excess and disposition actions.

(f) *Federal equipment.* In the event a grantee or subgrantee is provided federally-owned equipment:

(1) Title will remain vested in the Federal Government.

(2) Grantees or subgrantees will manage the equipment in accordance with Federal agency rules and procedures, and submit an annual inventory listing.

(3) When the equipment is no longer needed, the grantee or subgrantee will request disposition instructions from the Federal agency.

(g) *Right to transfer title.* The Federal awarding agency may reserve the right to transfer title to the Federal Government or a third part named by the awarding agency when such a third party is otherwise eligible under existing statutes. Such transfers shall be subject to the following standards:

(1) The property shall be identified in the grant or otherwise made known to the grantee in writing.

(2) The Federal awarding agency shall issue disposition instruction within 120 calendar days after the end of the Federal support of the project for which it was acquired. If the Federal awarding agency fails to issue disposition instructions within the 120 calendar-day period the grantee shall follow § 33.32(e).

(3) When title to equipment is transferred, the grantee shall be paid an amount calculated by applying the percentage of participation in the purchase to the current fair market value of the property.

[53 FR 8070 and 8087, Mar. 11, 1988. Redesignated and amended at 57 FR 6199 and 6201, Feb. 21, 1992]

### § 33.33 Supplies.

(a) *Title.* Title to supplies acquired under a grant or subgrant will vest, upon acquisition, in the grantee or subgrantee respectively.

(b) *Disposition.* If there is a residual inventory of unused supplies exceeding $5,000 in total aggregate fair market value upon termination or completion of the award, and if the supplies are not needed for any other federally sponsored programs or projects, the grantee or subgrantee shall compensate the awarding agency for its share.

### § 33.34 Copyrights.

The Federal awarding agency reserves a royalty-free, nonexclusive, and irrevocable license to reproduce, publish or otherwise use, and to authorize others to use, for Federal Government purposes:

(a) The copyright in any work developed under a grant, subgrant, or contract under a grant or subgrant; and

(b) Any rights of copyright to which a grantee, subgrantee or a contractor purchases ownership with grant support.

### § 33.35 Subawards to debarred and suspended parties.

Grantees and subgrantees must comply with the requirements of OMB guidance in Subpart C, 2 CFR part 180, as implemented by the Department of Defense in 2 CFR part 1125. Those requirements include restrictions on entering into a covered transaction with any party which is debarred or suspended or is otherwise excluded from or ineligible for participation in Federal assistance programs under Executive Order 12549, ''Debarment and Suspension.''

[53 FR 8070, 8087, Mar. 11, 1988, as amended at 70 FR 49477, Aug. 23, 2005; 72 FR 34998, June 26, 2007]

### § 33.36 Procurement.

(a) *States.* When procuring property and services under a grant, a State will follow the same policies and procedures it uses for procurements from its non-Federal funds. The State will ensure that every purchase order or other contract includes any clauses required by

Federal statutes and executive orders and their implementing regulations. Other grantees and subgrantees will follow paragraphs (b) through (i) in this section.

(b) *Procurement standards.* (1) Grantees and subgrantees will use their own procurement procedures which reflect applicable State and local laws and regulations, provided that the procurements conform to applicable Federal law and the standards identified in this section.

(2) Grantees and subgrantees will maintain a contract administration system which ensures that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.

(3) Grantees and subgrantees will maintain a written code of standards of conduct governing the performance of their employees engaged in the award and administration of contracts. No employee, officer or agent of the grantee or subgrantee shall participate in selection, or in the award or administration of a contract supported by Federal funds if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when:

(i) The employee, officer or agent,

(ii) Any member of his immediate family,

(iii) His or her partner, or

(iv) An organization which employs, or is about to employ, any of the above, has a financial or other interest in the firm selected for award. The grantee's or subgrantee's officers, employees or agents will neither solicit nor accept gratuities, favors or anything of monetary value from contractors, potential contractors, or parties to subagreements. Grantee and subgrantees may set minimum rules where the financial interest is not substantial or the gift is an unsolicited item of nominal intrinsic value. To the extent permitted by State or local law or regulations, such standards or conduct will provide for penalties, sanctions, or other disciplinary actions for violations of such standards by the grantee's and subgrantee's officers, employees, or agents, or by contractors or their agents. The awarding agency may in regulation provide additional prohibitions relative to real, apparent, or potential conflicts of interest.

(4) Grantee and subgrantee procedures will provide for a review of proposed procurements to avoid purchase of unnecessary or duplicative items. Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase. Where appropriate, an analysis will be made of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach.

(5) To foster greater economy and efficiency, grantees and subgrantees are encouraged to enter into State and local intergovernmental agreements for procurement or use of common goods and services.

(6) Grantees and subgrantees are encouraged to use Federal excess and surplus property in lieu of purchasing new equipment and property whenever such use is feasible and reduces project costs.

(7) Grantees and subgrantees are encouraged to use value engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunities for cost reductions. Value engineering is a systematic and creative anaylsis of each contract item or task to ensure that its essential function is provided at the overall lower cost.

(8) Grantees and subgrantees will make awards only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Consideration will be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.

(9) Grantees and subgrantees will maintain records sufficient to detail the significant history of a procurement. These records will include, but are not necessarily limited to the following: rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price.

(10) Grantees and subgrantees will use time and material type contracts only—

(i) After a determination that no other contract is suitable, and

(ii) If the contract includes a ceiling price that the contractor exceeds at its own risk.

(11) Grantees and subgrantees alone will be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to source evaluation, protests, disputes, and claims. These standards do not relieve the grantee or subgrantee of any contractual responsibilities under its contracts. Federal agencies will not substitute their judgment for that of the grantee or subgrantee unless the matter is primarily a Federal concern. Violations of law will be referred to the local, State, or Federal authority having proper jurisdiction.

(12) Grantees and subgrantees will have protest procedures to handle and resolve disputes relating to their procurements and shall in all instances disclose information regarding the protest to the awarding agency. A protestor must exhaust all administrative remedies with the grantee and subgrantee before pursuing a protest with the Federal agency. Reviews of protests by the Federal agency will be limited to:

(i) Violations of Federal law or regulations and the standards of this section (violations of State or local law will be under the jurisdiction of State or local authorities) and

(ii) Violations of the grantee's or subgrantee's protest procedures for failure to review a complaint or protest. Protests received by the Federal agency other than those specified above will be referred to the grantee or subgrantee.

(c) *Competition*. (1) All procurement transactions will be conducted in a manner providing full and open competition consistent with the standards of § 33.36. Some of the situations considered to be restrictive of competition include but are not limited to:

(i) Placing unreasonable requirements on firms in order for them to qualify to do business,

(ii) Requiring unnecessary experience and excessive bonding,

(iii) Noncompetitive pricing practices between firms or between affiliated companies,

(iv) Noncompetitive awards to consultants that are on retainer contracts,

(v) Organizational conflicts of interest,

(vi) Specifying only a ''brand name'' product instead of allowing ''an equal'' product to be offered and describing the performance of other relevant requirements of the procurement, and

(vii) Any arbitrary action in the procurement process.

(2) Grantees and subgrantees will conduct procurements in a manner that prohibits the use of statutorily or administratively imposed in-State or local geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. Nothing in this section preempts State licensing laws. When contracting for architectural and engineering (A/E) services, geographic location may be a selection criteria provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.

(3) Grantees will have written selection procedures for procurement transactions. These procedures will ensure that all solicitations:

(i) Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description shall not, in competitive procurements, contain features which unduly restrict competition. The description may include a statement of the qualitative nature of the material, product or service to be procured, and when necessary, shall set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a ''brand name or equal'' description may be used as a means to define the performance or other salient requirements of a procurement. The specific features of the

named brand which must be met by offerors shall be clearly stated; and

(ii) Identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.

(4) Grantees and subgrantees will ensure that all prequalified lists of persons, firms, or products which are used in acquiring goods and services are current and include enough qualified sources to ensure maximum open and free competition. Also, grantees and subgrantees will not preclude potential bidders from qualifying during the solicitation period.

(d) *Methods of procurement to be followed*—(1) *Procurement by small purchase procedures*. Small purchase procedures are those relatively simple and informal procurement methods for securing services, supplies, or other property that do not cost more than the simplified acquisition threshold fixed at 41 U.S.C. 403(11) (currently set at $100,000). If small purchase procedures are used, price or rate quotations shall be obtained from an adequate number of qualified sources.

(2) Procurement by *sealed bids* (formal advertising). Bids are publicly solicited and a firm-fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price. The sealed bid method is the preferred method for procuring construction, if the conditions in § 33.36(d)(2)(i) apply.

(i) In order for sealed bidding to be feasible, the following conditions should be present:

(A) A complete, adequate, and realistic specification or purchase description is available;

(B) Two or more responsible bidders are willing and able to compete effectively and for the business; and

(C) The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price.

(ii) If sealed bids are used, the following requirements apply:

(A) The invitation for bids will be publicly advertised and bids shall be solicited from an adequate number of known suppliers, providing them sufficient time prior to the date set for opening the bids;

(B) The invitation for bids, which will include any specifications and pertinent attachments, shall define the items or services in order for the bidder to properly respond;

(C) All bids will be publicly opened at the time and place prescribed in the invitation for bids;

(D) A firm fixed-price contract award will be made in writing to the lowest responsive and responsible bidder. Where specified in bidding documents, factors such as discounts, transportation cost, and life cycle costs shall be considered in determining which bid is lowest. Payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of; and

(E) Any or all bids may be rejected if there is a sound documented reason.

(3) Procurement by *competitive proposals*. The technique of competitive proposals is normally conducted with more than one source submitting an offer, and either a fixed-price or cost-reimbursement type contract is awarded. It is generally used when conditions are not appropriate for the use of sealed bids. If this method is used, the following requirements apply:

(i) Requests for proposals will be publicized and identify all evaluation factors and their relative importance. Any response to publicized requests for proposals shall be honored to the maximum extent practical;

(ii) Proposals will be solicited from an adequate number of qualified sources;

(iii) Grantees and subgrantees will have a method for conducting technical evaluations of the proposals received and for selecting awardees;

(iv) Awards will be made to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered; and

(v) Grantees and subgrantees may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby competitors' qualifications are evaluated and the most qualified competitor is selected,

subject to negotiation of fair and reasonable compensation. The method, where price is not used as a selection factor, can only be used in procurement of A/E professional services. It cannot be used to purchase other types of services though A/E firms are a potential source to perform the proposed effort.

(4) Procurement by *noncompetitive proposals* is procurement through solicitation of a proposal from only one source, or after solicitation of a number of sources, competition is determined inadequate.

(i) Procurement by noncompetitive proposals may be used only when the award of a contract is infeasible under small purchase procedures, sealed bids or competitive proposals and one of the following circumstances applies:

(A) The item is available only from a single source;

(B) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation;

(C) The awarding agency authorizes noncompetitive proposals; or

(D) After solicitation of a number of sources, competition is determined inadequate.

(ii) Cost analysis, i.e., verifying the proposed cost data, the projections of the data, and the evaluation of the specific elements of costs and profits, is required.

(iii) Grantees and subgrantees may be required to submit the proposed procurement to the awarding agency for pre-award review in accordance with paragraph (g) of this section.

(e) *Contracting with small and minority firms, women's business enterprise and labor surplus area firms.* (1) The grantee and subgrantee will take all necessary affirmative steps to assure that minority firms, women's business enterprises, and labor surplus area firms are used when possible.

(2) Affirmative steps shall include:

(i) Placing qualified small and minority businesses and women's business enterprises on solicitation lists;

(ii) Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources;

(iii) Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority business, and women's business enterprises;

(iv) Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority business, and women's business enterprises;

(v) Using the services and assistance of the Small Business Administration, and the Minority Business Development Agency of the Department of Commerce; and

(vi) Requiring the prime contractor, if subcontracts are to be let, to take the affirmative steps listed in paragraphs (e)(2) (i) through (v) of this section.

(f) *Contract cost and price.* (1) Grantees and subgrantees must perform a cost or price analysis in connection with every procurement action including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, grantees must make independent estimates before receiving bids or proposals. A cost analysis must be performed when the offeror is required to submit the elements of his estimated cost, e.g., under professional, consulting, and architectural engineering services contracts. A cost analysis will be necessary when adequate price competition is lacking, and for sole source procurements, including contract modifications or change orders, unless price resonableness can be established on the basis of a catalog or market price of a commercial product sold in substantial quantities to the general public or based on prices set by law or regulation. A price analysis will be used in all other instances to determine the reasonableness of the proposed contract price.

(2) Grantees and subgrantees will negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed. To establish a fair and reasonable profit, consideration will be given to the

complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.

(3) Costs or prices based on estimated costs for contracts under grants will be allowable only to the extent that costs incurred or cost estimates included in negotiated prices are consistent with Federal cost principles (see § 33.22). Grantees may reference their own cost principles that comply with the applicable Federal cost principles.

(4) The cost plus a percentage of cost and percentage of construction cost methods of contracting shall not be used.

(g) *Awarding agency review.* (1) Grantees and subgrantees must make available, upon request of the awarding agency, technical specifications on proposed procurements where the awarding agency believes such review is needed to ensure that the item and/or service specified is the one being proposed for purchase. This review generally will take place prior to the time the specification is incorporated into a solicitation document. However, if the grantee or subgrantee desires to have the review accomplished after a solicitation has been developed, the awarding agency may still review the specifications, with such review usually limited to the technical aspects of the proposed purchase.

(2) Grantees and subgrantees must on request make available for awarding agency pre-award review procurement documents, such as requests for proposals or invitations for bids, independent cost estimates, etc. when:

(i) A grantee's or subgrantee's procurement procedures or operation fails to comply with the procurement standards in this section; or

(ii) The procurement is expected to exceed the simplified acquisition threshold and is to be awarded without competition or only one bid or offer is received in response to a solicitation; or

(iii) The procurement, which is expected to exceed the simplified acquisition threshold, specifies a ''brand name'' product; or

(iv) The proposed award is more than the simplified acquisition threshold and is to be awarded to other than the apparent low bidder under a sealed bid procurement; or

(v) A proposed contract modification changes the scope of a contract or increases the contract amount by more than the simplified acquisition threshold.

(3) A grantee or subgrantee will be exempt from the pre-award review in paragraph (g)(2) of this section if the awarding agency determines that its procurement systems comply with the standards of this section.

(i) A grantee or subgrantee may request that its procurement system be reviewed by the awarding agency to determine whether its system meets these standards in order for its system to be certified. Generally, these reviews shall occur where there is a continuous high-dollar funding, and third-party contracts are awarded on a regular basis.

(ii) A grantee or subgrantee may self-certify its procurement system. Such self-certification shall not limit the awarding agency's right to survey the system. Under a self-certification procedure, awarding agencies may wish to rely on written assurances from the grantee or subgrantee that it is complying with these standards. A grantee or subgrantee will cite specific procedures, regulations, standards, etc., as being in compliance with these requirements and have its system available for review.

(h) *Bonding requirements.* For construction or facility improvement contracts or subcontracts exceeding the simplified acquisition threshold, the awarding agency may accept the bonding policy and requirements of the grantee or subgrantee provided the awarding agency has made a determination that the awarding agency's interest is adequately protected. If such a determination has not been made, the minimum requirements shall be as follows:

(1) *A bid guarantee from each bidder equivalent to five percent of the bid price.* The ''bid guarantee'' shall consist of a firm commitment such as a bid bond,

certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of his bid, execute such contractual documents as may be required within the time specified.

(2) *A performance bond on the part of the contractor for 100 percent of the contract price.* A ''performance bond'' is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract.

(3) *A payment bond on the part of the contractor for 100 percent of the contract price.* A ''payment bond'' is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract.

(i) *Contract provisions.* A grantee's and subgrantee's contracts must contain provisions in paragraph (i) of this section. Federal agencies are permitted to require changes, remedies, changed conditions, access and records retention, suspension of work, and other clauses approved by the Office of Federal Procurement Policy.

(1) Administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as may be appropriate. (Contracts more than the simplified acquisition threshold)

(2) Termination for cause and for convenience by the grantee or subgrantee including the manner by which it will be effected and the basis for settlement. (All contracts in excess of $10,000)

(3) Compliance with Executive Order 11246 of September 24, 1965, entitled ''Equal Employment Opportunity,'' as amended by Executive Order 11375 of October 13, 1967, and as supplemented in Department of Labor regulations (41 CFR chapter 60). (All construction contracts awarded in excess of $10,000 by grantees and their contractors or subgrantees)

(4) Compliance with the Copeland ''Anti-Kickback'' Act (18 U.S.C. 874) as supplemented in Department of Labor regulations (29 CFR Part 3). (All contracts and subgrants for construction or repair)

(5) Compliance with the Davis-Bacon Act (40 U.S.C. 276a to 276a–7) as supplemented by Department of Labor regulations (29 CFR Part 5). (Construction contracts in excess of $2000 awarded by grantees and subgrantees when required by Federal grant program legislation)

(6) Compliance with Sections 103 and 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327–330) as supplemented by Department of Labor regulations (29 CFR Part 5). (Construction contracts awarded by grantees and subgrantees in excess of $2000, and in excess of $2500 for other contracts which involve the employment of mechanics or laborers)

(7) Notice of awarding agency requirements and regulations pertaining to reporting.

(8) Notice of awarding agency requirements and regulations pertaining to patent rights with respect to any discovery or invention which arises or is developed in the course of or under such contract.

(9) Awarding agency requirements and regulations pertaining to copyrights and rights in data.

(10) Access by the grantee, the subgrantee, the Federal grantor agency, the Comptroller General of the United States, or any of their duly authorized representatives to any books, documents, papers, and records of the contractor which are directly pertinent to that specific contract for the purpose of making audit, examination, excerpts, and transcriptions.

(11) Retention of all required records for three years after grantees or subgrantees make final payments and all other pending matters are closed.

(12) Compliance with all applicable standards, orders, or requirements issued under section 306 of the Clean Air Act (42 U.S.C. 1857(h)), section 508 of the Clean Water Act (33 U.S.C. 1368), Executive Order 11738, and Environmental Protection Agency regulations (40 CFR part 15). (Contracts, subcontracts, and subgrants of amounts in excess of $100,000)

(13) Mandatory standards and policies relating to energy efficiency which are contained in the state energy conservation plan issued in compliance with the

Energy Policy and Conservation Act (Pub. L. 94–163, 89 Stat. 871).

[53 FR 8070 and 8087, Mar. 11, 1988. Redesignated and amended at 57 FR 6199 and 6201, Feb. 21, 1992; 60 FR 19639, Apr. 19, 1995]

### § 33.37 Subgrants.

(a) *States*. States shall follow State law and procedures when awarding and administering subgrants (whether on a cost reimbursement or fixed amount basis) of financial assistance to local and Indian tribal governments. States shall:

(1) Ensure that every subgrant includes any clauses required by Federal statute and executive orders and their implementing regulations;

(2) Ensure that subgrantees are aware of requirements imposed upon them by Federal statute and regulation;

(3) Ensure that a provision for compliance with § 33.42 is placed in every cost reimbursement subgrant; and

(4) Conform any advances of grant funds to subgrantees substantially to the same standards of timing and amount that apply to cash advances by Federal agencies.

(b) *All other grantees*. All other grantees shall follow the provisions of this part which are applicable to awarding agencies when awarding and administering subgrants (whether on a cost reimbursement or fixed amount basis) of financial assistance to local and Indian tribal governments. Grantees shall:

(1) Ensure that every subgrant includes a provision for compliance with this part;

(2) Ensure that every subgrant includes any clauses required by Federal statute and executive orders and their implementing regulations; and

(3) Ensure that subgrantees are aware of requirements imposed upon them by Federal statutes and regulations.

(c) *Exceptions*. By their own terms, certain provisions of this part do not apply to the award and administration of subgrants:

(1) Section 33.10;

(2) Section 33.11;

(3) The letter-of-credit procedures specified in Treasury Regulations at 31 CFR part 205, cited in § 33.21; and

(4) Section 33.50.

[53 FR 8070 and 8087, Mar. 11, 1988. Redesignated and amended at 57 FR 6199 and 6201, Feb. 21, 1992]

## REPORTS, RECORDS, RETENTION, AND ENFORCEMENT

### § 33.40 Monitoring and reporting program performance.

(a) *Monitoring by grantees*. Grantees are responsible for managing the day-to-day operations of grant and subgrant supported activities. Grantees must monitor grant and subgrant supported activities to assure compliance with applicable Federal requirements and that performance goals are being achieved. Grantee monitoring must cover each program, function or activity.

(b) *Nonconstruction performance reports*. The Federal agency may, if it decides that performance information available from subsequent applications contains sufficient information to meet its programmatic needs, require the grantee to submit a performance report only upon expiration or termination of grant support. Unless waived by the Federal agency this report will be due on the same date as the final Financial Status Report.

(1) Grantees shall submit annual performance reports unless the awarding agency requires quarterly or semi-annual reports. However, performance reports will not be required more frequently than quarterly. Annual reports shall be due 90 days after the grant year, quarterly or semi-annual reports shall be due 30 days after the reporting period. The final performance report will be due 90 days after the expiration or termination of grant support. If a justified request is submitted by a grantee, the Federal agency may extend the due date for any performance report. Additionally, requirements for unnecessary performance reports may be waived by the Federal agency.

(2) Performance reports will contain, for each grant, brief information on the following:

(i) A comparison of actual accomplishments to the objectives established for the period. Where the output of the project can be quantified, a computation of the cost per unit of output

may be required if that information will be useful.

(ii) The reasons for slippage if established objectives were not met.

(iii) Additional pertinent information including, when appropriate, analysis and explanation of cost overruns or high unit costs.

(3) Grantees will not be required to submit more than the original and two copies of performance reports.

(4) Grantees will adhere to the standards in this section in prescribing performance reporting requirements for subgrantees.

(c) *Construction performance reports.* For the most part, on-site technical inspections and certified percentage-of-completion data are relied on heavily by Federal agencies to monitor progress under construction grants and subgrants. The Federal agency will require additional formal performance reports only when considered necessary, and never more frequently than quarterly.

(d) *Significant developments.* Events may occur between the scheduled performance reporting dates which have significant impact upon the grant or subgrant supported activity. In such cases, the grantee must inform the Federal agency as soon as the following types of conditions become known:

(1) Problems, delays, or adverse conditions which will materially impair the ability to meet the objective of the award. This disclosure must include a statement of the action taken, or contemplated, and any assistance needed to resolve the situation.

(2) Favorable developments which enable meeting time schedules and objectives sooner or at less cost than anticipated or producing more beneficial results than originally planned.

(e) Federal agencies may make site visits as warranted by program needs.

(f) *Waivers, extensions.* (1) Federal agencies may waive any performance report required by this part if not needed.

(2) The grantee may waive any performance report from a subgrantee when not needed. The grantee may extend the due date for any performance report from a subgrantee if the grantee will still be able to meet its performance reporting obligations to the Federal agency.

**§ 33.41 Financial reporting.**

(a) *General.* (1) Except as provided in paragraphs (a) (2) and (5) of this section, grantees will use only the forms specified in paragraphs (a) through (e) of this section, and such supplementary or other forms as may from time to time be authorized by OMB, for:

(i) Submitting financial reports to Federal agencies, or

(ii) Requesting advances or reimbursements when letters of credit are not used.

(2) Grantees need not apply the forms prescribed in this section in dealing with their subgrantees. However, grantees shall not impose more burdensome requirements on subgrantees.

(3) Grantees shall follow all applicable standard and supplemental Federal agency instructions approved by OMB to the extend required under the Paperwork Reduction Act of 1980 for use in connection with forms specified in paragraphs (b) through (e) of this section. Federal agencies may issue substantive supplementary instructions only with the approval of OMB. Federal agencies may shade out or instruct the grantee to disregard any line item that the Federal agency finds unnecessary for its decisionmaking purposes.

(4) Grantees will not be required to submit more than the original and two copies of forms required under this part.

(5) Federal agencies may provide computer outputs to grantees to expedite or contribute to the accuracy of reporting. Federal agencies may accept the required information from grantees in machine usable format or computer printouts instead of prescribed forms.

(6) Federal agencies may waive any report required by this section if not needed.

(7) Federal agencies may extend the due date of any financial report upon receiving a justified request from a grantee.

(b) *Financial Status Report*—(1) *Form.* Grantees will use Standard Form 269 or

269A, Financial Status Report, to report the status of funds for all nonconstruction grants and for construction grants when required in accordance with §33.41(e)(2)(iii).

(2) *Accounting basis.* Each grantee will report program outlays and program income on a cash or accrual basis as prescribed by the awarding agency. If the Federal agency requires accrual information and the grantee's accounting records are not normally kept on the accural basis, the grantee shall not be required to convert its accounting system but shall develop such accrual information through and analysis of the documentation on hand.

(3) *Frequency.* The Federal agency may prescribe the frequency of the report for each project or program. However, the report will not be required more frequently than quarterly. If the Federal agency does not specify the frequency of the report, it will be submitted annually. A final report will be required upon expiration or termination of grant support.

(4) *Due date.* When reports are required on a quarterly or semiannual basis, they will be due 30 days after the reporting period. When required on an annual basis, they will be due 90 days after the grant year. Final reports will be due 90 days after the expiration or termination of grant support.

(c) *Federal Cash Transactions Report*—(1) *Form.* (i) For grants paid by letter or credit, Treasury check advances or electronic transfer of funds, the grantee will submit the Standard Form 272, Federal Cash Transactions Report, and when necessary, its continuation sheet, Standard Form 272a, unless the terms of the award exempt the grantee from this requirement.

(ii) These reports will be used by the Federal agency to monitor cash advanced to grantees and to obtain disbursement or outlay information for each grant from grantees. The format of the report may be adapted as appropriate when reporting is to be accomplished with the assistance of automatic data processing equipment provided that the information to be submitted is not changed in substance.

(2) *Forecasts of Federal cash requirements.* Forecasts of Federal cash requirements may be required in the ''Remarks'' section of the report.

(3) *Cash in hands of subgrantees.* When considered necessary and feasible by the Federal agency, grantees may be required to report the amount of cash advances in excess of three days' needs in the hands of their subgrantees or contractors and to provide short narrative explanations of actions taken by the grantee to reduce the excess balances.

(4) *Frequency and due date.* Grantees must submit the report no later than 15 working days following the end of each quarter. However, where an advance either by letter of credit or electronic transfer of funds is authorized at an annualized rate of one million dollars or more, the Federal agency may require the report to be submitted within 15 working days following the end of each month.

(d) *Request for advance or reimbursement*—(1) *Advance payments.* Requests for Treasury check advance payments will be submitted on Standard Form 270, Request for Advance or Reimbursement. (This form will not be used for drawdowns under a letter of credit, electronic funds transfer or when Treasury check advance payments are made to the grantee automatically on a predetermined basis.)

(2) *Reimbursements.* Requests for reimbursement under nonconstruction grants will also be submitted on Standard Form 270. (For reimbursement requests under construction grants, see paragraph (e)(1) of this section.)

(3) The frequency for submitting payment requests is treated in §33.41(b)(3).

(e) *Outlay report and request for reimbursement for construction programs*—(1) *Grants that support construction activities paid by reimbursement method.* (i) Requests for reimbursement under construction grants will be submitted on Standard Form 271, Outlay Report and Request for Reimbursement for Construction Programs. Federal agencies may, however, prescribe the Request for Advance or Reimbursement form, specified in §33.41(d), instead of this form.

(ii) The frequency for submitting reimbursement requests is treated in §33.41(b)(3).

(2) *Grants that support construction activities paid by letter of credit, electronic funds transfer or Treasury check advance.* (i) When a construction grant is paid by letter of credit, electronic funds transfer or Treasury check advances, the grantee will report its outlays to the Federal agency using Standard Form 271, Outlay Report and Request for Reimbursement for Construction Programs. The Federal agency will provide any necessary special instruction. However, frequency and due date shall be governed by § 33.41(b)(3) and (4).

(ii) When a construction grant is paid by Treasury check advances based on periodic requests from the grantee, the advances will be requested on the form specified in § 33.41(d).

(iii) The Federal agency may substitute the Financial Status Report specified in § 33.41(b) for the Outlay Report and Request for Reimbursement for Construction Programs.

(3) *Accounting basis.* The accounting basis for the Outlay Report and Request for Reimbursement for Construction Programs shall be governed by § 33.41(b)(2).

[53 FR 8070 and 8087, Mar. 11, 1988. Redesignated and amended at 57 FR 6199 and 6201, Feb. 21, 1992]

### § 33.42 Retention and access requirements for records.

(a) *Applicability.* (1) This section applies to all financial and programmatic records, supporting documents, statistical records, and other records of grantees or subgrantees which are:

(i) Required to be maintained by the terms of this part, program regulations or the grant agreement, or

(ii) Otherwise reasonably considered as pertinent to program regulations or the grant agreement.

(2) This section does not apply to records maintained by contractors or subcontractors. For a requirement to place a provision concerning records in certain kinds of contracts, see § 33.36(i)(10).

(b) *Length of retention period.* (1) Except as otherwise provided, records must be retained for three years from the starting date specified in paragraph (c) of this section.

(2) If any litigation, claim, negotiation, audit or other action involving the records has been started before the expiration of the 3-year period, the records must be retained until completion of the action and resolution of all issues which arise from it, or until the end of the regular 3-year period, whichever is later.

(3) To avoid duplicate recordkeeping, awarding agencies may make special arrangements with grantees and subgrantees to retain any records which are continuously needed for joint use. The awarding agency will request transfer of records to its custody when it determines that the records possess long-term retention value. When the records are transferred to or maintained by the Federal agency, the 3-year retention requirement is not applicable to the grantee or subgrantee.

(c) *Starting date of retention period*—(1) *General.* When grant support is continued or renewed at annual or other intervals, the retention period for the records of each funding period starts on the day the grantee or subgrantee submits to the awarding agency its single or last expenditure report for that period. However, if grant support is continued or renewed quarterly, the retention period for each year's records starts on the day the grantee submits its expenditure report for the last quarter of the Federal fiscal year. In all other cases, the retention period starts on the day the grantee submits its final expenditure report. If an expenditure report has been waived, the retention period starts on the day the report would have been due.

(2) *Real property and equipment records.* The retention period for real property and equipment records starts from the date of the disposition or replacement or transfer at the direction of the awarding agency.

(3) *Records for income transactions after grant or subgrant support.* In some cases grantees must report income after the period of grant support. Where there is such a requirement, the retention period for the records pertaining to the earning of the income starts from the end of the grantee's fiscal year in which the income is earned.

(4) *Indirect cost rate proposals, cost allocations plans, etc.* This paragraph applies to the following types of documents, and their supporting records: indirect cost rate computations or proposals, cost allocation plans, and any similar accounting computations of the rate at which a particular group of costs is chargeable (such as computer usage chargeback rates or composite fringe benefit rates).

(i) *If submitted for negotiation.* If the proposal, plan, or other computation is required to be submitted to the Federal Government (or to the grantee) to form the basis for negotiation of the rate, then the 3-year retention period for its supporting records starts from the date of such submission.

(ii) *If not submitted for negotiation.* If the proposal, plan, or other computation is not required to be submitted to the Federal Government (or to the grantee) for negotiation purposes, then the 3-year retention period for the proposal plan, or computation and its supporting records starts from end of the fiscal year (or other accounting period) covered by the proposal, plan, or other computation.

(d) *Substitution of microfilm.* Copies made by microfilming, photocopying, or similar methods may be substituted for the original records.

(e) *Access to records*—(1) *Records of grantees and subgrantees.* The awarding agency and the Comptroller General of the United States, or any of their authorized representatives, shall have the right of access to any pertinent books, documents, papers, or other records of grantees and subgrantees which are pertinent to the grant, in order to make audits, examinations, excerpts, and transcripts.

(2) *Expiration of right of access.* The rights of access in this section must not be limited to the required retention period but shall last as long as the records are retained.

(f) *Restrictions on public access.* The Federal Freedom of Information Act (5 U.S.C. 552) does not apply to records Unless required by Federal, State, or local law, grantees and subgrantees are not required to permit public access to their records.

[53 FR 8070 and 8087, Mar. 11, 1988. Redesignated and amended at 57 FR 6199 and 6201, Feb. 21, 1992]

### § 33.43 Enforcement.

(a) *Remedies for noncompliance.* If a grantee or subgrantee materially fails to comply with any term of an award, whether stated in a Federal statute or regulation, an assurance, in a State plan or application, a notice of award, or elsewhere, the awarding agency may take one or more of the following actions, as appropriate in the circumstances:

(1) Temporarily withhold cash payments pending correction of the deficiency by the grantee or subgrantee or more severe enforcement action by the awarding agency,

(2) Disallow (that is, deny both use of funds and matching credit for) all or part of the cost of the activity or action not in compliance,

(3) Wholly or partly suspend or terminate the current award for the grantee's or subgrantee's program,

(4) Withhold further awards for the program, or

(5) Take other remedies that may be legally available.

(b) *Hearings, appeals.* In taking an enforcement action, the awarding agency will provide the grantee or subgrantee an opportunity for such hearing, appeal, or other administrative proceeding to which the grantee or subgrantee is entitled under any statute or regulation applicable to the action involved.

(c) *Effects of suspension and termination.* Costs of grantee or subgrantee resulting from obligations incurred by the grantee or subgrantee during a suspension or after termination of an award are not allowable unless the awarding agency expressly authorizes them in the notice of suspension or termination or subsequently. Other grantee or subgrantee costs during suspension or after termination which are necessary and not reasonably avoidable are allowable if:

(1) The costs result from obligations which were properly incurred by the grantee or subgrantee before the effective date of suspension or termination,

are not in anticipation of it, and, in the case of a termination, are noncancellable, and,

(2) The costs would be allowable if the award were not suspended or expired normally at the end of the funding period in which the termination takes effect.

(d) *Relationship to debarment and suspension.* The enforcement remedies identified in this section, including suspension and termination, do not preclude grantee or subgrantee from being subject to ''Debarment and Suspension'' under E.O. 12549 (see § 33.35).

[53 FR 8070 and 8087, Mar. 11, 1988. Redesignated and amended at 57 FR 6199 and 6201, Feb. 21, 1992]

### § 33.44 Termination for convenience.

Except as provided in § 33.43 awards may be terminated in whole or in part only as follows:

(a) By the awarding agency with the consent of the grantee or subgrantee in which case the two parties shall agree upon the termination conditions, including the effective date and in the case of partial termination, the portion to be terminated, or

(b) By the grantee or subgrantee upon written notification to the awarding agency, setting forth the reasons for such termination, the effective date, and in the case of partial termination, the portion to be terminated. However, if, in the case of a partial termination, the awarding agency determines that the remaining portion of the award will not accomplish the purposes for which the award was made, the awarding agency may terminate the award in its entirety under either § 33.43 or paragraph (a) of this section.

[53 FR 8070 and 8087, Mar. 11, 1988. Redesignated and amended at 57 FR 6199 and 6201, Feb. 21, 1992]

## Subpart D—After-The-Grant Requirements

### § 33.50 Closeout.

(a) *General.* The Federal agency will close out the award when it determines that all applicable administrative actions and all required work of the grant has been completed.

(b) *Reports.* Within 90 days after the expiration or termination of the grant, the grantee must submit all financial, performance, and other reports required as a condition of the grant. Upon request by the grantee, Federal agencies may extend this timeframe. These may include but are not limited to:

(1) *Final performance or progress report.*

(2) *Financial Status Report (SF 269) or Outlay Report and Request for Reimbursement for Construction Programs (SF–271) (as applicable).*

(3) *Final request for payment (SF–270) (if applicable).*

(4) *Invention disclosure (if applicable).*

(5) *Federally-owned property report:*

In accordance with § 33.32(f), a grantee must submit an inventory of all federally owned property (as distinct from property acquired with grant funds) for which it is accountable and request disposition instructions from the Federal agency of property no longer needed.

(c) *Cost adjustment.* The Federal agency will, within 90 days after receipt of reports in paragraph (b) of this section, make upward or downward adjustments to the allowable costs.

(d) *Cash adjustments.* (1) The Federal agency will make prompt payment to the grantee for allowable reimbursable costs.

(2) The grantee must immediately refund to the Federal agency any balance of unobligated (unencumbered) cash advanced that is not authorized to be retained for use on other grants.

[53 FR 8070 and 8087, Mar. 11, 1988. Redesignated and amended at 57 FR 6199 and 6201, Feb. 21, 1992]

### § 33.51 Later disallowances and adjustments.

The closeout of a grant does not affect:

(a) The Federal agency's right to disallow costs and recover funds on the basis of a later audit or other review;

(b) The grantee's obligation to return any funds due as a result of later refunds, corrections, or other transactions;

(c) Records retention as required in § 33.42;

(d) Property management requirements in §§ 33.31 and 33.32; and

(e) Audit requirements in §33.26.

[53 FR 8070 and 8087, Mar. 11, 1988. Redesignated and amended at 57 FR 6199 and 6201, Feb. 21, 1992]

### §33.52 Collection of amounts due.

(a) Any funds paid to a grantee in excess of the amount to which the grantee is finally determined to be entitled under the terms of the award constitute a debt to the Federal Government. If not paid within a reasonable period after demand, the Federal agency may reduce the debt by:

(1) Making an adminstrative offset against other requests for reimbursements,

(2) Withholding advance payments otherwise due to the grantee, or

(3) Other action permitted by law.

(b) Except where otherwise provided by statutes or regulations, the Federal agency will charge interest on an overdue debt in accordance with the Federal Claims Collection Standards (4 CFR Ch. II). The date from which interest is computed is not extended by litigation or the filing of any form of appeal.

## Subpart E—Entitlement [Reserved]

# PART 34—ADMINISTRATIVE REQUIREMENTS FOR GRANTS AND AGREEMENTS WITH FOR-PROFIT ORGANIZATIONS

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APPENDIX A TO PART 34—CONTRACT PROVISIONS

AUTHORITY: 5 U.S.C. 301 and 10 U.S.C. 113.

SOURCE: 63 FR 12204, Mar. 12, 1998, unless otherwise noted.

## Subpart A—General

### §34.1 Purpose.

(a) This part prescribes administrative requirements for awards to for-profit organizations.

(b) Applicability to prime awards and subawards is as follows:

(1) *Prime awards.* DoD Components shall apply the provisions of this part to awards to for-profit organizations. DoD Components shall not impose requirements that are in addition to, or inconsistent with, the requirements provided in this part, except:

(i) In accordance with the deviation procedures or special award conditions in §34.3 or §34.4, respectively; or

(ii) As required by Federal statute, Executive order, or Federal regulation

implementing a statute or Executive order.

(2) *Subawards.* (i) Any legal entity (including any State, local government, university or other nonprofit organization, as well as any for-profit entity) that receives an award from a DoD Component shall apply the provisions of this part to subawards with for-profit organizations. It should be noted that subawards (see definition in § 34.2) are financial assistance for substantive programmatic performance and do not include recipients' procurement of goods and services.

(ii) For-profit organizations that receive prime awards covered by this part shall apply to each subaward the administrative requirements that are applicable to the particular type of subrecipient (e.g., 32 CFR part 33 specifies requirements for subrecipients that are States or local governments, and 32 CFR part 32 contains requirements for universities or other nonprofit organizations).

**§ 34.2 Definitions.**

The following are definitions of terms as used in this part. Grants officers are cautioned that terms may be defined differently in this part than they are in other parts of the DoD Grant and Agreement Regulations (DoDGARs).

*Advance.* A payment made by Treasury check or other appropriate payment mechanism to a recipient upon its request either before outlays are made by the recipient or through the use of predetermined payment schedules.

*Award.* A grant or a cooperative agreement other than a technology investment agreement (TIA). TIAs are covered by part 37 of the DoDGARs (32 CFR part 37). Portions of this part may apply to a TIA, but only to the extent that 32 CFR part 37 makes them apply.

*Cash contributions.* The recipient's cash outlay, including the outlay of money contributed to the recipient by third parties.

*Closeout.* The process by which the grants officer administering an award made by a DoD Component determines that all applicable administrative actions and all required work of the award have been completed by the recipient and DoD Component.

*Contract.* Either:

(1) A procurement contract made by a recipient under a DoD Component's award or by a subrecipient under a subaward; or

(2) A procurement subcontract under a contract awarded by a recipient or subrecipient.

*Cost sharing or matching.* That portion of project or program costs not borne by the Federal Government.

*Disallowed costs.* Those charges to an award that the grants officer administering an award made by a DoD Component determines to be unallowable, in accordance with the applicable Federal cost principles or other terms and conditions contained in the award.

*DoD Component.* A Military Department, Defense Agency, DoD Field Activity, or organization within the Office of the Secretary of Defense that provides or administers an award to a recipient.

*Equipment.* Tangible nonexpendable personal property charged directly to the award having a useful life of more than one year and an acquisition cost of $5,000 or more per unit. That definition applies for the purposes of the Federal administrative requirements in this part. However, the recipient's policy may be to use a lower dollar value for defining ''equipment,'' and nothing in this part should be construed as requiring the recipient to establish a higher limit for purposes other than the administrative requirements in this part.

*Excess property.* Property under the control of any DoD Component that, as determined by the head thereof, is no longer required for its needs or the discharge of its responsibilities.

*Expenditures.* See the definition for outlays in this section.

*Federally owned property.* Property in the possession of, or directly acquired by, the Government and subsequently made available to the recipient.

*Funding period.* The period of time when Federal funding is available for obligation by the recipient.

*Intellectual property*. Intangible personal property such as patents and patent applications, trademarks, copyrights, technical data, and software rights.

*Obligations*. The amounts of orders placed, contracts and grants awarded, services received and similar transactions during a given period that require payment by the recipient during the same or a future period.

*Outlays* or *expenditures*. Charges made to the project or program. They may be reported on a cash or accrual basis. For reports prepared on a cash basis, outlays are the sum of cash disbursements for direct charges for goods and services, the amount of indirect expense charged, the value of third party in-kind contributions applied and the amount of cash advances and payments made to subrecipients. For reports prepared on an accrual basis, outlays are the sum of cash disbursements for direct charges for goods and services, the amount of indirect expense incurred, the value of in-kind contributions applied, and the net increase (or decrease) in the amounts owed by the recipient for goods and other property received, for services performed by employees, contractors, subrecipients and other payees and other amounts becoming owed under programs for which no current services or performance are required.

*Personal property*. Property of any kind except real property. It may be:

(1) Tangible, having physical existence (i.e., equipment and supplies); or

(2) Intangible, having no physical existence, such as patents, copyrights, data and software.

*Prior approval*. Written or electronic approval by an authorized official evidencing prior consent.

*Program income*. Gross income earned by the recipient that is directly generated by a supported activity or earned as a result of the award. Program income includes, but is not limited to, income from fees for services performed, the use or rental of real or personal property acquired under federally-funded projects, the sale of commodities or items fabricated under an award, license fees and royalties on patents and copyrights, and interest on loans made with award funds. Interest earned on advances of Federal funds is not program income. Except as otherwise provided in program regulations or the terms and conditions of the award, program income does not include the receipt of principal on loans, rebates, credits, discounts, etc., or interest earned on any of them.

*Project costs*. All allowable costs, as set forth in the applicable Federal cost principles, incurred by a recipient and the value of the contributions made by third parties in accomplishing the objectives of the award during the project period.

*Project period*. The period established in the award document during which Federal sponsorship begins and ends.

*Property*. Real property and personal property (equipment, supplies, and intellectual property), unless stated otherwise.

*Real property*. Land, including land improvements, structures and appurtenances thereto, but excludes movable machinery and equipment.

*Recipient*. A for-profit organization receiving an award directly from a DoD Component to carry out a project or program.

*Research*. Basic, applied, and advanced research activities. *Basic research* is defined as efforts directed toward increasing knowledge or understanding in science and engineering. *Applied research* is defined as efforts that attempt to determine and exploit the potential of scientific discoveries or improvements in technology, such as new materials, devices, methods, and processes. ''Advanced research,'' advanced technology development that creates new technology or demonstrates the viability of applying existing technology to new products and processes in a general way, is most closely analogous to precommercialization or precompetitive technology development in the commercial sector (it does not include development of military systems and hardware where specific requirements have been defined).

*Small award*. An award not exceeding the simplified acquisition threshold fixed at 41 U.S.C. 403(11) (currently $100,000).

*Small business concern*. A concern, including its affiliates, that is independently owned and operated, not dominant in the field of operation in which it has applied for an award, and qualified as a small business under the criteria and size standards in 13 CFR part 121. For more details, grants officers should see 48 CFR part 19 in the ''Federal Acquisition Regulation.''

*Subaward*. Financial assistance in the form of money, or property in lieu of money, provided under an award by a recipient to an eligible subrecipient or by a subrecipient to a lower tier subrecipient. The term includes financial assistance when provided by any legal agreement, even if the agreement is called a contract, but the term includes neither procurement of goods and services nor any form of assistance which is excluded from the definition of ''award'' in this section.

*Subrecipient*. The legal entity to which a subaward is made and which is accountable to the recipient for the use of the funds provided.

*Supplies*. Tangible expendable personal property that is charged directly to the award and that has a useful life of less than one year or an acquisition cost of less than $5000 per unit.

*Suspension*. An action by a DoD Component that temporarily withdraws Federal sponsorship under an award, pending corrective action by the recipient or pending a decision to terminate the award by the DoD Component. Suspension of an award is a separate action from suspension of a participant under 2 CFR part 1125.

*Termination*. The cancellation of an award, in whole or in part, under an agreement at any time prior to either:

(1) The date on which all work under an award is completed; or

(2) The date on which Federal sponsorship ends, as given on the award document or any supplement or amendment thereto.

*Third party in-kind contributions*. The value of non-cash contributions provided by non-Federal third parties. Third party in-kind contributions may be in the form of real property, equipment, supplies and other expendable property, and the value of goods and services directly benefiting and specifically identifiable to the project or program.

*Unobligated balance*. The portion of the funds authorized by a DoD Component that has not been obligated by the recipient and is determined by deducting the cumulative obligations from the cumulative funds authorized.

[63 FR 12204, Mar. 12, 1998, as amended at 68 FR 47160, Aug. 7, 2003; 72 FR 34998, June 26, 2007]

### § 34.3 Deviations.

(a) *Individual deviations*. Individual deviations affecting only one award may be approved by DoD Components in accordance with procedures stated in 32 CFR 21.335(a) and 21.340.

(b) *Small awards*. DoD Components may apply less restrictive requirements than the provisions of this part when awarding small awards, except for those requirements which are statutory.

(c) *Other class deviations*. For classes of awards other than small awards, the Director, Defense Research and Engineering, or his or her designee, may grant exceptions from the requirements of this part when exceptions are not prohibited by statute. DoD Components shall request approval for such deviations in accordance with 32 CFR 21.335 (b) and 21.340.

[63 FR 12204, Mar. 12, 1998, as amended at 68 FR 47160, Aug. 7, 2003]

### § 34.4 Special award conditions.

(a) Grants officers may impose additional requirements as needed, over and above those provided in this part, if an applicant or recipient:

(1) Has a history of poor performance;

(2) Is not financially stable;

(3) Has a management system that does not meet the standards prescribed in this part;

(4) Has not conformed to the terms and conditions of a previous award; or

(5) Is not otherwise responsible.

(b) Before imposing additional requirements, DoD Components shall notify the applicant or recipient in writing as to:

(1) The nature of the additional requirements;

(2) The reason why the additional requirements are being imposed;

(3) The nature of the corrective action needed;

(4) The time allowed for completing the corrective actions; and

(5) The method for requesting reconsideration of the additional requirements imposed.

(c) Any special conditions shall be promptly removed once the conditions that prompted them have been corrected.

(d) Grants officers:

(1) Should coordinate the imposition and removal of special award conditions with the cognizant grants administration office identified in 32 CFR 22.710.

(2) Shall include in the award file the written notification to the recipient, described in paragraph (b) of this section, and the documentation required by 32 CFR 22.410(b).

## Subpart B—Post-award Requirements

FINANCIAL AND PROGRAM MANAGEMENT

### §34.10 Purpose of financial and program management.

Sections 34.11 through 34.17 prescribe standards for financial management systems; methods for making payments; and rules for cost sharing and matching, program income, revisions to budgets and program plans, audits, allowable costs, and fee and profit.

### §34.11 Standards for financial management systems.

(a) Recipients shall be allowed and encouraged to use existing financial management systems established for doing business in the commercial marketplace, to the extent that the systems comply with Generally Accepted Accounting Principles (GAAP) and the minimum standards in this section. As a minimum, a recipient's financial management system shall provide:

(1) Effective control of all funds. Control systems must be adequate to ensure that costs charged to Federal funds and those counted as the recipient's cost share or match are consistent with requirements for cost reasonableness, allowability, and allocability in the applicable cost principles (see §34.17) and in the terms and conditions of the award.

(2) Accurate, current and complete records that document for each project funded wholly or in part with Federal funds the source and application of the Federal funds and the recipient's required cost share or match. These records shall:

(i) Contain information about receipts, authorizations, assets, expenditures, program income, and interest.

(ii) Be adequate to make comparisons of outlays with budgeted amounts for each award (as required for programmatic and financial reporting under §34.41. Where appropriate, financial information should be related to performance and unit cost data. Note that unit cost data are generally not appropriate for awards that support research.

(3) To the extent that advance payments are authorized under §34.12, procedures that minimize the time elapsing between the transfer of funds to the recipient from the Government and the recipient's disbursement of the funds for program purposes.

(4) The recipient shall have a system to support charges to Federal awards for salaries and wages, whether treated as direct or indirect costs. Where employees work on multiple activities or cost objectives, a distribution of their salaries and wages will be supported by personnel activity reports which must:

(i) Reflect an after the fact distribution of the actual activity of each employee.

(ii) Account for the total activity for which each employee is compensated.

(iii) Be prepared at least monthly, and coincide with one or more pay periods.

(b) Where the Federal Government guarantees or insures the repayment of money borrowed by the recipient, the DoD Component, at its discretion, may require adequate bonding and insurance if the bonding and insurance requirements of the recipient are not deemed adequate to protect the interest of the Federal Government.

(c) The DoD Component may require adequate fidelity bond coverage where the recipient lacks sufficient coverage to protect the Federal Government's interest.

(d) Where bonds are required in the situations described above, the bonds shall be obtained from companies holding certificates of authority as acceptable sureties, as prescribed in 31 CFR part 223, ''Surety Companies Doing Business with the United States.''

**§ 34.12 Payment.**

(a) *Methods available.* Payment methods for awards with for-profit organizations are:

(1) *Reimbursement.* Under this method, the recipient requests reimbursement for costs incurred during a time period. In cases where the recipient submits each request for payment to the grants officer, the DoD payment office reimburses the recipient by electronic funds transfer or check after approval of the request by the grants officer designated to do so.

(2) *Advance payments.* Under this method, a DoD Component makes a payment to a recipient based upon projections of the recipient's cash needs. The payment generally is made upon the recipient's request, although predetermined payment schedules may be used when the timing of the recipient's needs to disburse funds can be predicted in advance with sufficient accuracy to ensure compliance with paragraph (b)(2)(iii) of this section.

(b) *Selecting a method.* (1) The preferred payment method is the reimbursement method, as described in paragraph (a)(1) of this section

(2) Advance payments, as described in paragraph (a)(2) of this section, may be used in exceptional circumstances, subject to the following conditions:

(i) The grants officer, in consultation with the program official, must judge that advance payments are necessary or will materially contribute to the probability of success of the project contemplated under the award (e.g., as startup funds for a project performed by a newly formed company). The rationale for the judgment shall be documented in the award file.

(ii) Cash advances shall be limited to the minimum amounts needed to carry out the program.

(iii) Recipients and the DoD Component shall maintain procedures to ensure that the timing of cash advances is as close as is administratively feasible to the recipients' disbursements of the funds for program purposes, including direct program or project costs and the proportionate share of any allowable indirect costs.

(iv) Recipients shall maintain advance payments of Federal funds in interest-bearing accounts, and remit annually the interest earned to the administrative grants officer responsible for post-award administration (the grants officer shall forward the payment to the responsible payment office, for return to the Department of Treasury's miscellaneous receipts account), unless one of the following applies:

(A) The recipient receives less than $120,000 in Federal awards per year.

(B) The best reasonably available interest bearing account would not be expected to earn interest in excess of $250 per year on Federal cash balances.

(C) The depository would require an average or minimum balance so high that it would not be feasible within the expected Federal and non-Federal cash resources.

(c) *Frequency of payments.* For either reimbursements or advance payments, recipients shall be authorized to submit requests for payment at least monthly.

(d) *Forms for requesting payment.* DoD Components may authorize recipients to use the SF–270,[1] ''Request for Advance or Reimbursement;'' the SF–271,[2] ''Outlay Report and Request for Reimbursement for Construction Programs;'' or prescribe other forms or formats as necessary.

[1] For copies of Standard Forms listed in this part, contact regional grants administration offices of the Office of Naval Research. Addresses for the offices are listed in the ''DoD Directory of Contract Administration Services Components,'' DLAH 4105.4, which can be obtained from either: Defense Logistics Agency, Publications Distribution Division (DASC-WDM), 8725 John J. Kingman Rd., Suite 0119, Fort Belvoir, VA 22060–6220; or the Defense Contract Management Command home page at *http://www.dcmc.dcrb.dla.mil.*

[2] See footnote 1 to this paragraph (d).

(e) *Timeliness of payments.* Payments normally will be made within 30 calendar days of the receipt of a recipient's request for reimbursement or advance by the office designated to receive the request (for further information about timeframes for payments, see 32 CFR 22.810(c)(3)(ii)).

(f) *Precedence of other available funds.* Recipients shall disburse funds available from program income, rebates, refunds, contract settlements, audit recoveries, and interest earned on such funds before requesting additional cash payments.

(g) *Withholding of payments.* Unless otherwise required by statute, grants officers shall not withhold payments for proper charges made by recipients during the project period for reasons other than the following:

(1) A recipient has failed to comply with project objectives, the terms and conditions of the award, or Federal reporting requirements, in which case the grants officer may suspend payments in accordance with § 34.52.

(2) The recipient is delinquent on a debt to the United States (see definitions of ''debt'' and ''delinquent debt'' in 32 CFR 22.105). In that case, the grants officer may, upon reasonable notice, withhold payments for obligations incurred after a specified date, until the debt is resolved.

### § 34.13 Cost sharing or matching.

(a) *Acceptable contributions.* All contributions, including cash contributions and third party in-kind contributions, shall be accepted as part of the recipient's cost sharing or matching when such contributions meet all of the following criteria:

(1) They are verifiable from the recipient's records.

(2) They are not included as contributions for any other federally-assisted project or program.

(3) They are necessary and reasonable for proper and efficient accomplishment of project or program objectives.

(4) They are allowable under § 34.17.

(5) They are not paid by the Federal Government under another award, except:

(i) Costs that are authorized by Federal statute to be used for cost sharing or matching; or

(ii) Independent research and development (IR&D) costs. In accordance with the for-profit cost principle in 48 CFR 31.205–18(e), use of IR&D as cost sharing is permitted, whether or not the Government decides at a later date to reimburse any of the IR&D as allowable indirect costs. In such cases, the IR&D must meet all of the criteria in paragraphs (a) (1) through (4) and (a) (6) through (8) of this section.

(6) They are provided for in the approved budget, when approval of the budget is required by the DoD Component.

(7) If they are real property or equipment, whether purchased with recipient's funds or donated by third parties, they must have the grants officer's prior approval if the contributions' value is to exceed depreciation or use charges during the project period (paragraphs (b)(1) and (b)(4)(ii) of this section discuss the limited circumstances under which a grants officer may approve higher values). If a DoD Component requires approval of a recipient's budget (see paragraph (a)(6) of this section), the grants officer's approval of the budget satisfies this prior approval requirement, for real property or equipment items listed in the budget.

(8) They conform to other provisions of this part, as applicable.

(b) *Valuing and documenting contributions*—(1) *Valuing recipient's property or services of recipient's employees.* Values shall be established in accordance with the applicable cost principles in § 34.17, which means that amounts chargeable to the project are determined on the basis of costs incurred. For real property or equipment used on the project, the cost principles authorize depreciation or use charges. The full value of the item may be applied when the item will be consumed in the performance of the award or fully depreciated by the end of the award. In cases where the full value of a donated capital asset is to be applied as cost sharing or matching, that full value shall be the lesser of the following:

(i) The certified value of the remaining life of the property recorded in the recipient's accounting records at the time of donation; or

(ii) The current fair market value. However, when there is sufficient justification, the grants officer may approve the use of the current fair market value of the donated property, even if it exceeds the certified value at the time of donation to the project. The grants officer may accept the use of any reasonable basis for determining the fair market value of the property.

(2) *Valuing services of others' employees.* When an employer other than the recipient furnishes the services of an employee, those services shall be valued at the employee's regular rate of pay plus an amount of fringe benefits and overhead (at an overhead rate appropriate for the location where the services are performed) provided these services are in the same skill for which the employee is normally paid.

(3) *Valuing volunteer services.* Volunteer services furnished by professional and technical personnel, consultants, and other skilled and unskilled labor may be counted as cost sharing or matching if the service is an integral and necessary part of an approved project or program. Rates for volunteer services shall be consistent with those paid for similar work in the recipient's organization. In those instances in which the required skills are not found in the recipient organization, rates shall be consistent with those paid for similar work in the labor market in which the recipient competes for the kind of services involved. In either case, paid fringe benefits that are reasonable, allowable, and allocable may be included in the valuation.

(4) *Valuing property donated by third parties.* (i) Donated supplies may include such items as office supplies or laboratory supplies. Value assessed to donated supplies included in the cost sharing or matching share shall be reasonable and shall not exceed the fair market value of the property at the time of the donation.

(ii) Normally only depreciation or use charges for equipment and buildings may be applied. However, the fair rental charges for land and the full value of equipment or other capital assets may be allowed, when they will be consumed in the performance of the award or fully depreciated by the end of the award, provided that the grants officer has approved the charges. When use charges are applied, values shall be determined in accordance with the usual accounting policies of the recipient, with the following qualifications:

(A) The value of donated space shall not exceed the fair rental value of comparable space as established by an independent appraisal of comparable space and facilities in a privately-owned building in the same locality.

(B) The value of loaned equipment shall not exceed its fair rental value.

(5) *Documentation.* The following requirements pertain to the recipient's supporting records for in-kind contributions from third parties:

(i) Volunteer services shall be documented and, to the extent feasible, supported by the same methods used by the recipient for its own employees.

(ii) The basis for determining the valuation for personal services and property shall be documented.

**§ 34.14 Program income.**

(a) DoD Components shall apply the standards in this section to the disposition of program income from projects financed in whole or in part with Federal funds.

(b) Recipients shall have no obligation to the Government, unless the terms and conditions of the award provide otherwise, for program income earned:

(1) From license fees and royalties for copyrighted material, patents, patent applications, trademarks, and inventions produced under an award. Note, however, that the Patent and Trademark Amendments (35 U.S.C. Chapter 18), as implemented in § 34.25, apply to inventions made under a research award.

(2) After the end of the project period. If a grants officer anticipates that an award is likely to generate program income after the end of the project period, the grants officer should indicate in the award document whether the recipient will have any obligation to the Federal Government with respect to such income.

(c) If authorized by the terms and conditions of the award, costs incident to the generation of program income may be deducted from gross income to determine program income, provided

these costs have not been charged to the award.

(d) Other than any program income excluded pursuant to paragraphs (b) and (c) of this section, program income earned during the project period shall be retained by the recipient and used in one or more of the following ways, as specified in program regulations or the terms and conditions of the award:

(1) Added to funds committed to the project by the DoD Component and recipient and used to further eligible project or program objectives.

(2) Used to finance the non-Federal share of the project or program.

(3) Deducted from the total project or program allowable cost in determining the net allowable costs on which the Federal share of costs is based.

(e) If the terms and conditions of an award authorize the disposition of program income as described in paragraph (d)(1) or (d)(2) of this section, and stipulate a limit on the amounts that may be used in those ways, program income in excess of the stipulated limits shall be used in accordance with paragraph (d)(3) of this section.

(f) In the event that the terms and conditions of the award do not specify how program income is to be used, paragraph (d)(3) of this section shall apply automatically to all projects or programs except research. For awards that support research, paragraph (d)(1) of this section shall apply automatically unless the terms and conditions specify another alternative or the recipient is subject to special award conditions, as indicated in § 34.4.

(g) Proceeds from the sale of property that is acquired, rather than fabricated, under an award are not program income and shall be handled in accordance with the requirements of the Property Standards (see §§ 34.20 through 34.25).

### § 34.15 Revision of budget and program plans.

(a) The budget plan is the financial expression of the project or program as approved during the award process. It may include either the sum of the Federal and non-Federal shares, or only the Federal share, depending upon DoD Component requirements. It shall be related to performance for program evaluation purposes whenever appropriate.

(b) Recipients are required to report deviations from budget and program plans, and request prior approvals for budget and program plan revisions, in accordance with this section.

(c) Recipients shall immediately request, in writing, prior approval from the cognizant grants officer when there is reason to believe that within the next seven calendar days a programmatic or budgetary revision will be necessary for certain reasons, as follows:

(1) The recipient always must obtain the grants officer's prior approval when a revision is necessary for either of the following two reasons (i.e., these two requirements for prior approval may never be waived):

(i) A change in the scope or the objective of the project or program (even if there is no associated budget revision requiring prior written approval).

(ii) A need for additional Federal funding.

(2) The recipient must obtain the grants officer's prior approval when a revision is necessary for any of the following six reasons, unless the requirement for prior approval is waived in the terms and conditions of the award (i.e., if the award document is silent, these prior approvals are required):

(i) A change in a key person specified in the application or award document.

(ii) The absence for more than three months, or a 25 percent reduction in time devoted to the project, by the approved project director or principal investigator.

(iii) The inclusion of any additional costs that require prior approval in accordance with applicable cost principles for Federal funds and recipients' cost share or match, in § 34.17 and § 34.13, respectively.

(iv) The inclusion of pre-award costs. All such costs are incurred at the recipient's risk (i.e., the DoD Component is under no obligation to reimburse such costs if for any reason the recipient does not receive an award, or if the award is less than anticipated and inadequate to cover such costs).

(v) A ''no-cost'' extension of the project period that does not require additional Federal funds and does not

change the approved objectives or scope of the project.

(vi) Any subaward, transfer or contracting out of substantive program performance under an award, unless described in the application and funded in the approved awards. This provision does not apply to the purchase of supplies, material, or general support services, except that procurement of equipment or other capital items of property always is subject to the grants officer's prior approval under § 34.21(a), if it is to be purchased with Federal funds, or § 34.13(a)(7), if it is to be used as cost sharing or matching.

(3) The recipient also must obtain the grants officer's prior approval when a revision is necessary for either of the following reasons, if specifically required in the terms and conditions of the award document (i.e., if the award document is silent, these prior approvals are not required):

(i) The transfer of funds among direct cost categories, functions and activities for awards in which the Federal share of the project exceeds $100,000 and the cumulative amount of such transfers exceeds or is expected to exceed 10 percent of the total budget as last approved by the DoD Component. No DoD Component shall permit a transfer that would cause any Federal appropriation or part thereof to be used for purposes other than those consistent with the original intent of the appropriation.

(ii) For awards that provide support for both construction and nonconstruction work, any fund or budget transfers between the two types of work supported.

(d) Within 30 calendar days from the date of receipt of the recipient's request for budget revisions, the grants officer shall review the request and notify the recipient whether the budget revisions have been approved. If the revision is still under consideration at the end of 30 calendar days, the grants officer shall inform the recipient in writing of the date when the recipient may expect the decision.

### § 34.16 Audits.

(a) Any recipient that expends $500,000 or more in a year under Federal awards shall have an audit made for that year by an independent auditor, in accordance with paragraph (b) of this section. The audit generally should be made a part of the regularly scheduled, annual audit of the recipient's financial statements. However, it may be more economical in some cases to have the Federal awards separately audited, and a recipient may elect to do so, unless that option is precluded by award terms and conditions, or by Federal laws or regulations applicable to the program(s) under which the awards were made.

(b) The auditor shall determine and report on whether:

(1) The recipient has an internal control structure that provides reasonable assurance that it is managing Federal awards in compliance with Federal laws and regulations, and with the terms and conditions of the awards.

(2) Based on a sampling of Federal award expenditures, the recipient has complied with laws, regulations, and award terms that may have a direct and material effect on Federal awards.

(c) The recipient shall make the auditor's report available to DoD Components whose awards are affected.

(d) The requirement for an annual independent audit is intended to ascertain the adequacy of the recipient's internal financial management systems and to curtail the unnecessary duplication and overlap that usually results when Federal agencies request audits of individual awards on a routine basis. Therefore, a grants officer:

(1) Shall consider whether the independent audit satisfies his or her requirements, before requesting any additional audits; and

(2) When requesting an additional audit, shall:

(i) Limit the scope of such additional audit to areas not adequately addressed by the independent audit.

(ii) Coordinate the audit request with the Federal agency with the predominant fiscal interest in the recipient, as the agency responsible for the scheduling and distribution of audits. If DoD has the predominant fiscal interest in the recipient, the Defense Contract Management Command (DCMC) is responsible for monitoring audits, ensuring resolution of audit findings, and

distributing audit reports. When an additional audit is requested and DoD has the predominant fiscal interest in the recipient, DCMC shall, to the extent practicable, ensure that the additional audit builds upon the independent audit or other audits performed in accordance with this section.

(e) There may be instances in which Federal auditors have recently performed audits, are performing audits, or are planning to perform audits, of a recipient. In these cases, the recipient and its Federal cognizant agency should seek to have the non-Federal, independent auditors work with the Federal auditors to develop a coordinated audit approach, to minimize duplication of audit work.

(f) Audit costs (including a reasonable allocation of the costs of the audit of the recipient's financial statement, based on the relative benefit to the Government and the recipient) are allowable costs of DoD awards.

[63 FR 12204, Mar. 12, 1998, as amended at 70 FR 49477, Aug. 23, 2005]

### § 34.17 Allowable costs.

Allowability of costs shall be determined in accordance with the cost principles applicable to the type of entity incurring the costs, as follows:

(a) *For-profit organizations.* Allowability of costs incurred by for-profit organizations that are recipients of prime awards from DoD Components, and those that are subrecipients under prime awards to other organizations, is to be determined in accordance with:

(1) The for-profit cost principles in 48 CFR parts 31 and 231 (in the Federal Acquisition Regulation, or FAR, and the Defense Federal Acquisition Regulation Supplement, or DFARS, respectively).

(2) The supplemental information on allowability of audit costs, in § 34.16(f).

(b) *Other types of organizations.* Allowability of costs incurred by other types of organizations that may be subrecipients under a prime award to a for-profit organization is determined as follows:

(1) *Institutions of higher education.* Allowability is determined in accordance with OMB Circular A–21,[3] '' Cost Principles for Educational Institutions.''

(2) *Other nonprofit organizations.* Allowability is determined in accordance with OMB Circular A–122,[4] ''Cost Principles for Non-Profit Organizations.'' Note that Attachment C of the Circular identifies selected nonprofit organizations for whom cost allowability is determined in accordance with the FAR cost principles for for-profit organizations.

(3) *Hospitals.* Allowability is determined in accordance with the provisions of 45 CFR part 74, Appendix E, ''Principles for Determining Costs Applicable to Research and Development Under Grants and Contracts with Hospitals.''

(4) *Governmental organizations.* Allowability for State, local, or federally recognized Indian tribal governments is determined in accordance with OMB Circular A–87,[5] ''Cost Principles for State and Local Governments.''

### § 34.18 Fee and profit.

In accordance with 32 CFR 22.205(b), grants and cooperative agreements shall not:

(a) Provide for the payment of fee or profit to the recipient.

(b) Be used to carry out programs where fee or profit is necessary to achieving program objectives.

## PROPERTY STANDARDS

### § 34.20 Purpose of property standards.

Sections 34.21 through 34.25 set forth uniform standards for management, use, and disposition of property. DoD Components shall encourage recipients to use existing property-management systems, to the extent that the systems meet these minimum requirements.

### § 34.21 Real property and equipment.

(a) *Prior approval for acquisition with Federal funds.* Recipients may purchase

[3] For copies of the Circular, contact the Office of Management and Budget, EOP Publications, 725 17th St. N.W., New Executive Office Building, Washington, D.C. 20503.

[4] See footnote 3 to paragraph (b)(1) of this section.

[5] See footnote 3 to paragraph (b)(1) of this section.

real property or equipment in whole or in part with Federal funds under an award only with the prior approval of the grants officer.

(b) *Title*. Title to such real property or equipment shall vest in the recipient upon acquisition. Unless a statute specifically authorizes a DoD Component to vest title in the recipient without further obligation to the Government, and the DoD Component elects to do so, the title shall be a conditional title. Title shall vest in the recipient subject to the conditions that the recipient:

(1) Use the real property or equipment for the authorized purposes of the project until funding for the project ceases, or until the property is no longer needed for the purposes of the project.

(2) Not encumber the property without approval of the grants officer.

(3) Use and dispose of the property in accordance with paragraphs (d) and (e) of this section.

(c) *Federal interest in real property or equipment offered as cost-share*. A recipient may offer the full value of real property or equipment that is purchased with recipient's funds or that is donated by a third party to meet a portion of any required cost sharing or matching, subject to the prior approval requirement in § 34.13(a)(7). If a recipient does so, the Government has a financial interest in the property, a share of the property value attributable to the Federal participation in the project. The property therefore shall be considered as if it had been acquired in part with Federal funds, and shall be subject to the provisions of paragraphs (b)(1), (b)(2) and (b)(3) of this section, and to the provisions of § 34.23.

(d) *Use*. If real property or equipment is acquired in whole or in part with Federal funds under an award, and the award provides that title vests conditionally in the recipient, the real property or equipment is subject to the following:

(1) During the time that the real property or equipment is used on the project or program for which it was acquired, the recipient shall make it available for use on other projects or programs, if such other use will not interfere with the work on the project or program for which the real property or equipment was originally acquired. Use of the real property or equipment on other projects will be in the following order of priority:

(i) Activities sponsored by DoD Components' grants, cooperative agreements, or other assistance awards;

(ii) Activities sponsored by other Federal agencies' grants, cooperative agreements, or other assistance awards;

(iii) Activities under Federal procurement contracts, or activities not sponsored by any Federal agency. If so used, use charges shall be assessed to those activities. For real property or equipment, the use charges shall be at rates equivalent to those for which comparable real property or equipment may be leased. The use charges shall be treated as program income.

(2) After Federal funding for the project ceases, or when the real property or equipment is no longer needed for the purposes of the project, the recipient may use the real property or equipment for other projects, insofar as:

(i) There are Federally sponsored projects for which the real property or equipment may be used. If the only use for the real property or equipment is for projects that have no Federal sponsorship, the recipient shall proceed with disposition of the real property or equipment, in accordance with paragraph (e) of this section.

(ii) The recipient obtains written approval from the grants officer to do so. The grants officer shall ensure that there is a formal change of accountability for the real property or equipment to a currently funded, Federal award.

(iii) The recipient's use of the real property or equipment for other projects is in the same order of priority as described in paragraph (d)(1) of this section.

(e) *Disposition*. (1) When an item of real property or equipment is no longer needed for Federally sponsored projects, the recipient shall proceed as follows:

(i) If the property that is no longer needed is equipment (rather than real property), the recipient may wish to replace it with an item that is needed

currently for the project. In that case, the recipient may use the original equipment as trade-in or sell it and use the proceeds to offset the costs of the replacement equipment, subject to the approval of the responsible agency (i.e., the DoD Component or the Federal agency to which the DoD Component delegated responsibility for administering the equipment).

(ii) The recipient may elect to retain title, without further obligation to the Federal Government, by compensating the Federal Government for that percentage of the current fair market value of the real property or equipment that is attributable to the Federal participation in the project.

(iii) If the recipient does not elect to retain title to real property or equipment (see paragraph (e)(1)(ii) of this section), or request approval to use equipment as trade-in or offset for replacement equipment (see paragraph (e)(1)(i) of this section), the recipient shall request disposition instructions from the responsible agency.

(2) If a recipient requests disposition instructions, in accordance with paragraph (e)(1)(iii) of this section, the responsible grants officer shall:

(i) For equipment (but not real property), consult with the Federal program manager and judge whether the age and nature of the equipment warrant a screening procedure, to determine whether the equipment is useful to a DoD Component or other Federal agency. If a screening procedure is warranted, the responsible agency shall determine whether the equipment can be used to meet a DoD Component's requirement. If no DoD requirement is found, the responsible agency shall report the availability of the equipment to the General Services Administration, to determine whether a requirement for the equipment exists in other Federal agencies.

(ii) For either real property or equipment, issue instructions to the recipient for disposition of the property no later than 120 calendar days after the recipient's request. The grants officer's options for disposition are to direct the recipient to:

(A) Transfer title to the real property or equipment to the Federal Government or to an eligible third party provided that, in such cases, the recipient shall be entitled to compensation for its attributable percentage of the current fair market value of the real property or equipment, plus any reasonable shipping or interim storage costs incurred. If title is transferred to the Federal Government, it shall be subject thereafter to provisions for Federally owned property in § 34.22.

(B) Sell the real property or equipment and pay the Federal Government for that percentage of the current fair market value of the property that is attributable to the Federal participation in the project (after deducting actual and reasonable selling and fix-up expenses, if any, from the sale proceeds). When the recipient is authorized or required to sell the real property or equipment, proper sales procedures shall be established that provide for competition to the extent practicable and result in the highest possible return.

(3) If the responsible agency fails to issue disposition instructions within 120 calendar days of the recipient's request, as described in paragraph (e)(2)(ii) of this section, the recipient shall dispose of the real property or equipment through the option described in paragraph (e)(2)(ii)(B) of this section.

### § 34.22 Federally owned property.

(a) *Annual inventory*. Recipients shall submit annually an inventory listing of all Federally owned property in their custody (property furnished by the Federal Government, rather than acquired by the recipient with Federal funds under the award), to the DoD Component or other Federal agency responsible for administering the property under the award.

(b) *Use on other activities*. (1) Use of federally owned property on other activities is permissible, if authorized by the DoD Component responsible for administering the award to which the property currently is charged.

(2) Use on other activities will be in the following order of priority:

(i) Activities sponsored by DoD Components' grants, cooperative agreements, or other assistance awards;

(ii) Activities sponsored by other Federal agencies' grants, cooperative

agreements, or other assistance awards;

(iii) Activities under Federal procurement contracts, or activities not sponsored by any Federal agency. If so used, use charges shall be assessed to those activities. For real property or equipment, the use charges shall be at rates equivalent to those for which comparable real property or equipment may be leased. The use charges shall be treated as program income.

(c) *Disposition of property*. Upon completion of the award, the recipient shall report the property to the responsible agency. The agency may:

(1) Use the property to meet another Federal Government need (e.g, by transferring accountability for the property to another Federal award to the same recipient, or by directing the recipient to transfer the property to a Federal agency that needs the property, or to another recipient with a currently funded award).

(2) Declare the property to be excess property and either:

(i) Report the property to the General Services Administration, in accordance with the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 483(b)(2)), as implemented by General Services Administration regulations at 41 CFR 101–47.202; or

(ii) Dispose of the property by alternative methods, if there is statutory authority to do so (e.g., DoD Components are authorized by 15 U.S.C. 3710(i), the Federal Technology Transfer Act, to donate research equipment to educational and nonprofit organizations for the conduct of technical and scientific education and research activities. Such donations shall be in accordance with the DoD implementation of E.O. 12999 (3 CFR, 1996 Comp., p. 180), ''Educational Technology: Ensuring Opportunity for All Children in the Next Century,'' as applicable.) Appropriate instructions shall be issued to the recipient by the responsible agency.

### § 34.23 Property management system.

The recipient's property management system shall include the following, for property that is Federally owned, and for equipment that is acquired in whole or in part with Federal funds, or that is used as matching share:

(a) Property records shall be maintained, to include the following information:

(1) A description of the property.

(2) Manufacturer's serial number, model number, Federal stock number, national stock number, or any other identification number.

(3) Source of the property, including the award number.

(4) Whether title vests in the recipient or the Federal Government.

(5) Acquisition date (or date received, if the property was furnished by the Federal Government) and cost.

(6) Information from which one can calculate the percentage of Federal participation in the cost of the property (not applicable to property furnished by the Federal Government).

(7) The location and condition of the property and the date the information was reported.

(8) Ultimate disposition data, including date of disposal and sales price or the method used to determine current fair market value where a recipient compensates the Federal Government for its share.

(b) Federally owned equipment shall be marked, to indicate Federal ownership.

(c) A physical inventory shall be taken and the results reconciled with the property records at least once every two years. Any differences between quantities determined by the physical inspection and those shown in the accounting records shall be investigated to determine the causes of the difference. The recipient shall, in connection with the inventory, verify the existence, current utilization, and continued need for the property.

(d) A control system shall be in effect to insure adequate safeguards to prevent loss, damage, or theft of the property. Any loss, damage, or theft of property shall be investigated and fully documented; if the property was owned by the Federal Government, the recipient shall promptly notify the Federal agency responsible for administering the property.

(e) Adequate maintenance procedures shall be implemented to keep the property in good condition.

### § 34.24 Supplies.

(a) Title shall vest in the recipient upon acquisition for supplies acquired with Federal funds under an award.

(b) Upon termination or completion of the project or program, the recipient shall retain any unused supplies. If the inventory of unused supplies exceeds $5,000 in total aggregate value and the items are not needed for any other Federally sponsored project or program, the recipient shall retain the items for use on non-Federal sponsored activities or sell them, but shall, in either case, compensate the Federal Government for its share.

### § 34.25 Intellectual property developed or produced under awards.

(a) *Patents.* Grants and cooperative agreements with:

(1) Small business concerns shall comply with 35 U.S.C. Chapter 18, as implemented by 37 CFR part 401, which applies to inventions made under grants and cooperative agreements with small business concerns for research and development. 37 CFR 401.14 provides a standard clause that is required in such grants and cooperative agreements in most cases, 37 CFR 401.3 specifies when the clause shall be included, and 37 CFR 401.5 specifies how the clause may be modified and tailored.

(2) For-profit organizations other than small business concerns shall comply with 35 U.S.C. 210(c) and Executive Order 12591 (3 CFR, 1987 Comp., p. 220) (which codifies a Presidential Memorandum on Government Patent Policy, dated February 18, 1983).

(i) The Executive order states that, as a matter of policy, grants and cooperative agreements should grant to all for-profit organizations, regardless of size, title to patents made in whole or in part with Federal funds, in exchange for royalty-free use by or on behalf of the Government (i.e., it extends the applicability of 35 U.S.C. Chapter 18, to the extent permitted by law, to for-profit organizations other than small business concerns).

(ii) 35 U.S.C. 210(c) states that 35 U.S.C. Chapter 18 is not intended to limit agencies' authority to agree to the disposition of rights in inventions in accordance with the Presidential memorandum codified by the Executive order. It also states that such grants and cooperative agreements shall provide for Government license rights required by 35 U.S.C. 202(c)(4) and march-in rights required by 35 U.S.C. 203.

(b) *Copyright, data and software rights.* Requirements concerning data and software rights are as follows:

(1) The recipient may copyright any work that is subject to copyright and was developed under an award. DoD Components reserve a royalty-free, nonexclusive and irrevocable right to reproduce, publish, or otherwise use the work for Federal purposes, and to authorize others to do so.

(2) Unless waived by the DoD Component making the award, the Federal Government has the right to:

(i) Obtain, reproduce, publish or otherwise use for Federal Government purposes the data first produced under an award.

(ii) Authorize others to receive, reproduce, publish, or otherwise use such data for Federal purposes.

## PROCUREMENT STANDARDS

### § 34.30 Purpose of procurement standards.

Section 34.31 sets forth requirements necessary to ensure:

(a) Compliance of recipients' procurements that use Federal funds with applicable Federal statutes and executive orders.

(b) Proper stewardship of Federal funds used in recipients' procurements.

### § 34.31 Requirements.

The following requirements pertain to recipients' procurements funded in whole or in part with Federal funds or with recipients' cost-share or match:

(a) *Reasonable cost.* Recipients procurement procedures shall make maximum practicable use of competition, or shall use other means that ensure reasonable cost for procured goods and services.

(b) *Pre-award review of certain procurements.* Prior to awarding a procurement contract under an award, a recipient may be required to provide the grants officer administering the award with pre-award documents (e.g., requests for

proposals, invitations for bids, or independent cost estimates) related to the procurement. Recipients will only be required to provide such documents for the grants officer's pre-award review in exceptional cases where the grants officer judges that there is a compelling need to do so. In such cases, the grants officer must include a provision in the award that states the requirement.

(c) *Contract provisions.* (1) Contracts in excess of the simplified acquisition threshold shall contain contractual provisions or conditions that allow for administrative, contractual, or legal remedies in instances in which a contractor violates or breaches the contract terms, and provide for such remedial actions as may be appropriate.

(2) All contracts in excess of the simplified acquisition threshold shall contain suitable provisions for termination for default by the recipient or for termination due to circumstances beyond the control of the contractor.

(3) All negotiated contracts in excess of the simplified acquisition threshold shall include a provision permitting access of the Department of Defense, the Comptroller General of the United States, or any of their duly authorized representatives, to any books, documents, papers, and records of the contractor that are directly pertinent to a specific program, for the purpose of making audits, examinations, excerpts, and transcriptions.

(4) All contracts, including those for amounts less than the simplified acquisition threshold, awarded by recipients and their contractors shall contain the procurement provisions of Appendix A to this part, as applicable.

REPORTS AND RECORDS

### § 34.40 Purpose of reports and records.

Sections 34.41 and 34.42 prescribe requirements for monitoring and reporting financial and program performance and for records retention.

### § 34.41 Monitoring and reporting program and financial performance.

Grants officers may use the provisions of 32 CFR 32.51 and 32.52 for awards to for-profit organizations, or may include equivalent technical and financial reporting requirements that ensure reasonable oversight of the expenditure of appropriated funds. As a minimum, equivalent requirements must include:

(a) Periodic reports (at least annually, and no more frequently than quarterly) addressing both program status and business status, as follows:

(1) The program portions of the reports must address progress toward achieving program performance goals, including current issues, problems, or developments.

(2) The business portions of the reports shall provide summarized details on the status of resources (federal funds and non-federal cost sharing or matching), including an accounting of expenditures for the period covered by the report. The report should compare the resource status with any payment and expenditure schedules or plans provided in the original award; explain any major deviations from those schedules; and discuss actions that will be taken to address the deviations.

(3) When grants officers previously authorized advance payments, pursuant to § 34.12(a)(2), they should consult with the program official and consider whether program progress reported in the periodic report, in relation to reported expenditures, is sufficient to justify continued authorization of advance payments.

(b) Unless inappropriate, a final performance report that addresses all major accomplishments under the award.

### § 34.42 Retention and access requirements for records.

(a) This section sets forth requirements for records retention and access to records for awards to recipients.

(b) Financial records, supporting documents, statistical records, and all other records pertinent to an award shall be retained for a period of three years from the date of submission of the final expenditure report. The only exceptions are the following:

(1) If any litigation, claim, or audit is started before the expiration of the 3-year period, the records shall be retained until all litigation, claims or audit findings involving the records have been resolved and final action taken.

(2) Records for real property and equipment acquired with Federal funds shall be retained for 3 years after final disposition.

(3) When records are transferred to or maintained by the DoD Component that made the award, the 3-year retention requirement is not applicable to the recipient.

(4) Indirect cost rate proposals, cost allocations plans, and related records, for which retention requirements are specified in §34.42(g).

(c) Copies of original records may be substituted for the original records if authorized by the grants officer.

(d) The grants officer shall request that recipients transfer certain records to DoD Component custody when he or she determines that the records possess long term retention value. However, in order to avoid duplicate recordkeeping, a grants officer may make arrangements for recipients to retain any records that are continuously needed for joint use.

(e) DoD Components, the Inspector General, Comptroller General of the United States, or any of their duly authorized representatives, have the right of timely and unrestricted access to any books, documents, papers, or other records of recipients that are pertinent to the awards, in order to make audits, examinations, excerpts, transcripts and copies of such documents. This right also includes timely and reasonable access to a recipient's personnel for the purpose of interview and discussion related to such documents. The rights of access in this paragraph are not limited to the required retention period, but shall last as long as records are retained.

(f) Unless required by statute, no DoD Component shall place restrictions on recipients that limit public access to the records of recipients that are pertinent to an award, except when the DoD Component can demonstrate that such records shall be kept confidential and would have been exempted from disclosure pursuant to the Freedom of Information Act (5 U.S.C. 552) if the records had belonged to the DoD Component making the award.

(g) Indirect cost proposals, cost allocation plans, and other cost accounting documents (such as documents related to computer usage chargeback rates), along with their supporting records, shall be retained for a 3-year period, as follows:

(1) If a recipient is required to submit an indirect-cost proposal, cost allocation plan, or other computation to the cognizant Federal agency, for purposes of negotiating an indirect cost rate or other rates, the 3-year retention period starts on the date of the submission. This retention requirement also applies to subrecipients submitting similar documents for negotiation to the recipient.

(2) If the recipient or the subrecipient is not required to submit the documents or supporting records for negotiating an indirect cost rate or other rates, the 3-year retention period for the documents and records starts at the end of the fiscal year (or other accounting period) covered by the proposal, plan, or other computation.

(h) If the information described in this section is maintained on a computer, recipients shall retain the computer data on a reliable medium for the time periods prescribed. Recipients may transfer computer data in machine readable form from one reliable computer medium to another. Recipients' computer data retention and transfer procedures shall maintain the integrity, reliability, and security of the original computer data. Recipients shall also maintain an audit trail describing the data transfer. For the record retention time periods prescribed in this section, recipients shall not destroy, discard, delete, or write over such computer data.

TERMINATION AND ENFORCEMENT

### §34.50 Purpose of termination and enforcement.

Sections 34.51 through 34.53 set forth uniform procedures for suspension, termination, enforcement, and disputes.

### §34.51 Termination.

(a) Awards may be terminated in whole or in part only in accordance with one of the following:

(1) By the grants officer, if a recipient materially fails to comply with the terms and conditions of an award.

(2) By the grants officer with the consent of the recipient, in which case the two parties shall agree upon the termination conditions, including the effective date and, in the case of partial termination, the portion to be terminated.

(3) By the recipient upon sending to the grants officer written notification setting forth the reasons for such termination, the effective date, and, in the case of partial termination, the portion to be terminated. The recipient must provide such notice at least 30 calendar days prior to the effective date of the termination. However, if the grants officer determines in the case of partial termination that the reduced or modified portion of the award will not accomplish the purposes for which the award was made, he or she may terminate the award in its entirety.

(b) If costs are allowed under an award, the responsibilities of the recipient referred to in § 34.61(b), including those for property management as applicable, shall be considered in the termination of the award, and provision shall be made for continuing responsibilities of the recipient after termination, as appropriate.

### § 34.52 Enforcement.

(a) *Remedies for noncompliance.* If a recipient materially fails to comply with the terms and conditions of an award, whether stated in a Federal statute, regulation, assurance, application, or notice of award, the grants officer may, in addition to imposing any of the special conditions outlined in § 34.4, take one or more of the following actions, as appropriate in the circumstances:

(1) Temporarily withhold cash payments pending correction of the deficiency by the recipient or more severe enforcement action by the grants officer and DoD Component.

(2) Disallow (that is, deny both use of funds and any applicable matching credit for) all or part of the cost of the activity or action not in compliance.

(3) Wholly or partly suspend or terminate the current award. In the case of termination, the recipient will be reimbursed for allowable costs incurred prior to termination, with the possible exception of those for activities and actions described in paragraph (a)(2) of this section.

(4) Withhold further awards for the project or program.

(5) Take other remedies that may be legally available.

(b) *Hearings and appeals.* In taking an enforcement action, the grants officer and DoD Component shall provide the recipient an opportunity for hearing, appeal, or other administrative proceeding to which the recipient is entitled under any statute or regulation applicable to the action involved (see § 34.53 and 32 CFR 22.815).

(c) *Effects of suspension and termination.* Costs of a recipient resulting from obligations incurred by the recipient during a suspension or after termination of an award are not allowable unless the grants officer expressly authorizes them in the notice of suspension or termination or subsequently. Other recipient costs during suspension or after termination which are necessary and not reasonably avoidable are allowable if the costs:

(1) Result from obligations which were properly incurred by the recipient before the effective date of suspension or termination, are not in anticipation of it, and in the case of a termination, are noncancellable; and

(2) Would be allowable if the award were not suspended or expired normally at the end of the funding period in which the termination takes effect.

(d) *Relationship to debarment and suspension.* The enforcement remedies identified in this section, including suspension and termination, do not preclude a recipient from being subject to debarment and suspension under 2 CFR part 1125.

[63 FR 12188, Mar. 12, 1998, as amended at 72 FR 34998, June 26, 2007]

### § 34.53 Disputes and appeals.

Recipients have the right to appeal certain decisions by grants officers. In resolving such issues, DoD policy is to use Alternative Dispute Resolution (ADR) techniques, to the maximum practicable extent. See 32 CFR 22.815 for standards for DoD Components' dispute resolution and formal, administrative appeal procedures.

## Subpart C—After-the-Award Requirements

### § 34.60 Purpose.

Sections 34.61 through 34.63 contain procedures for closeout and for subsequent disallowances and adjustments.

### § 34.61 Closeout procedures.

(a) The cognizant grants officer shall, at least six months prior to the expiration date of the award, contact the recipient to establish:

(1) All steps needed to close out the award, including submission of financial and performance reports, liquidation of obligations, and decisions on property disposition.

(2) A schedule for completing those steps.

(b) The following provisions shall apply to the closeout:

(1) The responsible grants officer and payment office shall expedite completion of steps needed to close out awards and make prompt, final payments to a recipient for allowable reimbursable costs under the award being closed out.

(2) The recipient shall promptly refund any unobligated balances of cash that the DoD Component has advanced or paid and that is not authorized to be retained by the recipient for use in other projects. For unreturned amounts that become delinquent debts, see 32 CFR 22.820.

(3) When authorized by the terms and conditions of the award, the grants officer shall make a settlement for any upward or downward adjustments to the Federal share of costs after closeout reports are received.

(4) The recipient shall account for any real property and personal property acquired with Federal funds or received from the Federal Government in accordance with §§ 34.21 through 34.25.

(5) If a final audit is required and has not been performed prior to the closeout of an award, the DoD Component shall retain the right to recover an appropriate amount after fully considering the recommendations on disallowed costs resulting from the final audit.

### § 34.62 Subsequent adjustments and continuing responsibilities.

(a) The closeout of an award does not affect any of the following:

(1) The right of the Department of Defense to disallow costs and recover funds on the basis of a later audit or other review.

(2) The obligation of the recipient to return any funds due as a result of later refunds, corrections, or other transactions.

(3) Audit requirements in § 34.16.

(4) Property management requirements in §§ 34.21 through 34.25.

(5) Records retention as required in § 34.42.

(b) After closeout of an award, a relationship created under an award may be modified or ended in whole or in part with the consent of the grants officer and the recipient, provided the responsibilities of the recipient referred to in § 34.61(a), including those for property management as applicable, are considered and provisions made for continuing responsibilities of the recipient, as appropriate.

### § 34.63 Collection of amounts due.

Any funds paid to a recipient in excess of the amount to which the recipient is finally determined to be entitled under the terms and conditions of the award constitute a debt to the Federal Government. Procedures for issuing the demand for payment and pursuing administrative offset and other remedies are described in 32 CFR 22.820.

## APPENDIX A TO PART 34—CONTRACT PROVISIONS

All contracts awarded by a recipient, including those for amounts less than the simplified acquisition threshold, shall contain the following provisions as applicable:

1. *Equal Employment Opportunity*—All contracts shall contain a provision requiring compliance with E.O. 11246 (3 CFR, 1964–1965 Comp., p. 339), ''Equal Employment Opportunity,'' as amended by E.O. 11375 (3 CFR, 1966–1970 Comp., p. 684), ''Amending Executive Order 11246 Relating to Equal Employment Opportunity,'' and as supplemented by regulations at 41 CFR chapter 60, ''Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor.''

2. *Copeland ''Anti-Kickback'' Act (18 U.S.C. 874 and 40 U.S.C. 276c)*—All contracts and subawards in excess of $2000 for construction or

repair awarded by recipients and subrecipients shall include a provision for compliance with the Copeland ''Anti-Kickback'' Act (18 U.S.C. 874), as supplemented by Department of Labor regulations (29 CFR part 3, ''Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or Grants from the United States''). The Act provides that each contractor or subrecipient shall be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he is otherwise entitled. The recipient shall report all suspected or reported violations to the responsible DoD Component.

3. *Contract Work Hours and Safety Standards Act (40 U.S.C. 327–333)*—Where applicable, all contracts awarded by recipients in excess of $100,000 for construction and other purposes that involve the employment of mechanics or laborers shall include a provision for compliance with Sections 102 and 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327–333), as supplemented by Department of Labor regulations (29 CFR part 5). Under Section 102 of the Act, each contractor shall be required to compute the wages of every mechanic and laborer on the basis of a standard work week of 40 hours. Work in excess of the standard work week is permissible provided that the worker is compensated at a rate of not less than 1½ times the basic rate of pay for all hours worked in excess of 40 hours in the work week. Section 107 of the Act is applicable to construction work and provides that no laborer or mechanic shall be required to work in surroundings or under working conditions which are unsanitary, hazardous or dangerous. These requirements do not apply to the purchases of supplies or materials or articles ordinarily available on the open market, or contracts for transportation or transmission of intelligence.

4. *Rights to Inventions Made Under a Contract, Grant or Cooperative Agreement*—Contracts, grants, or cooperative agreements for the performance of experimental, developmental, or research work shall provide for the rights of the Federal Government and the recipient in any resulting invention in accordance with 37 CFR part 401, ''Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements.''

5. *Clean Air Act* (42 U.S.C. 7401 *et seq.*) and the Federal Water Pollution Control Act (33 U.S.C. 1251 *et seq.*), as amended—Contracts and subawards of amounts in excess of $100,000 shall contain a provision that requires the recipient to agree to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act (42 U.S.C. 7401 *et seq.*) and the Federal Water Pollution Control Act as amended (33 U.S.C. 1251 *et seq.*). Violations shall be reported to the responsible DoD Component and the Regional Office of the Environmental Protection Agency (EPA).

6. *Byrd Anti-Lobbying Amendment (31 U.S.C. 1352)*—Contractors who apply or bid for an award of $100,000 or more shall file the required certification. Each tier certifies to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 U.S.C. 1352. Each tier shall also disclose any lobbying with non-Federal funds that takes place in connection with obtaining any Federal award. Such disclosures are forwarded from tier to tier up to the recipient.

7. *Debarment and Suspension (E.O.s 12549 and 12689)*—A contract award with an amount expected to equal or exceed $25,000 and certain other contract awards (see 2 CFR 1125.220, which implements OMB guidance at 2 CFR 180.220) shall not be made to parties listed on the Governmentwide Excluded Parties List System, in accordance with the DoD adoption at 2 CFR part 1125 of the OMB guidance implementing E.O.s 12549 (3 CFR, 1986 Comp., p. 189) and 12689 (3 CFR, 1989 Comp., p. 235), ''Debarment and Suspension.'' The Excluded Parties List System accessible on the Internet at *www.epls.gov* contains the names of parties debarred, suspended, or otherwise excluded by agencies, as well as parties declared ineligible under statutory or regulatory authority other than E.O. 12549.

[63 FR 12204, Mar. 12, 1998, as amended at 70 FR 49477, Aug. 23, 2005; 72 FR 34998, June 26, 2007]

# PART 37—TECHNOLOGY INVESTMENT AGREEMENTS

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Subpart J—Definitions of Terms Used in this Part

37.1205 Advance.
37.1210 Advanced research.
37.1215 Agreements officer.
37.1220 Applied research.
37.1225 Articles of collaboration.
37.1230 Assistance.
37.1235 Award-specific audit.
37.1240 Basic research.
37.1245 Cash contributions.
37.1250 Commercial firm.
37.1255 Consortium.
37.1260 Cooperative agreement.
37.1265 Cost sharing.
37.1270 Data.
37.1275 DoD Component.
37.1280 Equipment.
37.1285 Expenditure-based award.
37.1290 Expenditures or outlays.
37.1295 Grant.
37.1300 In-kind contributions.
37.1305 Institution of higher education.
37.1310 Intellectual property.
37.1315 Nonprofit organization.
37.1320 Participant.
37.1325 Periodic audit.
37.1330 Procurement contract.
37.1335 Program income.
37.1340 Program official.
37.1345 Property.
37.1350 Real property.
37.1355 Recipient.
37.1360 Research.
37.1365 Supplies.
37.1370 Termination.
37.1375 Technology investment agreements.

APPENDIX A TO PART 37—WHAT IS THE CIVIL-MILITARY INTEGRATION POLICY THAT IS THE BASIS FOR TECHNOLOGY INVESTMENT AGREEMENTS?
APPENDIX B TO PART 37—WHAT TYPE OF INSTRUMENT IS A TIA AND WHAT STATUTORY AUTHORITIES DOES IT USE?
APPENDIX C TO PART 37—WHAT IS THE DESIRED COVERAGE FOR PERIODIC AUDITS OF FOR-PROFIT PARTICIPANTS TO BE AUDITED BY IPAS?
APPENDIX D TO PART 37—WHAT COMMON NATIONAL POLICY REQUIREMENTS MAY APPLY AND NEED TO BE INCLUDED IN TIAS?
APPENDIX E TO PART 37—WHAT PROVISIONS MAY A PARTICIPANT NEED TO INCLUDE WHEN PURCHASING GOODS OR SERVICES UNDER A TIA?

AUTHORITY: 5 U.S.C. 301 and 10 U.S.C. 113.

SOURCE: 68 FR 47160, Aug. 7, 2003, unless otherwise noted.

## Subpart A—General

### § 37.100 What does this part do?

This part establishes uniform policies and procedures for the DoD Components' award and administration of technology investment agreements (TIAs).

### § 37.105 Does this part cover all types of instruments that 10 U.S.C. 2371 authorizes?

No, this part covers only TIAs, some of which use the authority of 10 U.S.C. 2371 (*see* appendix B to this part). This part does not cover assistance instruments other than TIAs that use the authority of 10 U.S.C. 2371. It also does not cover acquisition agreements for prototype projects that use 10 U.S.C. 2371 authority augmented by the authority in section 845 of Public Law 103–160, as amended.

### § 37.110 What type of instruments are technology investment agreements (TIAs)?

TIAs are assistance instruments used to stimulate or support research. As discussed in appendix B to this part, a TIA may be either a kind of cooperative agreement or a type of assistance transaction other than a grant or cooperative agreement.

### § 37.115 For what purposes are TIAs used?

The ultimate goal for using TIAs, like other assistance instruments used in defense research programs, is to foster the best technologies for future defense needs. TIAs differ from and complement other assistance instruments available to agreements officers, in that TIAs address the goal by fostering civil-military integration (*see* appendix A to this part). TIAs therefore are designed to:

(a) Reduce barriers to commercial firms' participation in defense research, to give the Department of Defense (DoD) access to the broadest possible technology and industrial base.

(b) Promote new relationships among performers in both the defense and commercial sectors of that technology and industrial base.

(c) Stimulate performers to develop, use, and disseminate improved practices.

### § 37.120 Can my organization award or administer TIAs?

Your office may award or administer TIAs if it has a delegation of the authorities in 10 U.S.C. 2371, as well as 10 U.S.C. 2358. If your office is in a Military Department, it must have a delegation of the authority of the Secretary of that Military Department under those statutes. If your office is in a Defense Agency, it must have a delegation of the authority of the Secretary of Defense under 10 U.S.C. 2358 and 2371. Your office needs those authorities to be able to:

(a) Enter into cooperative agreements to stimulate or support research, using the authority of 10 U.S.C. 2358, as well as assistance transactions other than grants or cooperative agreements, using the authority of 10 U.S.C. 2371. The reason that both authorities are needed is that a TIA, depending upon its patent rights provision (*see* appendix B to this part), may be either a cooperative agreement or a type of assistance transaction other than a grant or cooperative agreement.

(b) Recover funds from a recipient and reuse the funds for program purposes, as authorized by 10 U.S.C. 2371 and described in § 37.580.

(c) Exempt certain information received from proposers from disclosure under the Freedom of Information Act, as authorized by 10 U.S.C. 2371 and described in § 37.420.

### § 37.125 May I award or administer TIAs if I am authorized to award or administer other assistance instruments?

(a) You must have specific authorization to award or administer TIAs. Being authorized to award or administer grants and cooperative agreements is not sufficient; a grants officer is an agreements officer only if the statement of appointment also authorizes the award or administration of TIAs.

(b) You receive that authorization in the same way that you receive authority to award other assistance instruments, as described in 32 CFR 21.425 and 21.435 through 21.445.

### § 37.130 Which other parts of the DoD Grant and Agreement Regulations apply to TIAs?

(a) TIAs are explicitly covered in this part and part 21 of the DoD Grant and Agreement Regulations (DoDGARs). Part 21 (32 CFR part 21) addresses deviation procedures and other general matters that relate to the DoDGARs, to DoD Components' authorities and responsibilities for assistance instruments, and to requirements for reporting information about assistance awards.

(b) Two additional parts of the DoDGARs apply to TIAs, although they do not mention TIAs explicitly. They are:

(1) Part 1125 (2 CFR part 1125) on nonprocurement debarment and suspension, which applies because it covers nonprocurement instruments in general;

(2) Part 26 (32 CFR part 26), on drug-free workplace requirements, which applies because it covers financial assistance in general; and

(3) Part 28 (32 CFR part 28), on lobbying restrictions, which applies by law (31 U.S.C. 1352) to TIAs that are cooperative agreements and as a matter of DoD policy to all other TIAs.

(c) Portions of four other DoDGARs parts apply to TIAs only as cited by reference in this part. Those parts of

the DoDGARs are parts 22, 32, 33, and 34 (32 CFR parts 22, 32, 33, and 34).

[68 FR 47160, Aug. 7, 2003, as amended at 70 FR 49477, Aug. 23, 2005; 72 FR 34999, June 26, 2007]

## Subpart B—Appropriate Use of Technology Investment Agreements

### § 37.200 What are my responsibilities as an agreements officer for ensuring the appropriate use of TIAs?

You must ensure that you use TIAs only in appropriate situations. To do so, you must conclude that the use of a TIA is justified based on:

(a) The nature of the project, as discussed in § 37.205;

(b) The type of recipient, addressed in § 37.210;

(c) The recipient's commitment and cost sharing, as described in § 37.215;

(d) The degree of involvement of the Government program official, as discussed in § 37.220; and

(e) Your judgment that the use of a TIA could benefit defense research objectives in ways that likely would not happen if another type of assistance instrument were used. Your answers to the four questions in § 37.225 should be the basis for your judgment.

### § 37.205 What judgments must I make about the nature of the project?

You must:

(a) Conclude that the principal purpose of the project is stimulation or support of research (*i.e.*, assistance), rather than acquiring goods or services for the benefit of the Government (*i.e.*, acquisition);

(b) Decide that the basic, applied, or advanced research project is relevant to the policy objective of civil-military integration (*see* appendix A of this part); and

(c) Ensure that, to the maximum extent practicable, any TIA that uses the authority of 10 U.S.C. 2371 (*see* appendix B of this part) does not support research that duplicates other research being conducted under existing programs carried out by the Department of Defense. This is a statutory requirement of 10 U.S.C. 2371.

(d) When your TIA is a type of assistance transaction other than a grant or cooperative agreement, satisfy the condition in 10 U.S.C. 2371 to judge that the use of a standard grant or cooperative agreement for the research project is not feasible or appropriate. As discussed in appendix B to this part:

(1) This situation arises if your TIA includes a patent provision that is less restrictive than is possible under the Bayh-Dole statute (because the patent provision is what distinguishes a TIA that is a cooperative agreement from a TIA that is an assistance transaction other than a grant or cooperative agreement).

(2) You satisfy the requirement to judge that a standard cooperative agreement is not feasible or appropriate when you judge that execution of the research project warrants a less restrictive patent provision than is possible under Bayh-Dole.

### § 37.210 To what types of recipients may I award a TIA?

(a) As a matter of DoD policy, you may award a TIA only when one or more for-profit firms are to be involved either in the:

(1) Performance of the research project; or

(2) The commercial application of the research results. In that case, you must determine that the nonprofit performer has at least a tentative agreement with specific for-profit partners who plan on being involved when there are results to transition. You should review the agreement between the nonprofit and for-profit partners, because the for-profit partners' involvement is the basis for using a TIA rather than another type of assistance instrument.

(b) Consistent with the goals of civil-military integration, TIAs are most appropriate when one or more commercial firms (as defined at § 37.1250) are to be involved in the project.

(c) You are encouraged to make awards to consortia (a consortium may include one or more for-profit firms, as well as State or local government agencies, institutions of higher education, or other nonprofit organizations). The reasons are that:

(1) When multiple performers are participating as a consortium, they are more equal partners in the research performance than usually is the case

with a prime recipient and subawards. All of them therefore are more likely to be directly involved in developing and revising plans for the research effort, reviewing technical progress, and overseeing financial and other business matters. That feature makes consortia well suited to building new relationships among performers in the defense and commercial sectors of the technology and industrial base, a principal objective for the use of TIAs.

(2) In addition, interactions among the participants within a consortium potentially provide a self-governance mechanism. The potential for additional self-governance is particularly good when a consortium includes multiple for-profit participants that normally are competitors within an industry.

(d) TIAs also may be used for carrying out research performed by single firms or multiple performers in prime award-subaward relationships. In awarding TIAs in those cases, however, you should consider providing for greater involvement of the program official or a way to increase self-governance (*e.g.*, a prime award with multiple subawards arranged so as to give the subrecipients more insight into and authority and responsibility for programmatic and business aspects of the overall project than they usually have).

### § 37.215 What must I conclude about the recipient's commitment and cost sharing?

(a) You should judge that the recipient has a strong commitment to and self-interest in the success of the project. You should find evidence of that commitment and interest in the proposal, in the recipient's management plan, or through other means. A recipient's self-interest might be driven, for example, by a research project's potential for fostering technology to be incorporated into products and processes for the commercial marketplace.

(b) You must seek cost sharing. The purpose of cost share is to ensure that the recipient incurs real risk that gives it a vested interest in the project's success; the willingness to commit to meaningful cost sharing therefore is one good indicator of a recipient's self-interest. The requirements are that:

(1) To the maximum extent practicable, the non-Federal parties carrying out a research project under a TIA are to provide at least half of the costs of the project. Obtaining this cost sharing, to the maximum extent practicable, is a statutory condition for any TIA under the authority of 10 U.S.C. 2371, and is a matter of DoD policy for all other TIAs.

(2) The parties must provide the cost sharing from non-Federal resources that are available to them unless there is specific authority to use other Federal resources for that purpose (*see* § 37.530(f)).

(c) You may consider whether cost sharing is impracticable in a given case, unless there is a non-waivable, statutory requirement for cost sharing that applies to the particular program under which the award is to be made. Before deciding that cost sharing is impracticable, you should carefully consider whether there are other factors that demonstrate the recipient's self-interest in the success of the current project.

### § 37.220 How involved should the Government program official be in the project?

(a) TIAs are used to carry out cooperative relationships between the Federal Government and the recipient, which requires a greater level of involvement of the Government program official in the execution of the research than the usual oversight of a research grant or procurement contract. For example, program officials will participate in recipients' periodic reviews of research progress and will be substantially involved with the recipients in the resulting revisions of plans for future effort. That increased programmatic involvement before and during program execution with a TIA can reduce the need for some Federal financial requirements that are problematic for commercial firms.

(b) Some aspects of their involvement require program officials to have greater knowledge about and participation in business matters that traditionally would be your exclusive responsibility as the agreements officer. TIAs

therefore also require closer cooperation between program officials and you, as the one who decides business matters.

### § 37.225 What judgment must I make about the benefits of using a TIA?

Before deciding that a TIA is appropriate, you also must judge that using a TIA could benefit defense research objectives in ways that likely would not happen if another type of assistance instrument were used (*e.g.*, a cooperative agreement subject to all of the requirements of 32 CFR part 34). You, in conjunction with Government program officials, must consider the questions in paragraphs (a) through (d) of this section, to help identify the benefits that may justify using a TIA and reducing some of the usual requirements. In accordance with § 37.1030, you will report your answers to these questions to help the DoD measure the Department-wide benefits of using TIAs and meet requirements to report to the Congress. Note that you must give full concise answers only to questions that relate to the benefits that you perceive for using the TIA, rather than another type of funding instrument, for the particular research project. A simple ''no'' or ''not applicable'' is a sufficient response for other questions. The questions are:

(a) Will the use of a TIA permit the involvement in the research of any commercial firms or business units of firms that would not otherwise participate in the project? If so:

(1) What are the expected benefits of those firms' or divisions' participation (e.g., is there a specific technology that could be better, more readily available, or less expensive)?

(2) Why would they not participate if an instrument other than a TIA were used? You should identify specific provisions of the TIA or features of the TIA award process that enable their participation.

(b) Will the use of a TIA allow the creation of new relationships among participants at the prime or subtier levels, among business units of the same firm, or between non-Federal participants and the Federal Government that will help the DoD get better technology in the future? If so:

(1) Why do these new relationships have the potential for helping the DoD get technology in the future that is better, more affordable, or more readily available?

(2) Are there provisions of the TIA or features of the TIA award process that enable these relationships to form? If so, you should be able to identify specifically what they are. If not, you should be able to explain specifically why you think that the relationships could not be created if an assistance instrument other than a TIA were used.

(c) Will the use of a TIA allow firms or business units of firms that traditionally accept Government awards to use new business practices in the execution of the research that will help us get better technology, help us get new technology more quickly or less expensively, or facilitate partnering with commercial firms? If so:

(1) What specific benefits will the DoD potentially get from the use of these new practices? You should be able to explain specifically why you foresee a potential for those benefits.

(2) Are there provisions of the TIA or features of the TIA award process that enable the use of the new practices? If so, you should be able to identify those provisions or features and explain why you think that the practices could not be used if the award were made using an assistance instrument other than a TIA.

(d) Are there any other benefits of the use of a TIA that could help the Department of Defense better meet its objectives in carrying out the research project? If so, you should be able to identify specifically what they are, how they can help meet defense objectives, what features of the TIA or award process enable the DoD to realize them, and why the benefits likely would not be realized if an assistance instrument other than a TIA were used.

### § 37.230 May I use a TIA if a participant is to receive fee or profit?

In accordance with 32 CFR 22.205(b), you may not use a TIA if any participant is to receive fee or profit. Note that this policy extends to all performers of the research project carried

out under the TIA, including any subawards for substantive program performance, but it does not preclude participants' or subrecipients' payment of reasonable fee or profit when making purchases from suppliers of goods (*e.g.*, supplies and equipment) or services needed to carry out the research.

## Subpart C—Expenditure-Based and Fixed-Support Technology Investment Agreements

### § 37.300 What is the difference between an expenditure-based and fixed-support TIA?

The fundamental difference between an expenditure-based and fixed-support TIA is that:

(a) For an expenditure-based TIA, the amounts of interim payments or the total amount ultimately paid to the recipient are based on the amounts the recipient expends on project costs. If a recipient completes the project specified at the time of award before it expends all of the agreed-upon Federal funding and recipient cost sharing, the Federal Government may recover its share of the unexpended balance of funds or, by mutual agreement with the recipient, amend the agreement to expand the scope of the research project. An expenditure-based TIA therefore is analogous to a cost-type procurement contract or grant.

(b) For a fixed-support TIA, the amount of assistance established at the time of award is not meant to be adjusted later if the research project is carried out to completion. In that sense, a fixed-support TIA is somewhat analogous to a fixed-price procurement contract (although ''price,'' a concept appropriate to a procurement contract for buying a good or service, is not appropriate for a TIA or other assistance instrument for stimulation or support of a project).

### § 37.305 When may I use a fixed-support TIA?

You may use a fixed-support TIA if:

(a) The agreement is to support or stimulate research with outcomes that are well defined, observable, and verifiable;

(b) You can reasonably estimate the resources required to achieve those outcomes well enough to ensure the desired level of cost sharing (*see* example in § 37.560(b)); and

(c) Your TIA does not require a specific amount or percentage of recipient cost sharing. In cases where the agreement does require a specific amount or percentage of cost sharing, a fixed-support TIA is not practicable because the agreement has to specify cost principles or standards for costs that may be charged to the project; require the recipient to track the costs of the project; and provide access for audit to allow verification of the recipient's compliance with the mandatory cost sharing. You therefore must use an expenditure-based TIA if you:

(1) Have a non-waivable requirement (*e.g.*, in statute) for a specific amount or percentage of recipient cost sharing; or

(2) Have otherwise elected to include in the TIA a requirement for a specific amount or percentage of cost sharing.

### § 37.310 When would I use an expenditure-based TIA?

In general, you must use an expenditure-based TIA under conditions other than those described in § 37.305. Reasons for any exceptions to this general rule must be documented in the award file and must be consistent with the policy in § 37.230 that precludes payment of fee or profit to participants.

### § 37.315 What are the advantages of using a fixed-support TIA?

In situations where the use of fixed-support TIAs is permissible (see §§ 37.305 and 37.310), their use may encourage some commercial firms' participation in the research. With a fixed-support TIA, you can eliminate or reduce some post-award requirements that sometimes are cited as disincentives for those firms to participate. For example, a fixed-support TIA need not:

(a) Specify minimum standards for the recipient's financial management system.

(b) Specify cost principles or standards stating the types of costs the recipient may charge to the project.

(c) Provide for financial audits by Federal auditors or independent public accountants of the recipient's books and records.

(d) Set minimum standards for the recipient's purchasing system.

(e) Require the recipient to prepare financial reports for submission to the Federal Government.

## Subpart D—Competition Phase

### § 37.400 Must I use competitive procedures to award TIAs?

DoD policy is to award TIAs using merit-based, competitive procedures, as described in 32 CFR 22.315:

(a) In every case where required by statute; and

(b) To the maximum extent practicable in all other cases.

### § 37.405 What must my announcement or solicitation include?

Your announcement, to be considered as part of a competitive procedure, must include the basic information described in 32 CFR 22.315(a). Additional elements for you to consider in the case of a program that may use TIAs are described in §§ 37.410 through 37.420.

### § 37.410 Should my announcement or solicitation state that TIAs may be awarded?

Yes, once you consider the factors described in subpart B of this part and decide that TIAs are among the types of instruments that you may award pursuant to a solicitation, it is important for you to state that fact in the solicitation. You also should state that TIAs are more flexible than traditional Government funding instruments and that provisions are negotiable in areas such as audits and intellectual property rights that may cause concern for commercial firms. Doing so should increase the likelihood that commercial firms will be willing to submit proposals.

### § 37.415 Should I address cost sharing in the announcement or solicitation?

To help ensure a competitive process that is fair and equitable to all potential proposers, you should state clearly in the solicitation:

(a) That, to the maximum extent practicable, the non-Federal parties carrying out a research project under a TIA are to provide at least half of the costs of the project (see § 37.215(b)).

(b) The types of cost sharing that are acceptable;

(c) How any in-kind contributions will be valued, in accordance with §§ 37.530 through 37.555; and

(d) Whether you will give any consideration to alternative approaches a proposer may offer to demonstrate its strong commitment to and self-interest in the project's success, in accordance with § 37.215.

### § 37.420 Should I tell proposers that we will not disclose information that they submit?

Your solicitation should tell potential proposers that:

(a) For all TIAs, information described in paragraph (b) of this section is exempt from disclosure requirements of the Freedom of Information Act (FOIA)(codified at 5 U.S.C. 552) for a period of five years after the date on which the DoD Component receives the information from them.

(b) As provided in 10 U.S.C. 2371, disclosure is not required, and may not be compelled, under FOIA during that period if:

(1) A proposer submits the information in a competitive or noncompetitive process that could result in their receiving a cooperative agreement for basic, applied, or advanced research under the authority of 10 U.S.C. 2358 or any other type of transaction authorized by 10 U.S.C. 2371 (as explained in appendix B to this part, that includes all TIAs); and

(2) The type of information is among the following types that are exempt:

(i) Proposals, proposal abstracts, and supporting documents; and

(ii) Business plans and technical information submitted on a confidential basis.

(c) If proposers desire to protect business plans and technical information for five years from FOIA disclosure requirements, they must mark them with a legend identifying them as documents submitted on a confidential

basis. After the five-year period, information may be protected for longer periods if it meets any of the criteria in 5 U.S.C. 552(b) (as implemented by the DoD in subpart C of 32 CFR part 286) for exemption from FOIA disclosure requirements.

## Subpart E—Pre-Award Business Evaluation

### § 37.500 What must my pre-award business evaluation address?

(a) You must determine the qualification of the recipient, as described in §§ 37.510 and 37.515.

(b) As the business expert working with the program official, you also must address the financial aspects of the proposed agreement. You must:

(1) Determine that the total amount of funding for the proposed effort is reasonable, as addressed in § 37.520.

(2) Assess the value and determine the reasonableness of the recipient's proposed cost sharing contribution, as discussed in §§ 37.525 through 37.555.

(3) If you are contemplating the use of a fixed-support rather than expenditure-based TIA, ensure that its use is justified, as explained in §§ 37.560 and 37.565.

(4) Address issues of inconsistent cost accounting by traditional Government contractors, should they arise, as noted in § 37.570.

(5) Determine amounts for milestone payments, if you use them, as discussed in § 37.575.

### § 37.505 What resources are available to assist me during the pre-award business evaluation?

Administrative agreements officers of the Defense Contract Management Agency and the Office of Naval Research can share lessons learned from administering other TIAs. Program officials can be a source of information when you are determining the reasonableness of proposed funding (*e.g.*, on labor rates, as discussed in § 37.520) or establishing observable and verifiable technical milestones for payments (*see* § 37.575). Auditors at the Defense Contract Audit Agency can act in an advisory capacity to help you determine the reasonableness of proposed amounts, including values of in-kind contributions toward cost sharing.

RECIPIENT QUALIFICATION

### § 37.510 What are my responsibilities for determining that a recipient is qualified?

Prior to award of a TIA, your responsibilities for determining that the recipient is qualified are the same as those of a grants officer who is awarding a grant or cooperative agreement. Those responsibilities are described in subpart D of 32 CFR part 22. When the recipient is a consortium that is not formally incorporated, you have the additional responsibility described in § 37.515.

### § 37.515 Must I do anything additional to determine the qualification of a consortium?

(a) When the prospective recipient of a TIA is a consortium that is not formally incorporated, your determination that the recipient meets the standard at 32 CFR 22.415(a) requires that you, in consultation with legal counsel, review the management plan in the consortium's collaboration agreement. The purpose of your review is to ensure that the management plan is sound and that it adequately addresses the elements necessary for an effective working relationship among the consortium members. An effective working relationship is essential to increase the research project's chances of success.

(b) The collaboration agreement, commonly referred to as the articles of collaboration, is the document that sets out the rights and responsibilities of each consortium member. It binds the individual consortium members together, whereas the TIA binds the Government and the consortium as a group (or the Government and a consortium member on behalf of the consortium, as explained in § 37.1015). The document should discuss, among other things, the consortium's:

(1) Management structure.

(2) Method of making payments to consortium members.

(3) Means of ensuring and overseeing members' efforts on the project.

(4) Provisions for members' cost sharing contributions.

(5) Provisions for ownership and rights in intellectual property developed previously or under the agreement.

TOTAL FUNDING

**§ 37.520 What is my responsibility for determining that the total project funding is reasonable?**

In cooperation with the program official, you must assess the reasonableness of the total estimated budget to perform the research that will be supported by the agreement. Additional guidance follows for:

(a) *Labor*. Much of the budget likely will involve direct labor and associated indirect costs, which may be represented together as a ''loaded'' labor rate. The program official is an essential advisor on reasonableness of the overall level of effort and its composition by labor category. You also may rely on your experience with other awards as the basis for determining reasonableness. If you have any unresolved questions, two of the ways that you might find helpful in establishing reasonableness are to:

(1) Consult the administrative agreements officers or auditors identified in § 37.505.

(2) Compare loaded labor rates of for-profit firms that do not have expenditure-based Federal procurement contracts or assistance awards with a standard or average for the particular industry. Note that the program official may have knowledge about customary levels of direct labor charges in the particular industry that is involved. You may be able to compare associated indirect charges with Government-approved indirect cost rates that exist for many nonprofit and for-profit organizations that have Federal procurement contracts or assistance awards (note the requirement in § 37.630 for a for-profit participant to use Federally approved provisional indirect cost rates, if it has them).

(b) *Real property and equipment*. In almost all cases, the project costs may include only depreciation or use charges for real property and equipment of for-profit participants, in accordance with § 37.685. Remember that the budget for an expenditure-based TIA may not include depreciation of a participant's property as a direct cost of the project if that participant's practice is to charge the depreciation of that type of property as an indirect cost, as many organizations do.

COST SHARING

**§ 37.525 What is my responsibility for determining the value and reasonableness of the recipient's cost sharing contribution?**

You must:

(a) Determine that the recipient's cost sharing contributions meet the criteria for cost sharing and determine values for them, in accordance with §§ 37.530 through 37.555. In doing so, you must:

(1) Ensure that there are affirmative statements from any third parties identified as sources of cash contributions.

(2) Include in the award file an evaluation that documents how you determined the values of the recipient's contributions to the funding of the project.

(b) Judge that the recipient's cost sharing contribution, as a percentage of the total budget, is reasonable. To the maximum extent practicable, the recipient must provide at least half of the costs of the project, in accordance with § 37.215.

**§ 37.530 What criteria do I use in deciding whether to accept a recipient's cost sharing?**

You may accept any cash or in-kind contributions that meet all of the following criteria:

(a) In your judgment, they represent meaningful cost sharing that demonstrates the recipient's commitment to the success of the research project. Cash contributions clearly demonstrate commitment and they are strongly preferred over in-kind contributions.

(b) They are necessary and reasonable for accomplishment of the research project's objectives.

(c) They are costs that may be charged to the project under § 37.625 and § 37.635, as applicable to the participant making the contribution.

(d) They are verifiable from the recipient's records.

(e) They are not included as cost sharing contributions for any other Federal award.

(f) They are not paid by the Federal Government under another award, except:

(1) Costs that are authorized by Federal statute to be used for cost sharing; or

(2) Independent research and development (IR&D) costs, as described at 32 CFR 34.13(a)(5)(ii), that meet all of the criteria in paragraphs (a) through (e) of this section. IR&D is acceptable as cost sharing, even though it may be reimbursed by the Government through other awards. It is standard business practice for all for-profit firms, including commercial firms, to recover their research and development (R&D) costs (which for Federal procurement contracts is recovered as IR&D) through prices charged to their customers. Thus, the cost principles at 48 CFR part 31 allow a for-profit firm that has expenditure-based, Federal procurement contracts to recover through those procurement contracts the allocable portion of its R&D costs associated with a technology investment agreement.

### § 37.535 How do I value cost sharing related to real property or equipment?

You rarely should accept values for cost sharing contributions of real property or equipment that are in excess of depreciation or reasonable use charges, as discussed in § 37.685 for for-profit participants. You may accept the full value of a donated capital asset if the real property or equipment is to be dedicated to the project and you expect that it will have a fair market value that is less than $5,000 at the project's end. In those cases, you should value the donation at the lesser of:

(a) The value of the property as shown in the recipient's accounting records (*i.e.*, purchase price less accumulated depreciation); or

(b) The current fair market value. You may accept the use of any reasonable basis for determining the fair market value of the property. If there is a justification to do so, you may accept the current fair market value even if it exceeds the value in the recipient's records.

### § 37.540 May I accept fully depreciated real property or equipment as cost sharing?

You should limit the value of any contribution of a fully depreciated asset to a reasonable use charge. In determining what is reasonable, you must consider:

(a) The original cost of the asset;

(b) Its estimated remaining useful life at the time of your negotiations;

(c) The effect of any increased maintenance charges or decreased performance due to age; and

(d) The amount of depreciation that the participant previously charged to Federal awards.

### § 37.545 May I accept costs of prior research as cost sharing?

No, you may not count any participant's costs of prior research as a cost sharing contribution. Only the additional resources that the recipient will provide to carry out the current project (which may include pre-award costs for the current project, as described in § 37.830) are to be counted.

### § 37.550 May I accept intellectual property as cost sharing?

(a) In most instances, you should not count costs of patents and other intellectual property (*e.g.*, copyrighted material, including software) as cost sharing, because:

(1) It is difficult to assign values to these intangible contributions;

(2) Their value usually is a manifestation of prior research costs, which are not allowed as cost share under § 37.545; and

(3) Contributions of intellectual property rights generally do not represent the same cost of lost opportunity to a recipient as contributions of cash or tangible assets. The purpose of cost share is to ensure that the recipient incurs real risk that gives it a vested interest in the project's success.

(b) You may include costs associated with intellectual property if the costs are based on sound estimates of market value of the contribution. For example, a for-profit firm may offer the use of commercially available software for

which there is an established license fee for use of the product. The costs of the development of the software would not be a reasonable basis for valuing its use.

### § 37.555 How do I value a recipient's other contributions?

For types of participant contributions other than those addressed in §§ 37.535 through 37.550, the general rule is that you are to value each contribution consistently with the cost principles or standards in § 37.625 and § 37.635 that apply to the participant making the contribution. When valuing services and property donated by parties other than the participants, you may use as guidance the provisions of 32 CFR 34.13(b)(2) through (5).

FIXED-SUPPORT OR EXPENDITURE-BASED APPROACH

### § 37.560 Must I be able to estimate project expenditures precisely in order to justify use of a fixed-support TIA?

(a) To use a fixed-support TIA, rather than an expenditure-based TIA, you must have confidence in your estimate of the expenditures required to achieve well-defined outcomes. Therefore, you must work carefully with program officials to select outcomes that, when the recipient achieves them, are reliable indicators of the amount of effort the recipient expended. However, your estimate of the required expenditures need not be a precise dollar amount, as illustrated by the example in paragraph (b) of this section, if:

(1) The recipient is contributing a substantial share of the costs of achieving the outcomes, which must meet the criteria in § 37.305(a); and

(2) You are confident that the costs of achieving the outcomes will be at least a minimum amount that you can specify and the recipient is willing to accept the possibility that its cost sharing percentage ultimately will be higher if the costs exceed that minimum amount.

(b) To illustrate the approach, consider a project for which you are confident that the recipient will have to expend at least $800,000 to achieve the specified outcomes. You must determine, in conjunction with program officials, the minimum level of recipient cost sharing that you want to negotiate, based on the circumstances, to demonstrate the recipient's commitment to the success of the project. For purposes of this illustration, let that minimum recipient cost sharing be 40% of the total project costs. In that case, the Federal share should be no more than 60% and you could set a fixed level of Federal support at $480,000 (60% of $800,000). With that fixed level of Federal support, the recipient would be responsible for the balance of the costs needed to complete the project.

(c) Note, however, that the level of recipient cost sharing you negotiate is to be based solely on the level needed to demonstrate the recipient's commitment. You may not use a shortage of Federal Government funding for the program as a reason to try to persuade a recipient to accept a fixed-support TIA, rather than an expenditure-based instrument, or to accept responsibility for a greater share of the total project costs than it otherwise is willing to offer. If you lack sufficient funding to provide an appropriate Federal Government share for the entire project, you instead should rescope the effort covered by the agreement to match the available funding.

### § 37.565 May I use a hybrid instrument that provides fixed support for only a portion of a project?

Yes, for a research project that is to be carried out by a number of participants, you may award a TIA that provides for some participants to perform under fixed-support arrangements and others to perform under expenditure-based arrangements. This approach may be useful, for example, if a commercial firm that is a participant will not accept an agreement with all of the post-award requirements of an expenditure-based award. Before using a fixed-support arrangement for that firm's portion of the project, you must judge that it meets the criteria in § 37.305.

ACCOUNTING, PAYMENTS, AND RECOVERY OF FUNDS

### § 37.570 What must I do if a CAS-covered participant accounts differently for its own and the Federal Government shares of project costs?

(a) If a participant has Federal procurement contracts that are subject to the Cost Accounting Standards (CAS) in part 30 of the Federal Acquisition Regulation (FAR) and the associated FAR Appendix (48 CFR part 30 and 48 CFR 9903.201–1, respectively), you must alert the participant during the pre-award negotiations to the potential for a CAS violation, as well as the cognizant administrative contracting officer (ACO) for the participant's procurement contracts, if you learn that the participant plans to account differently for its own share and the Federal Government's share of project costs under the TIA. This may arise, for example, if a for-profit firm or other organization subject to the FAR cost principles in 48 CFR parts 31 and 231 proposes to charge:

(1) Its share of project costs as independent research and development (IR&D) costs to enable recovery of the costs through Federal Government procurement contracts, as allowed under the FAR cost principles; and

(2) The Federal Government's share to the project, rather than as IR&D costs.

(b) The reason for alerting the participant and the ACO is that the inconsistent charging of the two shares could cause a noncompliance with Cost Accounting Standard (CAS) 402. Noncompliance with CAS 402 is a potential issue only for a participant that has CAS-covered Federal procurement contracts (note that CAS requirements do not apply to a for-profit participant's TIAs).

(c) For for-profit participants with CAS-covered procurement contracts, the cognizant ACO in most cases will be an individual within the Defense Contract Management Agency (DCMA). You can identify a cognizant ACO at the DCMA by querying the contract administration team locator that matches contractors with their ACOs (currently on the World Wide Web at *http://alerts.dcmdw.dcma.mil/support*, a site that also can be accessed through the DCMA home page at *http://www.dcma.mil)*.

### § 37.575 What are my responsibilities for determining milestone payment amounts?

(a) If you select the milestone payment method (*see* § 37.805), you must assess the reasonableness of the estimated amount for reaching each milestone. This assessment enables you to set the amount of each milestone payment to approximate the Federal share of the anticipated resource needs for carrying out that phase of the research effort.

(b) The Federal share at each milestone need not be the same as the Federal share of the total project. For example, you might deliberately set payment amounts with a larger Federal share for early milestones if a project involves a start-up company with limited resources.

(c) For an expenditure-based TIA, if you have minimum percentages that you want the recipient's cost sharing to be at the milestones, you should indicate those percentages in the agreement or in separate instructions to the post-award administrative agreements officer. That will help the administrative agreements officer decide when a project's expenditures have fallen too far below the original projections, requiring adjustments of future milestone payment amounts (*see* § 37.1105(c)).

(d) For fixed-support TIAs, the milestone payments should be associated with the well-defined, observable and verifiable technical outcomes (*e.g.*, demonstrations, tests, or data analysis) that you establish for the project in accordance with §§ 37.305(a) and 37.560(a).

### § 37.580 What is recovery of funds and when should I consider including it in my TIA?

(a) Recovery of funds refers to the use of the authority in 10 U.S.C. 2371 to include a provision in certain types of agreements, including TIAs, that require a recipient to make payments to the Department of Defense or another Federal agency as a condition of the agreement. Recovery of funds is a good

tool in the right circumstances, at the discretion of the agreements officer and the awarding organization, but its purpose is not to augment program budgets. It may be used to recover funds provided to a recipient through a TIA or another Federal procurement or assistance instrument, and the recovery should not exceed the amounts provided. Recovery of funds is distinct from program income, as described in § 37.835.

(b) In accordance with 10 U.S.C. 2371, as implemented by policy guidance from the Office of the Under Secretary of Defense (Comptroller), the payment amounts may be credited to an existing account of the Department of Defense and used for the same program purposes as other funds in that account.

(c) Before you use the authority to include a provision for recovery of funds, note that 10 U.S.C. 2371 requires you to judge that it would not be feasible or appropriate to use for the research project a standard grant or cooperative agreement (in this instance, a ''standard cooperative agreement'' means a cooperative agreement without a provision for recovery of funds). You satisfy that 10 U.S.C. 2371 requirement when you judge that execution of the research project warrants inclusion of a provision for recovery of funds.

## Subpart F—Award Terms Affecting Participants' Financial, Property, and Purchasing Systems

### § 37.600 Which administrative matters are covered in this subpart?

This subpart addresses ''systemic'' administrative matters that place requirements on the operation of a participant's financial management, property management, or purchasing system. Each participant's systems are organization-wide and do not vary with each agreement. Therefore, all TIAs should address systemic requirements in a uniform way for each type of participant organization.

### § 37.605 What is the general policy on participants' financial, property, and purchasing systems?

The general policy for expenditure-based TIAs is to avoid requirements that would force participants to use different financial management, property management, and purchasing systems than they currently use for:

(a) Expenditure-based Federal procurement contracts and assistance awards in general, if they receive them; or

(b) Commercial business, if they have no expenditure-based Federal procurement contracts and assistance awards.

### § 37.610 Must I tell participants what requirements they are to flow down for subrecipients' systems?

If it is an expenditure-based award, your TIA must require participants to flow down the same financial management, property management, and purchasing systems requirements to a subrecipient that would apply if the subrecipient were a participant. For example, a for-profit participant would flow down to a university subrecipient the requirements that apply to a university participant. Note that this policy applies to subawards for substantive performance of portions of the research project supported by the TIA, and not to participants' purchases of goods or services needed to carry out the research.

FINANCIAL MATTERS

### § 37.615 What standards do I include for financial systems of for-profit firms?

(a) To avoid causing needless changes in participants' financial management systems, your expenditure-based TIAs will make for-profit participants that currently perform under other expenditure-based Federal procurement contracts or assistance awards subject to the same standards for financial management systems that apply to those other awards. Therefore, if a for-profit participant has expenditure-based DoD assistance awards other than TIAs, your TIAs are to apply the standards in 32 CFR 34.11. You may grant an exception and allow a for-profit participant that has other expenditure-based Federal Government awards to use an alternative set of standards that meets the minimum criteria in paragraph (b) of this section, if there is a compelling programmatic or business reason to do so. For each case in which you grant an

exception, you must document the reason in the award file.

(b) For an expenditure-based TIA, you are to allow and encourage each for-profit participant that does not currently perform under expenditure-based Federal procurement contracts or assistance awards (other than TIAs) to use its existing financial management system as long as the system, as a minimum:

(1) Complies with Generally Accepted Accounting Principles.

(2) Effectively controls all project funds, including Federal funds and any required cost share. The system must have complete, accurate, and current records that document the sources of funds and the purposes for which they are disbursed. It also must have procedures for ensuring that project funds are used only for purposes permitted by the agreement (*see* § 37.625).

(3) Includes, if advance payments are authorized under § 37.805, procedures to minimize the time elapsing between the payment of funds by the Government and the firm's disbursement of the funds for program purposes.

### § 37.620 What financial management standards do I include for nonprofit participants?

So as not to force system changes for any State, local government, institution of higher education, or other nonprofit organization, your expenditure-based TIA's requirements for the financial management system of any nonprofit participant are the same as those that apply to the participant's other Federal assistance awards. Specifically, the requirements are those in:

(a) 32 CFR 33.20 for State and local governments; and

(b) 32 CFR 32.21(b) for other nonprofit organizations, with the exception of Government-owned, contractor-operated (GOCO) facilities and Federally Funded Research and Development Centers (FFRDCs) that are excepted from the definition of ''recipient'' in 32 CFR part 32. Although it should occur infrequently, if a nonprofit GOCO or FFRDC is a participant, you must specify appropriate standards that conform as much as practicable with requirements in that participant's other Federal awards.

### § 37.625 What cost principles or standards do I require for for-profit participants?

(a) So as not to require any firm to needlessly change its cost-accounting system, your expenditure-based TIAs are to apply the Government cost principles in 48 CFR parts 31 and 231 to for-profit participants that currently perform under expenditure-based Federal procurement contracts or assistance awards (other than TIAs) and therefore have existing systems for identifying allowable costs under those principles. If there are programmatic or business reasons to do otherwise, you may grant an exception from this requirement and use alternative standards as long as the alternative satisfies the conditions described in paragraph (b) of this section; if you do so, you must document the reasons in your award file.

(b) For other for-profit participants, you may establish alternative standards in the agreement as long as that alternative provides, as a minimum, that Federal funds and funds counted as recipients' cost sharing will be used only for costs that:

(1) A reasonable and prudent person would incur in carrying out the research project contemplated by the agreement. Generally, elements of cost that appropriately are charged are those identified with research and development activities under the Generally Accepted Accounting Principles (see Statement of Financial Accounting Standards Number 2, ''Accounting for Research and Development Costs,'' October 1974[1]). Moreover, costs must be allocated to DoD and other projects in accordance with the relative benefits the projects receive. Costs charged to DoD projects must be given consistent treatment with costs allocated to the

[1] Copies may be obtained from the Financial Accounting Standards Board (FASB), 401 Merritt 7, P.O. Box 5116, Norwalk, CT 06856–5116. Information about ordering also may be found at the Internet site *http://www.fasb.org* or by telephoning the FASB at (800) 748–0659.

participants' other research and development activities (*e.g.*, activities supported by the participants themselves or by non-Federal sponsors).

(2) Are consistent with the purposes stated in the governing Congressional authorizations and appropriations. You are responsible for ensuring that provisions in the award document address any requirements that result from authorizations and appropriations.

### § 37.630 Must I require a for-profit firm to use Federally approved indirect cost rates?

In accordance with the general policy in § 37.605, you must require a for-profit participant that has Federally approved indirect cost rates for its Federal procurement contracts to use those rates to accumulate and report costs under an expenditure-based TIA. This includes both provisional and final rates that are approved up until the time that the TIA is closed out. You may grant an exception from this requirement if there are programmatic or business reasons to do otherwise (*e.g.*, the participant offers you a lower rate). If you grant an exception, the participant must accumulate and report the costs using an accounting system and practices that it uses for other customers (*e.g.*, its commercial customers). Also, you must document the reason for the exception in your award file.

### § 37.635 What cost principles do I require a nonprofit participant to use?

So as not to force financial system changes for any nonprofit participant, your expenditure-based TIA will provide that costs to be charged to the research project by any nonprofit participant must be determined to be allowable in accordance with:

(a) OMB Circular A–87,[2] if the participant is a State or local governmental organization.

(b) OMB Circular A–21,[3] if the participant is an institution of higher education.

(c) 45 CFR part 74, appendix E, if the participant is a hospital.

(d) OMB Circular A–122, if the participant is any other type of nonprofit organization (the cost principles in 48 CFR parts 31 and 231 are to be used by any nonprofit organization that is identified in Circular A–122 as being subject to those cost principles).

### § 37.640 Must I include a provision for audits of for-profit participants?

If your TIA is an expenditure-based award, you must include in it an audit provision that addresses, for each for-profit participant:

(a) Whether the for-profit participant must have periodic audits, in addition to any award-specific audits, as described in § 37.645. Note that the DCAA or the Office of the Inspector General, DoD (OIG, DoD), can provide advice on the types and scope of audits that may be needed in various circumstances.

(b) Whether the DCAA or an independent public accountant (IPA) will perform required audits, as discussed in § 37.650.

(c) How frequently any periodic audits are to be performed, addressed in § 37.655.

(d) Other matters described in § 37.660, such as audit coverage, allowability of audit costs, auditing standards, and remedies for noncompliance.

### § 37.645 Must I require periodic audits, as well as award-specific audits, of for-profit participants?

You need to consider requirements for both periodic audits and award-specific audits (as defined in § 37.1325 and § 37.1235, respectively). The way that your expenditure-based TIA addresses the two types of audits will vary, depending upon the type of for-profit participant.

(a) For for-profit participants that are audited by the DCAA or other Federal auditors, as described in §§ 37.650(b) and 37.655, you need not add specific requirements for periodic audits because the Federal audits should be sufficient to address whatever may be needed.

[2] Electronic copies may be obtained at Internet site *http://www.whitehouse.gov/OMB*. For paper copies, contact the Office of Management and Budget, EOP Publications, 725 17th St. NW., New Executive Office Building, Washington, DC 20503.

[3] *See* footnote 2 to § 37.635(a).

Your inclusion in the TIA of the standard access-to-records provision for those for-profit participants, as discussed in § 37.915(a), gives the necessary access in the event that you or administrative agreements officers later need to request audits to address award-specific issues that arise.

(b) For each other for-profit participant, you:

(1) Should require that the participant have an independent auditor (*i.e.*, the DCAA or an independent public accountant) conduct periodic audits of its systems if it expends $500,000 or more per year in TIAs and other Federal assistance awards. A prime reason for including this requirement is that the Federal Government, for an expenditure-based award, necessarily relies on amounts reported by the participant's systems when it sets payment amounts or adjusts performance outcomes. The periodic audit provides some assurance that the reported amounts are reliable.

(2) Must ensure that the award provides an independent auditor the access needed for award-specific audits, to be performed at the request of the cognizant administrative agreements officer if issues arise that require audit support. However, consistent with the government-wide policies on single audits that apply to nonprofit participants (see § 37.665), you should rely on periodic audits to the maximum extent possible to resolve any award-specific issues.

### § 37.650 Who must I identify as the auditor for a for-profit participant?

The auditor that you will identify in the expenditure-based TIA to perform periodic and award-specific audits of a for-profit participant depends on the circumstances, as follows:

(a) You may provide that an IPA will be the auditor for a for-profit participant that does not meet the criteria in paragraph (b) of this section, but only if the participant will not agree to give the DCAA access to the necessary books and records for audit purposes. Note that the allocable portion of the costs of the IPA's audit may be reimbursable under the TIA, as described in § 37.660(b). The IPA should be the one that the participant uses to perform other audits (*e.g.*, of its financial statement), to minimize added burdens and costs. You must document in the award file the participant's unwillingness to give the DCAA access. The DCAA is to be the auditor if the participant grants the necessary access.

(b) Except as provided in paragraph (c) of this section, you must identify the DCAA as the auditor for any for-profit participant that is subject to DCAA audits because it is currently performing under a Federal award that is subject to the:

(1) Cost principles in 48 CFR part 31 of the Federal Acquisition Regulation (FAR) and 48 CFR part 231 of the Defense FAR Supplement; or

(2) Cost Accounting Standards in 48 CFR chapter 99.

(c) If there are programmatic or business reasons that justify the use of an auditor other than the DCAA for a for-profit participant that meets the criteria in paragraph (b) of this section, you may provide that an IPA will be the auditor for that participant if you obtain prior approval from the Office of the Inspector General, DoD. You must submit requests for prior approval to the Assistant Inspector General (Auditing), 400 Army-Navy Drive, Arlington, VA 22202. Your request must include the name and address of the business unit(s) for which IPAs will be used. It also must explain why you judge that the participant will not give the DCAA the necessary access to records for audit purposes (*e.g.*, you may submit a statement to that effect from the participant). The OIG, DoD, will respond within five working days of receiving the request for prior approval, either by notifying you of the decision (approval or disapproval) or giving you a date by which they will notify you of the decision.

### § 37.655 Must I specify the frequency of IPAs' periodic audits of for-profit participants?

If your expenditure-based TIA provides for periodic audits of a for-profit participant by an IPA, you must specify the frequency for those audits. You should consider having an audit performed during the first year of the award, when the participant has its IPA do its next financial statement audit, unless the participant already

had a systems audit due to other Federal awards within the past two years. The frequency thereafter may vary depending upon the dollars the participant is expending annually under the award, but it is not unreasonable to require an updated audit every two to three years to reverify that the participant's systems are reliable (the audit then would cover the two or three-year period between audits). The DCAA is a source of advice on audit frequencies if your TIA provides for audits by IPAs.

### § 37.660 What else must I specify concerning audits of for-profit participants by IPAs?

If your expenditure-based TIA provides for audits of a for-profit participant by an IPA, you also must specify:

(a) What periodic audits are to cover. It is important that you specify audit coverage that is only as broad as needed to provide reasonable assurance of the participant's compliance with award terms that have a direct and material effect on the research project. Appendix C to this part provides guidance to for-profit participants and their IPAs that you may use for this purpose. The DCAA and the OIG, DoD, also can provide advice to help you set appropriate limits on audit objectives and scope.

(b) Who will pay for periodic and award-specific audits. The allocable portion of the costs of any audits by IPAs may be reimbursable under the TIA. The costs may be direct charges or allocated indirect costs, consistent with the participant's accounting system and practices.

(c) The auditing standards that the IPA will use. Unless you receive prior approval from the OIG, DoD, to do otherwise, you must provide that the IPA will perform the audits in accordance with the Generally Accepted Government Auditing Standards.[4]

(d) The available remedies for noncompliance. The agreement must provide that the participant may not charge costs to the award for any audit that the agreements officer, with the advice of the OIG, DoD, determines was not performed in accordance with the Generally Accepted Government Auditing Standards or other terms of the agreement. It also must provide that the Government has the right to require the participant to have the IPA take corrective action and, if corrective action is not taken, that the agreements officer has recourse to any of the remedies for noncompliance identified in 32 CFR 34.52(a).

(e) The remedy if it later is found that the participant, at the time it entered into the TIA, was performing on a procurement contract or other Federal award subject to the Cost Accounting Standards at 48 CFR part 30 and the cost principles at 48 CFR part 31. Unless the OIG, DoD, approves an exception (see § 37.650(c)), the TIA's terms must provide that the DCAA will perform the audits for the agreement if it later is found that the participant, at the time the TIA was awarded, was performing under awards described in § 37.650(b) that gave the DCAA audit access to the participant's books and records.

(f) Where the IPA is to send audit reports. The agreement must provide that the IPA is to submit audit reports to the administrative agreements officer and the OIG, DoD. It also must require that the IPA report instances of fraud directly to the OIG, DoD.

(g) The retention period for the IPA's working papers. You must specify that the IPA is to retain working papers for a period of at least three years after the final payment, unless the working papers relate to an audit whose findings are not fully resolved within that period or to an unresolved claim or dispute (in which case, the IPA must keep the working papers until the matter is resolved and final action taken).

(h) Who will have access to the IPA's working papers. The agreement must provide for Government access to working papers.

### § 37.665 Must I require nonprofit participants to have periodic audits?

Yes, expenditure-based TIAs are assistance instruments subject to the Single Audit Act (31 U.S.C. 7501–7507), so nonprofit participants are subject to

[4] The electronic document may be accessed at *www.gao.gov*. Printed copies may be purchased from the U.S. Government Printing Office; for ordering information, call (202) 512–1800 or access the Internet site at *www.gpo.gov*.

their usual requirements under that Act and OMB Circular A–133.[5] Specifically, the requirements are those in:

(a) 32 CFR 33.26 for State and local governments; and

(b) 32 CFR 32.26 for other nonprofit organizations. Note that those requirements also are appropriate for Government-owned, contractor-operated (GOCO) facilities and Federally Funded Research and Development Centers (FFRDCs) that are excluded from the definition of ''recipient'' in 32 CFR part 32, because nonprofit GOCOs and FFRDCs are subject to the Single Audit Act.

### § 37.670 Must I require participants to flow down audit requirements to subrecipients?

(a) Yes, in accordance with § 37.610, your expenditure-based TIA must require participants to flow down the same audit requirements to a subrecipient that would apply if the subrecipient were a participant.

(b) For example, a for-profit participant that is audited by the DCAA:

(1) Would flow down to a university subrecipient the Single Audit Act requirements that apply to a university participant.

(2) Could enter into a subaward allowing a for-profit participant, under the circumstances described in § 37.650(a), to use an IPA to do its audits.

(c) This policy applies to subawards for substantive performance of portions of the research project supported by the TIA, and not to participants' purchases of goods or services needed to carry out the research.

### § 37.675 Must I report when I enter into a TIA allowing a for-profit firm to use an IPA?

Yes, you must include that information with the data you provide for your DoD Component's annual submission to the Defense Technical Information Center (DTIC), as provided in § 37.1030(c).

[5] *See* footnote 2 to § 37.635(a).

### § 37.680 Must I require a participant to report when it enters into a subaward allowing a for-profit firm to use an IPA?

Yes, your expenditure-based TIA must require participants to report to you when they enter into any subaward allowing a for-profit subawardee to use an IPA, as described in § 37.670(b)(2). You must provide that information about the new subaward under the TIA for your DoD Component's annual submission to the DTIC, even though the TIA may have been reported in a prior year and does not itself have to be reported again.

## PROPERTY

### § 37.685 May I allow for-profit firms to purchase real property and equipment with project funds?

(a) With the two exceptions described in paragraph (b) of this section, you must require a for-profit firm to purchase real property or equipment with its own funds that are separate from the research project. You should allow the firm to charge to an expenditure-based TIA only depreciation or use charges for real property or equipment (and your cost estimate for a fixed-support TIA only would include those costs). Note that the firm must charge depreciation consistently with its usual accounting practice. Many firms treat depreciation as an indirect cost. Any firm that usually charges depreciation indirectly for a particular type of property must not charge depreciation for that property as a direct cost to the TIA.

(b) In two situations, you may grant an exception and allow a for-profit firm to use project funds, which includes both the Federal Government and recipient shares, to purchase real property or equipment (*i.e.,* to charge to the project the full acquisition cost of the property). The two circumstances, which should be infrequent for equipment and extremely rare for real property, are those in which you either:

(1) Judge that the real property or equipment will be dedicated to the project and have a current fair market value that is less than $5,000 by the time the project ends; or

(2) Give prior approval for the firm to include the full acquisition cost of the real property or equipment as part of the cost of the project (see § 37.535).

(c) If you grant an exception in either of the circumstances described in paragraphs (b)(1) and (2) of this section, you must make the real property or equipment subject to the property management standards in 32 CFR 34.21(b) through (d). As provided in those standards, the title to the real property or equipment will vest conditionally in the for-profit firm upon acquisition. Your TIA, whether it is a fixed-support or expenditure-based award, must specify that any item of equipment that has a fair market value of $5,000 or more at the conclusion of the project also will be subject to the disposition process in 32 CFR 34.21(e), whereby the Federal Government will recover its interest in the property at that time.

### § 37.690 How are nonprofit participants to manage real property and equipment?

For nonprofit participants, your TIA's requirements for vesting of title, use, management, and disposition of real property or equipment acquired under the award are the same as those that apply to the participant's other Federal assistance awards. Specifically, the requirements are those in:

(a) 32 CFR 33.31 and 33.32, for participants that are States and local governmental organizations.

(b) 32 CFR 32.32 and 32.33, for other nonprofit participants, with the exception of nonprofit GOCOs and FFRDCs that are exempted from the definition of ''recipient'' in 32 CFR part 32. Although it should occur infrequently, if a nonprofit GOCO or FFRDC is a participant, you must specify appropriate standards that conform as much as practicable with requirements in that participant's other Federal awards. Note also that:

(1) If the TIA is a cooperative agreement (see appendix B to this part), 31 U.S.C. 6306 provides authority to vest title to tangible personal property in a nonprofit institution of higher education or in a nonprofit organization whose primary purpose is conducting scientific research, without further obligation to the Federal Government; and

(2) Your TIA therefore must specify any conditions on the vesting of title to real property or equipment acquired by any such nonprofit participant, or the title will vest in the participant without further obligation to the Federal Government, as specified in 32 CFR 32.33(b)(3).

### § 37.695 What are the requirements for Federally owned property?

If you provide Federally owned property to any participant for the performance of research under a TIA, you must require that participant to account for, use, and dispose of the property in accordance with:

(a) 32 CFR 34.22, if the participant is a for-profit firm.

(b) 32 CFR 33.32(f), if the participant is a State or local governmental organization. Note that 32 CFR 33.32(f) requires you to provide additional information to the participant on the procedures for managing the property.

(c) 32 CFR 32.33(a) and 32.34(f), if the participant is a nonprofit organization other than a GOCO or FFRDC (requirements for nonprofit GOCOs and FFRDCs should conform with the property standards that apply to their Federal procurement contracts).

### § 37.700 What are the requirements for supplies?

Your expenditure-based TIA's provisions should permit participants to use their existing procedures to account for and manage supplies. A fixed-support TIA should not include requirements to account for or manage supplies.

## PURCHASING

### § 37.705 What standards do I include for purchasing systems of for-profit firms?

(a) If your TIA is an expenditure-based award, it should require for-profit participants that currently perform under DoD assistance instruments subject to the purchasing standards in 32 CFR 34.31 to use the same requirements for TIAs, unless there are programmatic or business reasons to do otherwise (in which case you must document the reasons in the award file).

(b) You should allow other for-profit participants under expenditure-based TIAs to use their existing purchasing systems, as long as they flow down the applicable requirements in Federal statutes, Executive orders or Governmentwide regulations (see appendix E to this part for a list of those requirements).

(c) If your TIA is a fixed-support award, you need only require for-profit participants to flow down the requirements listed in appendix F to this part.

### § 37.710 What standards do I include for purchasing systems of nonprofit organizations?

(a) So as not to force system changes for any nonprofit participant, your expenditure-based TIA will provide that each nonprofit participant's purchasing system comply with:

(1) 32 CFR 33.36, if the participant is a State or local governmental organization.

(2) 32 CFR 32.40 through 32.49 if the participant is a nonprofit organization other than a GOCO or FFRDC that is excepted from the definition of ''recipient'' in 32 CFR part 32. Although it should occur infrequently, if a nonprofit GOCO or FFRDC is a participant, you must specify appropriate standards that conform as much as practicable with requirements in that participant's other Federal awards.

(b) If your TIA is a fixed-support award, you need only require nonprofit participants to flow down the requirements listed in appendix E to this part.

## Subpart G—Award Terms Related to Other Administrative Matters

### § 37.800 Which administrative matters are covered in this subpart?

This subpart addresses ''non-systemic'' administrative matters that do not impose organization-wide requirements on a participant's financial management, property management, or purchasing system. Because an organization does not have to redesign its systems to accommodate award-to-award variations in these requirements, a TIA that you award may differ from other TIAs in the non-systemic requirements that it specifies for a given participant, based on the circumstances of the particular research project. To eliminate needless administrative complexity, you should handle some non-systemic requirements, such as the payment method, in a uniform way for the agreement as a whole.

PAYMENTS

### § 37.805 If I am awarding a TIA, what payment methods may I specify?

Your TIA may provide for:

(a) *Reimbursement*, as described in 32 CFR 34.12(a)(1), if it is an expenditure-based award.

(b) *Advance payments*, as described in 32 CFR 34.12(a)(2), subject to the conditions in 32 CFR 34.12(b)(2)(i) through (iii).

(c) *Payments based on payable milestones*. These are payments made according to a schedule that is based on predetermined measures of technical progress or other payable milestones. This approach relies upon the fact that, as research progresses throughout the term of the agreement, observable activity will be taking place. The recipient is paid upon the accomplishment of the predetermined measure of progress. Fixed-support TIAs must use this payment method and each measure of progress appropriately would be one of the well-defined outcomes that you identify in the agreement (this does not preclude use of an initial advance payment, if there is no alternative to meeting immediate cash needs). There are cash management considerations when this payment method is used as a means of financing for an expenditure-based TIA (*see* § 37.575 and § 37.1105).

### § 37.810 What should my TIA's provisions specify for the method and frequency of recipients' payment requests?

The procedure and frequency for payment requests depend upon the payment method, as follows:

(a) For either reimbursements or advance payments, your TIA must allow recipients to submit requests for payment at least monthly. You may authorize the recipients to use the forms or formats described in 32 CFR 34.12(d).

(b) If the payments are based on payable milestones, the recipient will submit a report or other evidence of accomplishment to the program official at the completion of each predetermined activity. The agreement administrator may approve payment to the recipient after receiving validation from the program manager that the milestone was successfully reached.

### § 37.815 May the Government withhold payments?

Your TIA must provide that the administrative agreements officer may withhold payments in the circumstances described in 32 CFR 34.12(g), but not otherwise.

### § 37.820 Must I require a recipient to return interest on advance payments?

If your expenditure-based TIA provides for either advance payments or payable milestones, the agreement must require the recipient to:

(a) Maintain in an interest-bearing account any advance payments or milestone payment amounts received in advance of needs to disburse the funds for program purposes unless:

(1) The recipient receives less than $120,000 in Federal grants, cooperative agreements, and TIAs per year;

(2) The best reasonably available interest-bearing account would not be expected to earn interest in excess of $1,000 per year on the advance or milestone payments; or

(3) The depository would require an average or minimum balance so high that it would not be feasible within the expected Federal and non-Federal cash resources for the project.

(b) Remit annually the interest earned to the administrative agreements officer.

## Revision of Budget and Program Plans

### § 37.825 Must I require the recipient to obtain prior approval from the Government for changes in plans?

If it is an expenditure-based award, your agreement must require the recipient to obtain the agreement administrator's prior approval if there is to be a change in plans that results in a need for additional Federal funding (this is unnecessary for a fixed-support TIA because the recipient is responsible for additional costs of achieving the outcomes). Other than that, the program official's substantial involvement in the project should ensure that the Government has advance notice of changes in plans.

### § 37.830 May I let a recipient charge pre-award costs to the agreement?

Pre-award costs, as long as they are otherwise allowable costs of the project, may be charged to an expenditure-based TIA only with the specific approval of the agreements officer. All pre-award costs are incurred at the recipient's risk (*i.e.*, no DoD Component is obligated to reimburse the costs if for any reason the recipient does not receive an award or if the award is less than anticipated and inadequate to cover the costs).

## Program Income

### § 37.835 What requirements do I include for program income?

Your TIA should apply the standards of 32 CFR 34.14 for program income that may be generated. Note the need to specify whether the recipient is to have any obligation to the Federal Government with respect to program income generated after the end of the project period (the period, as established in the award document, during which Federal support is provided). Doing so is especially important if the TIA includes a provision for the recipient to return any amounts to the Federal Government (see § 37.580).

## Intellectual Property

### § 37.840 What general approach should I take in negotiating data and patent rights?

(a) You should confer with program officials and legal counsel to develop an overall strategy for intellectual property that takes into account inventions and data that may result from the project and future needs the Government may have for rights in them. The strategy should take into account any intellectual property the Government is furnishing and any pre-existing proprietary information that the recipient is furnishing, as well as data

and inventions that may be generated under the award (recognizing that new data and inventions may be less valuable without pre-existing information). All pre-existing intellectual property, both the Government's and the recipient's, should be marked to give notice of its status.

(b) Because TIAs entail substantial cost sharing by recipients, you must use discretion in negotiating Government rights to data and patentable inventions resulting from research under the agreements. The considerations in §§ 37.845 through 37.875 are intended to serve as guidelines, within which you necessarily have considerable latitude to negotiate provisions appropriate to a wide variety of circumstances that may arise. Your goal should be a good balance between DoD interests in:

(1) Gaining access to the best technologies for defense needs, including technologies available in the commercial marketplace, and promoting commercialization of technologies resulting from the research. Either of these interests may be impeded if you negotiate excessive rights for the Government. One objective of TIAs is to help incorporate defense requirements into the development of what ultimately will be commercially available technologies, an objective that is best served by reducing barriers to commercial firms' participation in the research. In that way, the commercial technology and industrial base can be a source of readily available, reliable, and affordable components, subsystems, computer software, and other technological products and manufacturing processes for military systems.

(2) Providing adequate protection of the Government's investment, which may be weakened if the Government's rights are inadequate. You should consider whether the Government may require access to data or inventions for Governmental purposes, such as a need to develop defense-unique products or processes that the commercial marketplace likely will not address.

### § 37.845 What data rights should I obtain?

(a) You should seek to obtain what you, with the advice of legal counsel, judge is needed to ensure future Government use of technology that emerges from the research, as long as doing so is consistent with the balance between DoD interests described in § 37.840(b). You should consider data in which you wish to obtain license rights and data that you may wish to be delivered; since TIAs are assistance instruments rather than acquisition instruments, however, it is not expected that data would be delivered in most cases. What generally is needed is an irrevocable, world-wide license for the Government to use, modify, reproduce, release, or disclose for Governmental purposes the data that are generated under TIAs (including any data, such as computer software, in which a recipient may obtain a copyright). A Governmental purpose is any activity in which the United States Government participates, but a license for Governmental purposes does not include the right to use, or have or permit others to use, modify, reproduce, release, or disclose data for commercial purposes.

(b) You may negotiate licenses of different scope than described in paragraph (a) of this section when necessary to accomplish program objectives or to protect the Government's interests. Consult with legal counsel before negotiating a license of different scope.

(c) In negotiating data rights, you should consider the rights in background data that are necessary to fully utilize technology that is expected to result from the TIA, in the event the recipient does not commercialize the technology or chooses to protect any invention as a trade secret rather than by a patent. If a recipient intends to protect any invention as a trade secret, you should consult with your intellectual property counsel before deciding what information related to the invention the award should require the recipient to report.

### § 37.850 Should I require recipients to mark data?

To protect the recipient's interests in data, your TIA should require the recipient to mark any particular data that it wishes to protect from disclosure with a legend identifying the data

as licensed data subject to use, release, or disclosure restrictions.

### § 37.855 How should I handle protected data?

Prior to releasing or disclosing data marked with a restrictive legend (as described in § 37.850) to third parties, you should require those parties to agree in writing that they will:

(a) Use the data only for governmental purposes; and

(b) Not release or disclose the data without the permission of the licensor (*i.e.*, the recipient).

### § 37.860 What rights should I obtain for inventions?

(a) You should negotiate rights in inventions that represent a good balance between the Government's interests (*see* § 37.840(b)) and the recipient's interests. As explained in appendix B to this part:

(1) You have the flexibility to negotiate patent rights provisions that vary from what the Bayh-Dole statute (Chapter 18 of Title 35, U.S.C.) requires in many situations. You have that flexibility because TIAs include not only cooperative agreements, but also assistance transactions other than grants or cooperative agreements.

(2) Your TIA becomes an assistance instrument other than a grant or cooperative agreement if its patent rights provision varies from what Bayh-Dole requires in your situation. However, you need not consider that difference in the type of transaction until the agreement is finalized, and it should not affect the provision you negotiate.

(b) As long as it is consistent with the balance between DoD interests described in § 37.840(b) and the recipient's interests, you should seek to obtain for the Government, when an invention is conceived or first actually reduced to practice under a TIA, a nonexclusive, nontransferrable, irrevocable, paid-up license to practice the invention, or to have it practiced, for or on behalf of the United States throughout the world. The license is for Governmental purposes, and does not include the right to practice the invention for commercial purposes.

(c) To provide for the license described in paragraph (b) of this section, your TIA generally would include the patent-rights clause that 37 CFR 401.14 specifies to implement the Bayh-Dole statute's requirements. Note that:

(1) The clause is designed specifically for grants, contracts, and cooperative agreements awarded to small businesses and nonprofit organizations, the types of funding instruments and recipients to which the entire Bayh-Dole statute applies. As explained in appendix B to this part, only two Bayh-Dole requirements (in 35 U.S.C. sections 202(c)(4) and 203) apply to cooperative agreements with other performers, by virtue of an amendment to Bayh-Dole at 35 U.S.C. 210(c).

(2) You may use the same clause, suitably modified, in cooperative agreements with performers other than small businesses and nonprofit organizations. Doing so is consistent with a 1983 Presidential memorandum that calls for giving other performers rights in inventions from Federally supported research that are at least as great as the rights that Bayh-Dole gives to small businesses and nonprofit organizations (*see* appendix B to this part for details). That Presidential memorandum is incorporated by reference in Executive Order 12591 (52 FR 13414, 3 CFR, 1987 Comp., p. 220), as amended by Executive Order 12618 (52 FR 48661, 3 CFR, 1987 Comp., p. 262).

(3) The clause provides for flow-down of Bayh-Dole patent-rights provisions to subawards with small businesses and nonprofit organizations.

(4) There are provisions in 37 CFR part 401 stating when you must include the clause (37 CFR 401.3) and, in cases when it is required, how you may modify and tailor it (37 CFR 401.5).

(d) You may negotiate Government rights of a different scope than the standard patent-rights provision described in paragraph (c) of this section when necessary to accomplish program objectives and foster the Government's interests. If you do so:

(1) With the help of the program manager and legal counsel, you must decide what best represents a reasonable arrangement considering the circumstances, including past investments, contributions under the current TIA, and potential commercial markets. Taking past investments as an

example, you should consider whether the Government or the recipient has contributed more substantially to the prior research and development that provides the foundation for the planned effort. If the predominant past contributor to the particular technology has been:

(i) The Government, then the TIA's patent-rights provision should be at or close to the standard Bayh-Dole provision.

(ii) The recipient, then a less restrictive patent provision may be appropriate, to allow the recipient to benefit more directly from its investments.

(2) You should keep in mind that obtaining a nonexclusive license at the time of award, as described in paragraph (b) of this section, is valuable if the Government later requires access to inventions to enable development of defense-unique products or processes that the commercial marketplace is not addressing. If you do not obtain a license at the time of award, you should consider alternative approaches to ensure access, such as negotiating a priced option for obtaining nonexclusive licenses in the future to inventions that are conceived or reduced to practice under the TIA.

(3) You also may consider whether you want to provide additional flexibility by giving the recipient more time than the standard patent-rights provision does to:

(i) Notify the Government of an invention, from the time the inventor discloses it within the for-profit firm.

(ii) Inform the Government whether it intends to take title to the invention.

(iii) Commercialize the invention, before the Government license rights in the invention become effective.

### § 37.865 Should my patent provision include march-in rights?

Your TIA's patent rights provision should include the Bayh-Dole march-in rights clause at paragraph (j)(1) of 37 CFR 401.14, or an equivalent clause, concerning actions that the Government may take to obtain the right to use subject inventions, if the recipient fails to take effective steps to achieve practical application of the subject inventions within a reasonable time. The march-in provision may be modified to best meet the needs of the program. However, only infrequently should the march-in provision be entirely removed (*e.g.*, you may wish to do so if a recipient is providing most of the funding for a research project, with the Government providing a much smaller share).

### § 37.870 Should I require recipients to mark documents related to inventions?

To protect the recipient's interest in inventions, your TIA should require the recipient to mark documents disclosing inventions it desires to protect by obtaining a patent. The recipient should mark the documents with a legend identifying them as intellectual property subject to public release or public disclosure restrictions, as provided in 35 U.S.C. 205.

### § 37.875 Should my TIA include a provision concerning foreign access to technology?

(a) Consistent with the objective of enhancing the national security by increasing DoD reliance on the U.S. commercial technology and industrial bases, you must include a provision in the TIA that addresses foreign access to technology developed under the TIA.

(b) The provision must provide, as a minimum, that any transfer of the:

(1) Technology must be consistent with the U.S. export laws, regulations and policies (*e.g.*, the International Traffic in Arms Regulation at chapter I, subchapter M, title 22 of the CFR (22 CFR parts 120 through 130), the DoD Industrial Security Regulation in DoD 5220.22–R,[6] and the Department of Commerce Export Regulation at chapter VII, subchapter C, title 15 of the CFR (15 CFR parts 730 through 774), as applicable.

(2) Exclusive right to use or sell the technology in the United States must, unless the Government grants a waiver, require that products embodying the technology or produced through

[6] Electronic copies may be obtained at the Washington Headquarters Services Internet site *http://www.dtic.mil/whs/directives*. Paper copies may be obtained, at cost, from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161.

the use of the technology will be manufactured substantially in the United States. The provision may further provide that:

(i) In individual cases, the Government may waive the requirement of substantial manufacture in the United States upon a showing by the recipient that reasonable but unsuccessful efforts have been made to transfer the technology under similar terms to those likely to manufacture substantially in the United States or that under the circumstances domestic manufacture is not commercially feasible.

(ii) In those cases, the DoD Component may require a refund to the Government of some or all the funds paid under the TIA for the development of the transferred technology.

(c) You may, but are not required to, seek to negotiate a domestic manufacture condition for transfers of nonexclusive rights to use or sell the technology in the United States, to parallel the one described for exclusive licenses in paragraph (b)(2) of this section, if you judge that nonexclusive licenses for foreign manufacture could effectively preclude the establishment of domestic sources of the technology for defense purposes.

FINANCIAL AND PROGRAMMATIC REPORTING

### § 37.880 What requirements must I include for periodic reports on program and business status?

Your TIA must include either:

(a) The requirements in 32 CFR 32.51 and 32.52 for status reports on programmatic performance and, if it is an expenditure-based award, on financial performance; or

(b) Alternative requirements that, as a minimum, include periodic reports addressing program and, if it is an expenditure-based award, business status. You must require submission of the reports at least annually, and you may require submission as frequently as quarterly (this does not preclude a recipient from electing to submit more frequently than quarterly the financial information that is required to process payment requests if the award is an expenditure-based TIA that uses reimbursement or advance payments under § 37.810(a)). The requirements for the content of the reports are as follows:

(1) The program portions of the reports must address progress toward achieving program performance goals, including current issues, problems, or developments.

(2) The business portions of the reports, applicable only to expenditure-based awards, must provide summarized details on the status of resources (federal funds and non-federal cost sharing), including an accounting of expenditures for the period covered by the report. The report should compare the resource status with any payment and expenditure schedules or plans provided in the original award; explain any major deviations from those schedules; and discuss actions that will be taken to address the deviations. You may require a recipient to separately identify in these reports the expenditures for each participant in a consortium and for each programmatic milestone or task, if you, after consulting with the program official, judge that those additional details are needed for good stewardship.

### § 37.885 May I require updated program plans?

In addition to reports on progress to date, your TIA may include a provision requiring the recipient to annually prepare updated technical plans for the future conduct of the research effort. If your TIA does include a requirement for annual program plans, you also must require the recipient to submit the annual program plans to the agreements officer responsible for administering the TIA.

### § 37.890 Must I require a final performance report?

You need not require a final performance report that addresses all major accomplishments under the TIA. If you do not do so, however, there must be an alternative that satisfies the requirement in DoD Instruction 3200.14[7] to document all DoD Science and Technology efforts and disseminate the results through the Defense Technical Information Center (DTIC). An example

[7] *See* footnote 6 to § 37.875(b)(1).

of an alternative would be periodic reports throughout the performance of the research that collectively cover the entire project.

### § 37.895 How is the final performance report to be sent to the Defense Technical Information Center?

(a) Whether your TIA requires a final performance report or uses an alternative means under § 37.890,[8] you may include an award term or condition or otherwise instruct the recipient to submit the documentation, electronically if available, either:

(1) Directly to the DTIC; or

(2) To the office that is administering the award (for subsequent transmission to the DTIC).

(b) If you specify that the recipient is to submit the report directly to the DTIC, you also:

(1) Must instruct the recipient to include a fully completed Standard Form 298, ''Report Documentation Page,'' with each document, so that the DTIC can recognize the document as being related to the particular award and properly record its receipt; and

(2) Should advise the recipient to provide a copy of the completed Standard Form 298 to the agreements officer responsible for administering the TIA.

### § 37.900 May I tell a participant that information in financial and programmatic reports will not be publicly disclosed?

You may tell a participant that:

(a) We may exempt from disclosure under the Freedom of Information Act (FOIA) a trade secret or commercial and financial information that a participant provides after the award, if the information is privileged or confidential information. The DoD Component that receives the FOIA request will review the information in accordance with DoD procedures at 32 CFR 286.23(h) (and any DoD Component supplementary procedures) to determine whether it is privileged or confidential information under the FOIA exemption at 5 U.S.C. 552(b)(4), as implemented by the DoD at 32 CFR 286.12(d).

(b) If the participant also provides information in the course of a competition prior to award, there is a statutory exemption for five years from FOIA disclosure requirements for certain types of information submitted at that time (see § 37.420).

### § 37.905 Must I make receipt of the final performance report a condition for final payment?

If a final report is required, your TIA should make receipt of the report a condition for final payment. If the payments are based on payable milestones, the submission and acceptance of the final report by the Government representative will be incorporated as an event that is a prerequisite for one of the payable milestones.

## RECORDS RETENTION AND ACCESS REQUIREMENTS

### § 37.910 How long must I require participants to keep records related to the TIA?

Your TIA must require participants to keep records related to the TIA (for which the agreement provides Government access under § 37.915) for a period of three years after submission of the final financial status report for an expenditure-based TIA or final programmatic status report for a fixed-support TIA, with the following exceptions:

(a) The participant must keep records longer than three years after submission of the final financial status report if the records relate to an audit, claim, or dispute that begins but does not reach its conclusion within the 3-year period. In that case, the participant must keep the records until the matter is resolved and final action taken.

(b) Records for any real property or equipment acquired with project funds under the TIA must be kept for three years after final disposition.

### § 37.915 What requirement for access to a for-profit participant's records do I include in a TIA?

(a) If a for-profit participant currently grants access to its records to the DCAA or other Federal Government auditors, your TIA must include

[8] Additional information on electronic submission to the DTIC can be found online, currently at *http://www.dtic.mil/dtic/submitting/elec_subm.html*.

for that participant the standard access-to-records requirements at 32 CFR 34.42(e). If the agreement is a fixed-support TIA, the language in 32 CFR 34.42(e) may be modified to provide access to records concerning the recipient's technical performance, without requiring access to the recipient's financial or other records. Note that any need to address access to technical records in this way is in addition to, not in lieu of, the need to address rights in data (*see* § 37.845).

(b) For other for-profit participants that do not currently give the Federal Government direct access to their records and are not willing to grant full access to records pertinent to the award, there is no set requirement to include a provision in your TIA for Government access to records. If the audit provision of an expenditure-based TIA gives an IPA access to the recipient's financial records for audit purposes, the Federal Government must have access to the IPA's reports and working papers and you need not include a provision requiring direct Government access to the recipient's financial records. For both fixed-support and expenditure-based TIAs, you may wish to negotiate Government access to recipient records concerning technical performance. Should you negotiate a provision giving access only to specific Government officials (*e.g.*, the agreements officer), rather than a provision giving Government access generally, it is important to let participants know that the OIG, DoD, has a statutory right of access to records and other materials to which other DoD Component officials have access.

### § 37.920 What requirement for access to a nonprofit participant's records do I include in a TIA?

Your TIA must include for any nonprofit participant the standard access-to-records requirement at:

(a) 32 CFR 33.42(e), for a participant that is a State or local governmental organization.

(b) 32 CFR 32.53(e), for a participant that is a nonprofit organization. The same requirement applies to any nonprofit GOCO or FFRDC, even though nonprofit GOCOs and FFRDCs are exempted from the definition of ''recipient'' in 32 CFR part 32.

TERMINATION AND ENFORCEMENT

### § 37.925 What requirements do I include for termination and enforcement?

Your TIA must apply the standards of 32 CFR 34.51 for termination, 32 CFR 34.52 for enforcement, and your organization's procedures implementing 32 CFR 22.815 for disputes and appeals.

## Subpart H—Executing the Award

### § 37.1000 What are my responsibilities at the time of award?

At the time of the award, you must:

(a) Ensure that the award document contains the appropriate terms and conditions and is signed by the appropriate parties, in accordance with §§ 37.1005 through 37.1015.

(b) Document your analysis of the agreement in the award file, as discussed in § 37.1020.

(c) Provide information about the award to offices responsible for reporting, as described in §§ 37.1025 through 37.1035.

(d) Distribute copies of the award document, as required by § 37.1045.

THE AWARD DOCUMENT

### § 37.1005 What are my general responsibilities concerning the award document?

You are responsible for ensuring that the award document is complete and accurate. Your objective is to create a document that:

(a) Addresses all issues;

(b) States requirements directly. It is not helpful to readers to incorporate statutes or rules by reference, without sufficient explanation of the requirements. You generally should not incorporate clauses from the Federal Acquisition Regulation (48 CFR parts 1–53) or Defense Federal Acquisition Regulation Supplement (48 CFR parts 201–253), because those provisions are designed for procurement contracts that are used to acquire goods and services, rather than for TIAs or other assistance instruments.

(c) Is written in clear and concise language, to minimize potential ambiguity.

### § 37.1010 What substantive issues should my award document address?

You necessarily will design and negotiate a TIA individually to meet the specific requirements of the particular project, so the complete list of substantive issues that you will address in the award document may vary. Every award document must address:

(a) *Project scope*. The scope is an overall vision statement for the project, including a discussion of the project's purpose, objectives, and detailed military and commercial goals. It is a critical provision because it provides a context for resolving issues that may arise during post-award administration. In a fixed-support TIA, you also must clearly specify the well-defined outcomes that reliably indicate the amount of effort expended and serve as the basis for the level of the fixed support (*see* §§ 37.305 and 37.560(a)).

(b) *Project management*. You should describe the nature of the relationship between the Federal Government and the recipient; the relationship among the participants, if the recipient is an unincorporated consortium; and the overall technical and administrative management of the project. TIAs are used to carry out collaborative relationships between the Federal Government and the recipient. Consequently, there must be substantial involvement of the DoD program official (*see* § 37.220) and usually the administrative agreements officer. The program official provides technical insight, which differs from the usual technical oversight of a project. The management provision also should discuss how you and the recipient will make any modifications to the TIA.

(c) *Termination, enforcement, and disputes*. Your TIA must provide for termination, enforcement remedies, and disputes and appeals procedures, in accordance with § 37.925.

(d) *Funding*. You must:

(1) Show the total amount of the agreement and the total period of performance.

(2) If the TIA is an expenditure-based award, state the Government's and recipient's agreed-upon cost shares. The award document should identify values for any in-kind contributions, determined in accordance with §§ 37.530 through 37.555, to preclude later disagreements about them.

(3) Specify the amount of Federal funds obligated and the performance period for those obligated funds.

(4) State, if the agreement is to be incrementally funded, that the Government's obligation for additional funding is contingent upon the availability of funds and that no legal obligation on the part of the Government exists until additional funds are made available and the agreement is amended. You also must include a prior approval requirement for changes in plans requiring additional Government funding, in accordance with § 37.825.

(e) *Payment*. You must choose the payment method and tell the recipient how, when, and where to submit payment requests, as discussed in §§ 37.805 through 37.815. Your payment method must take into account sound cash management practices by avoiding unwarranted cash advances. For an expenditure-based TIA, your payment provision must require the return of interest should excess cash balances occur, in accordance with § 37.820. For any TIA using the milestone payment method described in § 37.805(c), you must include language notifying the recipient that post-award administrators may adjust amounts of future milestone payments if a project's expenditures fall too far below the projections that were the basis for setting the amounts (*see* § 37.575(c) and § 37.1105(c)).

(f) *Records retention and access to records*. You must include the records retention requirement at § 37.910. You also must provide for access to for-profit and nonprofit participants' records, in accordance with § 37.915 and § 37.920.

(g) *Patents and data rights*. In designing the patents and data rights provision, you must set forth the minimum required Federal Government rights in intellectual property generated under the award and address related matters, as provided in §§ 37.840 through 37.875. It

is important to define all essential terms in the patent rights provision.

(h) *Foreign access to technology*. You must include a provision, in accordance with § 37.875, concerning foreign access and domestic manufacture of products using technology generated under the award.

(i) *Title to, management of, and disposition of tangible property*. Your property provisions for for-profit and nonprofit participants must be in accordance with §§ 37.685 through 37.700.

(j) *Financial management systems*. For an expenditure-based award, you must specify the minimum standards for financial management systems of both for-profit and nonprofit participants, in accordance with §§ 37.615 and 37.620.

(k) *Allowable costs*. If the TIA is an expenditure-based award, you must specify the standards that both for-profit and nonprofit participants are to use to determine which costs may be charged to the project, in accordance with §§ 37.625 through 37.635, as well as § 37.830.

(l) *Audits*. If your TIA is an expenditure-based award, you must include an audit provision for both for-profit and nonprofit participants and subrecipients, in accordance with §§ 37.640 through 37.670 and § 37.680.

(m) *Purchasing system standards*. You should include a provision specifying the standards in §§ 37.705 and 37.710 for purchasing systems of for-profit and nonprofit participants, respectively.

(n) *Program income*. You should specify requirements for program income, in accordance with § 37.835.

(o) *Financial and programmatic reporting*. You must specify the reports that the recipient is required to submit and tell the recipient when and where to submit them, in accordance with §§ 37.880 through 37.905.

(p) *Assurances for applicable national policy requirements*. You must incorporate assurances of compliance with applicable requirements in Federal statutes, Executive orders, or regulations (except for national policies that require certifications). Appendix D to this part contains a list of commonly applicable requirements that you need to augment with any specific requirements that apply in your particular circumstances (*e.g.*, general provisions in the appropriations act for the specific funds that you are obligating).

(q) *Other routine matters*. The agreement should address any other issues that need clarification, including who in the Government will be responsible for post-award administration and the statutory authority or authorities for entering into the TIA (*see* appendix B to this part for a discussion of statutory authorities). In addition, the agreement must specify that it takes precedence over any inconsistent terms and conditions in collateral documents such as attachments to the TIA or the recipient's articles of collaboration.

### § 37.1015 How do I decide who must sign the TIA if the recipient is an unincorporated consortium?

(a) If the recipient is a consortium that is not formally incorporated and the consortium members prefer to have the agreement signed by all of them individually, you may execute the agreement in that manner.

(b) If they wish to designate one consortium member to sign the agreement on behalf of the consortium as a whole, you should not decide whether to execute the agreement in that way until you review the consortium's articles of collaboration with legal counsel.

(1) The purposes of the review are to:

(i) Determine whether the articles properly authorize one participant to sign on behalf of the other participants and are binding on all consortium members with respect to the research project; and

(ii) Assess the risk that otherwise could exist when entering into an agreement signed by a single member on behalf of a consortium that is not a legal entity. For example, you should assess whether the articles of collaboration adequately address consortium members' future liabilities related to the research project (*i.e.*, whether they will have joint and severable liability).

(2) After the review, in consultation with legal counsel, you should determine whether it is better to have all of the consortium members sign the agreement individually or to allow them to designate one member to sign on all members' behalf.

REPORTING INFORMATION ABOUT THE AWARD

### § 37.1020 What must I document in my award file?

You should include in your award file an agreements analysis in which you:

(a) Briefly describe the program and detail the specific military and commercial benefits that should result from the project supported by the TIA. If the recipient is a consortium that is not formally incorporated, you should attach a copy of the signed articles of collaboration.

(b) Describe the process that led to the award of the TIA, including how you and program officials solicited and evaluated proposals and selected the one supported through the TIA.

(c) Explain how you decided that a TIA was the most appropriate instrument, in accordance with the factors in Subpart B of this part. Your explanation must include your answers to the relevant questions in § 37.225(a) through (d).

(d) Explain how you valued the recipient's cost sharing contributions, in accordance with §§ 37.530 through 37.555. For a fixed-support TIA, you must document the analysis you did (*see* § 37.560) to set the fixed level of Federal support; the documentation must explain how you determined the recipient's minimum cost share and show how you estimated the expenditures required to achieve the project outcomes.

(e) Document the results of your negotiation, addressing all significant issues in the TIA's provisions. For example, this includes specific explanations if you:

(1) Specify requirements for a participant's systems that vary from the standard requirements in §§ 37.615(a), 37.625(a), 37.630, or 37.705(a) in cases where those sections provide flexibility for you to do so.

(2) Provide that any audits are to be performed by an IPA, rather than the DCAA, where permitted under § 37.650. Your documentation must include:

(i) The names and addresses of business units for which IPAs will be the auditors;

(ii) Estimated amounts of Federal funds expected under the award for those business units; and

(iii) The basis (*e.g.*, a written statement from the recipient) for your judging that the business units do not currently perform under types of awards described in § 37.650(b)(1) and (2) and are not willing to grant the DCAA audit access.

(3) Include an intellectual property provision that varies from Bayh-Dole requirements.

(4) Determine that cost sharing is impracticable.

### § 37.1025 Must I report information to the Defense Assistance Awards Data System?

Yes, you must give the necessary information about the award to the office in your organization that is responsible for preparing DD Form 2566, ''DoD Assistance Award Action Report,'' reports for the Defense Assistance Award Data System, to ensure timely and accurate reporting of data required by 31 U.S.C. 6101–6106 (*see* 32 CFR part 21, subpart E).

### § 37.1030 What information must I report to the Defense Technical Information Center?

(a) For any TIA, you must give your answers to the questions in § 37.225(a) through (d) to the office in your DoD Component that is responsible for providing data on TIAs to the DTIC. Contact DTIC staff either by electronic mail at *aq@dtic.mil*, by telephone at 1–800–225–3842, or at DTIC-OCA, 8725 John J. Kingman Rd., Suite 0944, Fort Belvoir, VA 22060–6218, if you are unsure about the responsible office in your DoD Component. The DTIC compiles the information to help the Department of Defense measure the Department-wide benefits of using TIAs and assess the instruments' value in helping to meet the policy objectives described in § 37.205(b) and appendix A to this part.

(b) If the TIA uses the authority of 10 U.S.C. 2371, as described in § 37.1035, your information submission for the DTIC under paragraph (a) of this section must include the additional data required for the DoD's annual report to Congress.

(c) If, as permitted under § 37.650, the TIA includes a provision allowing a for-

profit participant to have audits performed by an IPA, rather than the DCAA, you must report that fact with the other information you submit about the TIA. Note that you also must include information about any use of IPAs permitted by subawards that participants make to for-profit firms, as provided in § 37.670. Information about a subaward under the TIA must be reported even if you receive the information in a subsequent year, when information about the TIA itself does not need to be reported.

(d) The requirements in this section to report information to the DTIC should not be confused with the post-award requirement to forward copies of technical reports to the DTIC, as described at §§ 37.890 and 37.895. The reporting requirements in this section are assigned the Report Control Symbol DD-AT&L(A) 1936.

### § 37.1035 How do I know if my TIA uses the 10 U.S.C. 2371 authority and I must report additional data under § 37.1030(b)?

As explained in appendix B to this part, a TIA uses the authority of 10 U.S.C. 2371 and therefore must be included in the DoD's annual report to Congress on the use of 10 U.S.C. 2371 authorities if it:

(a) Is an assistance transaction other than a grant or cooperative agreement, by virtue of its patent rights provision; or

(b) Includes a provision to recover funds from a recipient, as described at § 37.580.

### § 37.1040 When and how do I report information required by § 37.1035?

Information that you report, in accordance with § 37.1030, to the office that your DoD Component designates as the central point for reporting to the DTIC must be:

(a) Submitted by the dates that your central point establishes (which is consistent with the schedule DTIC specifies to DoD Components).

(b) In the format that your central point provides (which is consistent with the format that the DTIC specifies to DoD Components).

DISTRIBUTING COPIES OF THE AWARD DOCUMENT

### § 37.1045 To whom must I send copies of the award document?

You must send a copy of the award document to the:

(a) Recipient. You must include on the first page of the recipient's copy a prominent notice about the current DoD requirements for payment by electronic funds transfer (EFT).

(b) Office you designate to administer the TIA. You are strongly encouraged to delegate post-award administration to the regional office of the Defense Contract Management Agency or Office of Naval Research that administers awards to the recipient. When delegating, you should clearly indicate on the cover sheet or first page of the award document that the award is a TIA, to help the post-award administrator distinguish it from other types of assistance instruments.

(c) Finance and accounting office designated to make the payments to the recipient.

## Subpart I—Post-Award Administration

### § 37.1100 What are my responsibilities generally as an administrative agreements officer for a TIA?

As the administrative agreements officer for a TIA, you have the responsibilities that your office agreed to accept in the delegation from the office that made the award. Generally, you will have the same responsibilities as a post-award administrator of a grant or cooperative agreement, as described in 32 CFR 22.715. Responsibilities for TIAs include:

(a) Advising agreements officers before they award TIAs on how to establish award terms and conditions that better meet research programmatic needs, facilitate effective post-award administration, and ensure good stewardship of Federal funds.

(b) Participating as the business partner to the DoD program official to ensure the Government's substantial involvement in the research project. This may involve attendance with program officials at kickoff meetings or post-award conferences with recipients.

It also may involve attendance at the consortium management's periodic meetings to review technical progress, financial status, and future program plans.

(c) Tracking and processing of reports required by the award terms and conditions, including periodic business status reports, programmatic progress reports, and patent reports.

(d) Handling payment requests and related matters. For a TIA using advance payments, that includes reviews of progress to verify that there is continued justification for advancing funds, as discussed in § 37.1105(b). For a TIA using milestone payments, it includes making any needed adjustments in future milestone payment amounts, as discussed in § 37.1105(c).

(e) Coordinating audit requests and reviewing audit reports for both single audits of participants' systems and any award-specific audits that may be needed, as discussed in §§ 37.1115 and 37.1120.

(f) Responding, after coordination with program officials, to recipient requests for permission to sell or exclusively license intellectual property to entities that do not agree to manufacture substantially in the United States, as described in § 37.875(b). Before you grant approval for any technology, you must secure assurance that the Government will be able to use the technology (*e.g.*, a reasonable license for Government use, if the recipient is selling the technology) or seek reimbursement of the Government's investments.

(g) Notifying the agreements officer who made the award if a participant informs you about a subaward allowing a for-profit subrecipient to have audits performed by an IPA, rather than the DCAA. You should alert the awarding official that he or she must report the information, as required by § 37.1030(c).

### § 37.1105 What additional duties do I have as the administrator of a TIA with advance payments or payable milestones?

Your additional post-award responsibilities as an administrative agreements officer for an expenditure-based TIA with advance payments or payable milestones are to ensure good cash management. To do so, you must:

(a) For any expenditure-based TIA with advance payments or payable milestones, forward to the responsible payment office any interest that the recipient remits in accordance with § 37.820(b). The payment office will return the amounts to the Department of the Treasury's miscellaneous receipts account.

(b) For any expenditure-based TIA with advance payments, consult with the program official and consider whether program progress reported in periodic reports, in relation to reported expenditures, is sufficient to justify your continued authorization of advance payments under § 37.805(b).

(c) For any expenditure-based TIA using milestone payments, work with the program official at the completion of each payable milestone or upon receipt of the next business status report to:

(1) Compare the total amount of project expenditures, as recorded in the payable milestone report or business status report, with the projected budget for completing the milestone; and

(2) Adjust future payable milestones, as needed, if expenditures lag substantially behind what was originally projected and you judge that the recipient is receiving Federal funds sooner than necessary for program purposes. Before making adjustments, you should consider how large a deviation is acceptable at the time of the milestone. For example, suppose that the first milestone payment for a TIA you are administering is $50,000, and that the awarding official set the amount based on a projection that the recipient would have to expend $100,000 to reach the milestone (*i.e.*, the original plan was for the recipient's share at that milestone to be 50% of project expenditures). If the milestone payment report shows $90,000 in expenditures, the recipient's share at this point is 44% ($40,000 out of the total $90,000 expended, with the balance provided by the $50,000 milestone payment of Federal funds). For this example, you should adjust future milestones if you judge that a 6% difference in the recipient's share at the first milestone is too large, but not otherwise. Remember

that milestone payment amounts are not meant to track expenditures precisely at each milestone and that a recipient's share will increase as it continues to perform research and expend funds, until it completes another milestone to trigger the next Federal payment.

### § 37.1110 What other responsibilities related to payments do I have?

If you are the administrative agreements officer, you have the responsibilities described in 32 CFR 22.810(c), regardless of the payment method. You also must ensure that you do not withhold payments, except in one of the circumstances described in 32 CFR 34.12(g).

### § 37.1115 What are my responsibilities related to participants' single audits?

For audits of for-profit participant's systems, under §§ 37.640 through 37.660, you are the focal point within the Department of Defense for ensuring that participants submit audit reports and for resolving any findings in those reports. Nonprofit participants send their single audit reports to a Government-wide clearinghouse. For those participants, the Office of the Assistant Inspector General (Auditing) should receive any DoD-specific findings from the clearinghouse and refer them to you for resolution, if you are the appropriate official to do so.

### § 37.1120 When and how may I request an award-specific audit?

Guidance on when and how you should request additional audits for expenditure-based TIAs is identical to the guidance for grants officers in 32 CFR 34.16(d). If you require an award-specific examination or audit of a for-profit participant's records related to a TIA, you must use the auditor specified in the award terms and conditions, which should be the same auditor who performs periodic audits of the participant. The DCAA and the OIG, DoD, are possible sources of advice on audit-related issues, such as appropriate audit objectives and scope.

## Subpart J—Definitions of Terms Used in This Part

### § 37.1205 Advance.

A payment made to a recipient before the recipient disburses the funds for program purposes. Advance payments may be based upon recipients' requests or predetermined payment schedules.

### § 37.1210 Advanced research.

Research that creates new technology or demonstrates the viability of applying existing technology to new products and processes in a general way. Advanced research is most closely analogous to precompetitive technology development in the commercial sector (*i.e.*, early phases of research and development on which commercial competitors are willing to collaborate, because the work is not so coupled to specific products and processes that the results of the work must be proprietary). It does not include development of military systems and hardware where specific requirements have been defined. It is typically funded in Research, Development, Test and Evaluation programs within Budget Activity 3, Advanced Technology Development.

### § 37.1215 Agreements officer.

An official with the authority to enter into, administer, and/or terminate TIAs (*see* § 37.125).

### § 37.1220 Applied research.

Efforts that attempt to determine and exploit the potential of scientific discoveries or improvements in technology such as new materials, devices, methods and processes. It typically is funded in Research, Development, Test and Evaluation programs within Budget Activity 2, Applied Research (also known informally as research category 6.2) programs. Applied research normally follows basic research but may not be fully distinguishable from the related basic research. The term does not include efforts whose principal aim is the design, development, or testing of specific products, systems or processes to be considered for sale or acquisition; these efforts are within the definition of ''development.''

**§ 37.1225 Articles of collaboration.**

An agreement among the participants in a consortium that is not formally incorporated as a legal entity, by which they establish their relative rights and responsibilities (*see* § 37.515).

**§ 37.1230 Assistance.**

The transfer of a thing of value to a recipient to carry out a public purpose of support or stimulation authorized by a law of the United States (*see* 31 U.S.C. 6101(3)). Grants, cooperative agreements, and technology investment agreements are examples of legal instruments used to provide assistance.

**§ 37.1235 Award-specific audit.**

An audit of a single TIA, usually done at the cognizant agreements officer's request, to help resolve issues that arise during or after the performance of the research project. An award-specific audit of an individual award differs from a periodic audit of a participant (as defined in § 37.1325).

**§ 37.1240 Basic research.**

Efforts directed toward increasing knowledge and understanding in science and engineering, rather than the practical application of that knowledge and understanding. It typically is funded within Research, Development, Test and Evaluation programs in Budget Activity 1, Basic Research (also known informally as research category 6.1).

**§ 37.1245 Cash contributions.**

A recipient's cash expenditures made as contributions toward cost sharing, including expenditures of money that third parties contributed to the recipient.

**§ 37.1250 Commercial firm.**

A for-profit firm or segment of a for-profit firm (*e.g.*, a division or other business unit) that does a substantial portion of its business in the commercial marketplace.

**§ 37.1255 Consortium.**

A group of research-performing organizations that either is formally incorporated or that otherwise agrees to jointly carry out a research project (see definition of ''articles of collaboration,'' in § 37.1225).

**§ 37.1260 Cooperative agreement.**

A legal instrument which, consistent with 31 U.S.C. 6305, is used to enter into the same kind of relationship as a grant (see definition of ''grant,'' in § 37.1295), except that substantial involvement is expected between the Department of Defense and the recipient when carrying out the activity contemplated by the cooperative agreement. The term does not include ''cooperative research and development agreements'' as defined in 15 U.S.C. 3710a.

**§ 37.1265 Cost sharing.**

A portion of project costs that are borne by the recipient or non-Federal third parties on behalf of the recipient, rather than by the Federal Government.

**§ 37.1270 Data.**

Recorded information, regardless of form or method of recording. The term includes technical data, which are data of a scientific or technical nature, and computer software. It does not include financial, cost, or other administrative information related to the administration of a TIA.

**§ 37.1275 DoD Component.**

The Office of the Secretary of Defense, a Military Department, a Defense Agency, or a DoD Field Activity.

**§ 37.1280 Equipment.**

Tangible property, other than real property, that has a useful life of more than one year and an acquisition cost of $5,000 or more per unit.

**§ 37.1285 Expenditure-based award.**

A Federal Government contract or assistance award for which the amounts of interim payments or the total amount ultimately paid (*i.e.*, the sum of interim payments and final payment) are subject to redetermination or adjustment, based on the amounts expended by the recipient in carrying out the purposes for which the award was made. Most Federal Government grants and cooperative agreements are expenditure-based awards.

**§37.1290 Expenditures or outlays.**

Charges made to the project or program. They may be reported either on a cash or accrual basis, as shown in the following table:

| If reports are prepared on a . . . | Expenditures are the sum of . . . |
|---|---|
| (a) Cash basis | (1) Cash disbursements for direct charges for goods and services;<br>(2) The amount of indirect expense charged;<br>(3) The value of third party in-kind contributions applied; and<br>(4) The amount of cash advances and payments made to any other organizations for the performance of a part of the research effort. |
| (b) Accrual basis | (1) Cash disbursements for direct charges for goods and services;<br>(2) The amount of indirect expense incurred;<br>(3) The value of in-kind contributions applied; and<br>(4) The net increase (or decrease) in the amounts owed by the recipient for goods and other property received, for services performed by employees, contractors, and other payees and other amounts becoming owed under programs for which no current services or performance are required. |

**§37.1295 Grant.**

A legal instrument which, consistent with 31 U.S.C. 6304, is used to enter into a relationship:

(a) The principal purpose of which is to transfer a thing of value to the recipient to carry out a public purpose of support or stimulation authorized by a law of the United States, rather than to acquire property or services for the Department of Defense's direct benefit or use.

(b) In which substantial involvement is not expected between the Department of Defense and the recipient when carrying out the activity contemplated by the grant.

**§37.1300 In-kind contributions.**

The value of non-cash contributions made by a recipient or non-Federal third parties toward cost sharing.

**§37.1305 Institution of higher education.**

An educational institution that:

(a) Meets the criteria in section 101 of the Higher Education Act of 1965 (20 U.S.C. 1001); and

(b) Is subject to the provisions of OMB Circular A–110, ''Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations,'' as implemented by the Department of Defense at 32 CFR part 32.

**§37.1310 Intellectual property.**

Inventions, data, works of authorship, and other intangible products of intellectual effort that can be owned by a person, whether or not they are patentable or may be copyrighted. The term also includes mask works, such as

those used in microfabrication, whether or not they are tangible.

**§ 37.1315 Nonprofit organization.**

(a) Any corporation, trust, association, cooperative or other organization that:

(1) Is operated primarily for scientific, educational, service, or similar purposes in the public interest.

(2) Is not organized primarily for profit; and

(3) Uses its net proceeds to maintain, improve, or expand the operations of the organization.

(b) The term includes any nonprofit institution of higher education or nonprofit hospital.

**§ 37.1320 Participant.**

A consortium member or, in the case of an agreement with a single for-profit entity, the recipient. Note that a for-profit participant may be a firm or a segment of a firm (*e.g.*, a division or other business unit).

**§ 37.1325 Periodic audit.**

An audit of a participant, performed at an agreed-upon time (usually a regular time interval), to determine whether the participant as a whole is managing its Federal awards in compliance with the terms of those awards. Appendix C to this part describes what such an audit may cover. A periodic audit of a participant differs from an award-specific audit of an individual award (as defined in § 37.1235).

**§ 37.1330 Procurement contract.**

A Federal Government procurement contract. It is a legal instrument which, consistent with 31 U.S.C. 6303, reflects a relationship between the Federal Government and a State, a local government, or other recipient when the principal purpose of the instrument is to acquire property or services for the direct benefit or use of the Federal Government. See the more detailed definition of the term ''contract'' at 48 CFR 2.101.

**§ 37.1335 Program income.**

Gross income earned by the recipient or a participant that is generated by a supported activity or earned as a direct result of a TIA. Program income includes but is not limited to: income from fees for performing services; the use or rental of real property, equipment, or supplies acquired under a TIA; the sale of commodities or items fabricated under a TIA; and license fees and royalties on patents and copyrights. Interest earned on advances of Federal funds is not program income.

**§ 37.1340 Program official.**

A Federal Government program manager, scientific officer, or other individual who is responsible for managing the technical program being carried out through the use of a TIA.

**§ 37.1345 Property.**

Real property, equipment, supplies, and intellectual property, unless stated otherwise.

**§ 37.1350 Real property.**

Land, including land improvements, structures and appurtenances thereto, but excluding movable machinery and equipment.

**§ 37.1355 Recipient.**

An organization or other entity that receives a TIA from a DoD Component. Note that a for-profit recipient may be a firm or a segment of a firm (e.g., a division or other business unit).

**§ 37.1360 Research.**

Basic, applied, and advanced research, as defined in this subpart.

**§ 37.1365 Supplies.**

Tangible property other than real property and equipment. Supplies have a useful life of less than one year or an acquisition cost of less than $5,000 per unit.

**§ 37.1370 Termination.**

The cancellation of a TIA, in whole or in part, at any time prior to either:

(a) The date on which all work under the TIA is completed; or

(b) The date on which Federal sponsorship ends, as given in the award document or any supplement or amendment thereto.

**§ 37.1375 Technology investment agreements.**

A special class of assistance instruments used to increase involvement of commercial firms in defense research programs and for other purposes (described in appendix A to this part) related to integrating the commercial and defense sectors of the nation's technology and industrial base. A technology investment agreement may be a cooperative agreement with provisions tailored for involving commercial firms (as distinct from a cooperative agreement subject to all of the requirements in 32 CFR part 34), or another kind of assistance transaction (*see* appendix B to this part).

APPENDIX A TO PART 37—WHAT IS THE CIVIL-MILITARY INTEGRATION POLICY THAT IS THE BASIS FOR TECHNOLOGY INVESTMENT AGREEMENTS?

**Appendix A to Part 37-What is the Civil-Military Integration Policy that is the Basis for Technology Investment Agreements?**

A. TIAs complement other funding instruments that are available to agreements officers in that they are designed to foster civil-military integration in DoD Science and Technology (S&T) programs. Civil-military integration creates a single, national technology and industrial base upon which the DoD can draw to meet its needs. Achieving civil-military integration is a national policy objective, as stated in 10 U.S.C. 2501.

B. Civil-military integration includes:

1. Removing barriers to participation in DoD programs by commercial firms, firms that deal primarily in the commercial marketplace. In recent years, some commercial firms judged that it would be overly burdensome and costly for them to comply with Government-unique requirements. That belief caused some firms to decline to do cost-type business with the Federal Government. It caused other firms to create divisions for Government business that are separate and isolated from their divisions for commercial business. TIAs give agreements officers flexibility to tailor Government requirements and lower or remove barriers to firms' participation, where the tailoring of requirements can be done consistently with good stewardship of Federal Government funds.

2. Creating new business relationships among the performers in the technology and industrial base. Collaborations among commercial firms, firms that regularly perform defense programs, and nonprofit organizations can create wholes that are greater than the sums of the parts. The collaborations can enhance overall quality and productivity.

3. Promoting the development and use of new business practices and disseminating current best practices throughout the technology and industrial base.

C. The use of TIAs to promote civil-military integration will help defense S&T programs achieve their primary mission. That mission is to develop superior technology and help transition the technology to applications that enable affordable, decisive military capability. The use of TIAs to increase access to

commercial firms, to create new relationships, and to promote better business practices will help:

1. Increase technological sophistication. The DoD and firms that currently perform defense programs will benefit from technology in the commercial marketplace that often is more advanced than what is available in the defense-specific sector.

2. Reduce DoD's life-cycle costs for buying, operating, and maintaining weapon and support systems. The intent is that the DoD and firms that currently perform defense programs will be able to take advantage of the economies of scale of the commercial marketplace, which has a much larger volume of business for many high-technology products and processes than the Federal Government's share alone.

APPENDIX B TO PART 37—WHAT TYPE OF INSTRUMENT IS A TIA AND WHAT STATUTORY AUTHORITIES DOES IT USE?

**Appendix B to Part 37-What Type of Instrument is a TIA and What Statutory Authorities Does it Use?**

A. A TIA may be either a type of cooperative agreement or a type of "assistance transaction other than a grant or cooperative agreement," depending on its patent-rights provision. It is awarded under the statutory authority of 10 U.S.C. 2358, 10 U.S.C. 2371, or both, as explained in the paragraphs B through E of this Appendix and illustrated in the table below.

| | The TIA's patent provision complies with Bayh-Dole | The TIA's patent provision varies from what is possible under Bayh-Dole |
|---|---|---|
| 1. The TIA does not include recovery of funds provision | The TIA is a type of cooperative agreement, under 10 U.S.C. 2358(b)(1). | The TIA is a type of assistance transaction other than a grant or cooperative agreement, under 10 U.S.C. 2371. |
| 2. The TIA includes recovery of funds provision | The TIA is a type of cooperative agreement, under 10 U.S.C. 2358(b)(1). It uses recovery of funds authority of 10 U.S.C. 2371. | The TIA is a type of assistance transaction other than a grant or cooperative agreement, under 10 U.S.C. 2371. It also uses the recovery of funds authority of 10 U.S.C. 2371. |

B. A TIA is a type of cooperative agreement whenever its patent-rights provision complies with the Bayh-Dole statute (Chapter 18 of Title 35, U.S.C.), as shown in the preceding table. The authority to award the TIA is 10 U.S.C. 2358, in addition to any program-specific statute that may provide authority to award cooperative agreements. The TIA also may use the authority of 10 U.S.C. 2371 to include a recovery of funds provision that requires the recipient, as a condition for receiving support under the agreement, to make payments to the Department of Defense or other Federal agency.

C. A TIA becomes a type of assistance transaction other than a grant or cooperative agreement when its patent-rights provision is less restrictive than is possible under Bayh-Dole. The authority to award the instrument is 10 U.S.C. 2371, as well as any program-specific authority to provide assistance. Note that the agreements officer's judgment that the execution of the research project warrants a less restrictive patent provision than is possible under Bayh-Dole is sufficient to satisfy the statutory condition in 10 U.S.C. 2371 for use of an assistance transaction other than a cooperative agreement or grant (i.e., that it is not feasible or appropriate to use a standard grant or cooperative agreement to carry out the project). The TIA also may include a recovery of funds provision, as authorized by 10 U.S.C. 2371.

D. From a practical point of view, an agreements officer need not decide while he or she is negotiating the terms and conditions with the recipient whether a TIA is a cooperative agreement or an assistance transaction other than a grant or cooperative agreement. The agreements officer must make that decision when the agreement is finalized, based upon a comparison of the patent provision with what is required by Bayh-Dole.

E. In making that comparison, the agreements officer should consult with legal counsel and remember that most Bayh-Dole requirements apply only to small business firms and nonprofit organizations (note that a consortium that is not formally incorporated is neither a small business firm nor a nonprofit organization). There are only two requirements of Bayh-Dole, in 35 U.S.C. 202(c)(4) and 203 that directly apply to cooperative agreements with other than small business firms and nonprofit organizations. A 1984 amendment to Bayh-Dole, at 35 U.S.C. 210(c), makes those two portions apply. The 1984 amendment otherwise states that Bayh-Dole does not preclude agencies from complying with a 1983 Presidential Statement of Government Patent Policy (incorporated by reference in Executive Order 12591). The President in that statement authorized Federal agencies to tailor cooperative agreements with for-profit firms other than small businesses, in ways that would waive rights of the Government or obligations of the performer under Bayh-Dole, if they determined that:

1. "The interests of the United States and the general public will be better served thereby as, for example, where this is necessary to obtain a uniquely or highly qualified performer; or"

2. "The award involves co-sponsored, cost sharing, or joint venture research and development, and the performer, co-sponsor or joint venturer is making substantial contribution of funds, facilities or equipment to the work performed under the award."

APPENDIX C TO PART 37—WHAT IS THE DESIRED COVERAGE FOR PERIODIC AUDITS OF FOR-PROFIT PARTICIPANTS TO BE AUDITED BY IPAS?

## Appendix C to Part 37-What is the Desired Coverage for Periodic Audits of For-Profit Participants to be Audited by IPAs?

You may provide the following guidance to a for-profit participant and its IPA on the desired coverage of periodic audits.

## COVERAGE OF INDEPENDENT AUDITS OF FOR-PROFIT FIRMS

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Is a review of a firm's property management system usually required?

What are the objectives of the review?

What are the compliance requirements for Federally owned property and for equipment or real property purchased under DoD awards?

**E. Program Income**

Is an audit of program income usually required?

What is program income?

What is the objective of this portion of the audit?

What are the applicable standards for program income?

## PART 1. GENERAL INFORMATION

**What is the purpose of this document?**

This document provides guidance for an independent public accountant (IPA) who is asked by a for-profit firm to conduct an audit of its systems, due to the firm's having received a technology investment agreement from the Department of Defense (DoD).

**Why does the Federal Government need an audit?**

Federal officials are accountable to the public for the resources provided to carry out Government programs. Financial auditing contributes to accountability by providing an independent assessment to assure that recipients are handling Government funds properly.

**Can the audit be integrated with the regular audit of a firm's financial statements?**

Yes, the intent is to cause the minimum possible disruption to the firm's activities, so the IPA is encouraged to do the needed transaction sampling for DoD awards as part of the regularly scheduled audit of the firm's financial statements. In some cases, it may be even more efficient and economical to separately audit the individual DoD awards, and the firm may elect to have the IPA do so.

**What are the objectives of the audit?**

The auditor is to determine and report on whether:

- The firm has an internal control structure that provides reasonable assurance that it is managing DoD awards in compliance with the award terms and conditions, including applicable Federal laws and regulations.

- Based on a sampling of DoD award expenditures, the firm has complied with award terms and conditions, including applicable Federal laws and regulations, that may have a direct and material effect on DoD awards.

**What is the source of the requirement for the audit?**

The source of the requirement stated in the award document stems from sections 37.640 through 37.660 of 32 CFR part 37, which is part 37 of the DoD Grant and Agreement Regulations (DoDGARs).

**What should the IPA do if he or she finds that the Defense Contract Audit Agency is performing audits of the firm?**

The IPA should consult with officials of the firm to ensure that:

- DoD agreements officers were aware of the DCAA audit presence at the time they made awards; and

- The DoD agreements authorize the IPA to perform the audit, rather than requiring that the DCAA do so. If the IPA is authorized to perform the audit, he or she must consider the nature, timing, and extent of his or her own auditing procedures, to avoid unnecessary duplication of the DCAA effort.

## PART 2. AUDIT OBJECTIVES AND COMPLIANCE REQUIREMENTS

### A. ALLOWABLE COSTS

**What is the objective of this portion of the audit?**

The objective is to determine, by testing a sample of transactions, whether the firm complied with the requirements concerning allowability of costs charged to DoD awards.

**What standards or cost principles determine the costs that are allowable as charges to the award?**

Each technology investment agreement should specify the standards or cost principles that the for-profit firm is to use to determine the costs that it is allowed to charge to that award. While the TIA may specify use of the for-profit cost principles in the Federal Acquisition Regulation (FAR, at 48 CFR part 31) and Defense FAR Supplement (DFARS, at 48 CFR part 231), it more likely will specify an alternative standard. The minimum standard in the latter case is that Federal funds and the firm's cost sharing contributions will be used only for costs that a reasonable and prudent person would incur in carrying out the research project contemplated by the agreement.

**What compliance requirements for allowability of costs should the audit address?**

For a firm that is subject to the cost principles in the FAR and DFARS, the IPA should determine and report on whether costs charged to DoD awards are in compliance with those cost principles and indirect cost rates are applied in accordance with approved rate agreements.

For a firm that is subject to alternative standards that may be used for a TIA, the IPA should determine and report on whether costs charged to the DoD awards are:

- Necessary and reasonable for the performance of the research projects supported by the awards, or for related administration. Generally, elements of cost that appropriately are charged are those identified with research and development activities under the Generally Accepted Accounting Principles (see Statement of Financial Accounting Standards Number 2, "Accounting for Research and Development Costs," October 1974).

- Allocable to the research projects (i.e., costs are charged to DoD projects in a manner that is in accordance with the benefits the projects received).

- Given consistent treatment with costs allocated to the firm's other research and development activities (e.g., activities supported by the firm itself or by non-Federal sponsors).

- In conformance with any limitations in the award documents or regulations that they cite (e.g., any restrictions on types or amounts of costs, or requirements for prior approval of DoD agreements officers).

- Supported by appropriate documentation in the firm's records. The documentation may be in electronic form.

## B. COST SHARING

**What is the objective of this portion of the audit?**

The objective is to determine, by testing a sample of cost sharing contributions, whether the firm made the contributions that the agreements required.

**What are the compliance requirements for cost sharing?**

The provisions of the award documents will specify requirements for the firm's cost sharing, which may be contributions of a specified amount or a percentage of total project costs. The cost sharing may be in the form of allowable costs incurred or in-kind contributions (including third-party in-kind contributions).

The values of the firm's contributions are determined in accordance with sections 37.530 through 37.555 of 32 CFR part 37, which is part 37 of the DoDGARs.

## C. FINANCIAL REPORTING

**What are the objectives of this portion of the audit?**

The primary objective is to determine whether the firm's financial reports for DoD awards:

- Fairly and completely represent the expenditures and status of resources for projects supported by those awards; and
- Are supported by applicable accounting records and the accounting basis used (e.g., cash or accrual).

**What are the compliance requirements for financial reporting?**

The agreements will specify the frequency and content of the financial reports. They may specify the use of standard forms (e.g., the Standard Form 269 or 269A, "Financial Status Report," or Standard Form 272, "Report of Federal Cash Transactions). Alternatively, the agreements may specify an equivalent approach of periodic reports, and the reports may include information on both programmatic and business status. The requirements are in section 37.880 of 32 CFR part 37, which is part 37 of the DoDGARs.

Each financial report (and the business portion of any report that also has programmatic information) will contain at least summarized details on the status of resources (Federal funds and any non-Federal cost sharing that the agreements require), including an accounting of expenditures for the period covered by the report. The report should compare the resource status with any payment and expenditure schedules or plans provided in the original award; explain any major deviations from these schedules; and discuss actions that will be taken to address the deviations.

## D. EQUIPMENT AND REAL PROPERTY MANAGEMENT

**Is a review of a firm's property management system usually required?**

No, the IPA needs to review the property management system only if:

- There is Federally owned property associated with the award; or

- The firm charged the full purchase price of any equipment or real property as project costs (i.e., to Federal funds or the firm's funds that are counted toward required cost sharing); and

- The award under which the property was purchased provides for a continuing Federal interest in the property.

Note that the IPA generally will not need to review the property management system because most DoD awards will not have Federally owned property associated with them and will allow the firm to charge to the project only depreciation or use charges for real property or equipment.

**What are the objectives of the review?**

The objectives are to determine whether the firm:

- Obtained the necessary prior approval for the equipment or real property purchase from the grants officer or agreements officer.

- Keeps proper records for equipment and adequately safeguards and maintains equipment.

- Handles disposition or encumbrance of equipment or real property acquired under DoD awards in accordance with the applicable requirements.

**What are the compliance requirements for Federally owned property and for equipment or real property purchased under DoD awards?**

To protect the Federal interest in property, the DoD Grant and Agreement Regulations include standards for the firm's property management, use, and disposition, as shown in this table:

| If the property is . . . | Then the property management standards for the for-profit firm are in . . . |
|---|---|
| Real property or equipment purchased under a TIA, | Section 37.685 of 32 CFR part 37. |
| Federally owned property, | Section 37.695 of 32 CFR part 37. |

Note that a for-profit firm may include the full acquisition cost of real property or equipment as a charge to the project only with the prior approval of the grants officer or the agreements officer. The title to the real property or equipment vests conditionally in the for-profit firm upon acquisition, and there is a continuing Federal interest in the property unless an awarding office has statutory authority to do otherwise and elects to use that authority for a particular award. The Federal Government recovers its interest in the property through the disposition process at the project's end.

### E. PROGRAM INCOME

**Is an audit of program income usually required?**

No, most awards will not involve any program income.

**What is program income?**

Program income is gross income earned by the recipient that is generated by a supported activity or earned as a result of the award. For example, if the purpose of an award is to support the firm's delivery of services and the firm collects fees for doing so, those fees are program income. As another example, if samples of materials or biological specimens are generated as a result of a supported research effort, and the firm sells samples to other research organizations, the proceeds of those sales would be program income. If authorized by the terms and conditions of the award costs incident to the generation of program income may be deducted from gross income to determine program income, provided these costs have not been charged to the award.

**What is the objective of this portion of the audit?**

The objective is to determine whether program income is correctly recorded and used in accordance with the award terms and applicable standards.

**What are the applicable standards for program income?**

The standards for program income are in section 37.835 of 32 CFR part 37, which is part 37 of the DoDGARs.

## APPENDIX D TO PART 37—WHAT COMMON NATIONAL POLICY REQUIREMENTS MAY APPLY AND NEED TO BE INCLUDED IN TIAS?

Whether your TIA is a cooperative agreement or another type of assistance transaction, as discussed in Appendix B to this part, the terms and conditions of the agreement must provide for recipients' compliance with applicable Federal statutes and regulations. This appendix lists some of the more common requirements to aid you in identifying ones that apply to your TIA. The list is not intended to be all-inclusive, however, and you may need to consult legal

counsel to verify whether there are others that apply in your situation (*e.g.*, due to a provision in the appropriations act for the specific funds that you are using or due to a statute or rule that applies to a particular program or type of activity).

*A. Certifications*

One requirement that applies to all TIAs currently requires you to obtain a certification at the time of proposal. That requirement is in a Governmentwide common rule about lobbying prohibitions, which is implemented by the DoD at 32 CFR part 28. The prohibitions apply to all financial assistance. Appendix A to 32 CFR part 22 includes a sample provision that you may use, to have proposers incorporate the certification by reference into their proposals.

*B. Assurances That Apply to All TIAs*

DoD policy is to use a certification, as described in the preceding paragraph, only for a national policy requirement that specifically requires one. The usual approach to communicating other national policy requirements to recipients is to incorporate them as award terms or conditions, or assurances. Appendix B to 32 CFR part 22 lists national policy requirements that commonly apply to grants and cooperative agreements. It also has suggested language for assurances to incorporate the requirements in award documents. Of those requirements, the following six apply to all TIAs:

1. Requirements concerning debarment and suspension in the OMB guidance in 2 CFR part 180, as implemented by the DoD at 2 CFR part 1125. The requirements apply to all nonprocurement transactions.

2. Requirements concerning drug-free workplace in the Governmentwide common rule that the DoD has codified at 32 CFR part 26. The requirements apply to all financial assistance.

3. Prohibitions on discrimination on the basis of race, color, or national origin in Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d, *et seq.*). These apply to all financial assistance. They require recipients to flow down the prohibitions to any subrecipients performing a part of the substantive research program (as opposed to suppliers from whom recipients purchase goods or services). For further information, see item a. under the heading ''Nondiscrimination'' in Appendix B to 32 CFR part 22.

4. Prohibitions on discrimination on the basis of age, in the Age Discrimination Act of 1975 (42 U.S.C. 6101, *et seq.*). They apply to all financial assistance and require flow down to subrecipients. For further information, see item d. under the heading ''Nondiscrimination'' in Appendix B to 32 CFR part 22.

5. Prohibitions on discrimination on the basis of handicap, in section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794). They apply to all financial assistance and require flow down to subrecipients. For further information, see item e.1. under the heading ''Nondiscrimination'' in Appendix B to 32 CFR part 22.

6. Preferences for use of U.S.-flag air carriers in the International Air Transportation Fair Competitive Practices Act of 1974 (49 U.S.C. 40118), which apply to uses of U.S. Government funds.

C. OTHER ASSURANCES

Additional requirements listed in Appendix B to 32 CFR part 22 may apply in certain circumstances, as follows:

1. If construction work is to be done under a TIA or its subawards, it is subject to the prohibitions in Executive Order 11246 on discrimination on the basis of race, color, religion, sex, or national origin. For further information, see item b. under the heading ''Nondiscrimination'' in Appendix B to 32 CFR part 22.

2. If the research involves human subjects or animals, it is subject to the requirements in item a. or b., respectively, under the heading ''Live organisms'' in Appendix B to 32 CFR part 22.

3. If the research involves actions that may affect the environment, it is subject to the National Environmental Policy Act, which is item b.1. under the heading ''Environmental Standards'' in Appendix B to 32 CFR part 22. It also may be subject to one or more of the other requirements in items b.2. through b.6. under that heading, which concern flood-prone areas, coastal zones, coastal barriers, wild and scenic rivers, and underground sources of drinking water.

4. If the project may impact a historic property, it is subject to the National Historic Preservation Act of 1966 (16 U.S.C. 470, *et seq.*), as described under the heading ''National Historic Preservation'' in Appendix B to 32 CFR part 22.

[68 FR 47160, Aug. 7, 2003, as amended at 70 FR 49477, Aug. 23, 2005; 72 FR 34999, June 26, 2007]

## APPENDIX E TO PART 37—WHAT PROVISIONS MAY A PARTICIPANT NEED TO INCLUDE WHEN PURCHASING GOODS OR SERVICES UNDER A TIA?

A. As discussed in § 37.705, you must inform recipients of any national policy requirements that flow down to their purchases of goods or services (*e.g.*, supplies or equipment) under their TIAs. Note that purchases of goods or services differ from subawards, which are for substantive research program performance.

B. Appendix A to 32 CFR part 34 lists seven national policy requirements that commonly apply to firms' purchases under grants or cooperative agreements. Of those seven, two that apply to all recipients' purchases under TIAs are:

1. *Byrd Anti-Lobbying Amendment (31 U.S.C. 1352)*. A contractor submitting a bid to the recipient for a contract award of $100,000 or more must file a certification with the recipient that it has not and will not use Federal appropriations for certain lobbying purposes. The contractor also must disclose any lobbying with non-Federal funds that takes place in connection with obtaining any Federal award. For further details, see 32 CFR part 28, the DoD's codification of the Governmentwide common rule implementing this amendment.

2. *Debarment and suspension*. A contract award with an amount expected to equal or exceed $25,000 and certain other contract awards (see 2 CFR 1125.220, which implements OMB guidance in 2 CFR 180.220) shall not be made to parties listed on the Governmentwide Excluded Parties List System, in accordance with the DoD adoption at 2 CFR part 1125 of the OMB guidance implementing E.O.s 12549 (3 CFR, 1986 Comp., p. 189) and 12689 (3 CFR, 1989 Comp., p. 235), ''Debarment and Suspension.'' The Excluded Parties List System accessible on the Internet at *www.epls.gov* contains the names of parties debarred, suspended, or otherwise excluded by agencies, as well as parties declared ineligible under statutory or regulatory authority other than E.O. 12549.

C. One other requirement applies only in cases where construction work is to be performed under the TIA with Federal funds or recipient funds counted toward required cost sharing:

1. *Equal Employment Opportunity*. Although construction work should happen rarely under a TIA, the agreements officer in that case should inform the recipient that Department of Labor regulations at 41 CFR 60–1.4(b) prescribe a clause that must be incorporated into construction awards and subawards. Further details are provided in Appendix B to Part 22 of the DoDGARs (32 CFR part 22), in section b. under the heading ''Nondiscrimination.''

[68 FR 47160, Aug. 7, 2003, as amended at 70 FR 49478, Aug. 23, 2005; 72 FR 34999, June 26, 2007]

# SUBCHAPTER D—PERSONNEL, MILITARY AND CIVILIAN

CROSS REFERENCE: For a revision of Standards for a Merit System of Personnel Administration, see 5 CFR part 900.

## PART 44—SCREENING THE READY RESERVE

Sec.
44.1 Purpose.
44.2 Applicability.
44.3 Definitions.
44.4 Policy.
44.5 Responsibilities.
APPENDIX A TO PART 44—GUIDANCE

AUTHORITY: 10 U.S.C. 10145.

SOURCE: 64 FR 72027, Dec. 23, 1999, unless otherwise noted.

### § 44.1 Purpose.

Updates DoD policy and responsibilities for the screening of Ready Reservists under 10 U.S.C. 1003, 1005, and 1209.

### § 44.2 Applicability.

This part applies to the Office of the Secretary of Defense, the Military Departments (including the Coast Guard, when it is not operating as a Military Service in the Navy by agreement with the Department of Transportation), the Chairman of the Joint Chiefs of Staff, the Combatant Commands, 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''). The term ''Military Services'' as used in this part, refers to the Army, the Navy, the Air Force and the Marine Corps.

### § 44.3 Definitions.

For purposes of this part, the following definitions apply:

*Extreme community hardship*. A situation that, because of a Reservist's mobilization, may have a substantially adverse effect on the health, safety, or welfare of the community. Any request for a determination of such hardship shall be made by the Reservist and must be supported by documentation, as required by the Secretary concerned.

*Extreme personal hardship*. An adverse impact on a Reservist's dependents resulting from his or her mobilization. Any request for a determination of such hardship shall be made by the Reservist and must be supported by documentation, as required by the Secretary concerned.

*Individual Ready Reserve*. Within the Ready Reserve of each of the Reserve Components there is an Individual Ready Reserve. The Individual Ready Reserve consists of members of the Ready Reserve who are not in the Selected Reserve or the Inactive National Guard.

*Key employee*. Any Federal employee occupying a key position.

*Key position*. A Federal position that shall not be vacated during a national emergency or mobilization without SERIOUSLY impairing the capability of the parent Federal Agency or office to function effectively. The four categories of Federal key positions are set out in this paragraph. The first three categories are, by definition, key positions. However, the third category, Article III Judges, provides for exceptions on a case-by-case basis. The fourth category requires a case-by-case determination and designation as described in the following:

(1) The Vice President of the United States or any official specified in the order of presidential succession as in 3 U.S.C. 19.

(2) The members of the Congress and the heads of the Federal Agencies appointed by the President with the consent of the Senate. For this part, the term ''the heads of the Federal Agencies'' does not-include any person appointed by the President with the consent of the Senate to a Federal Agency as a member of a multimember board or commission. Such positions may be designated as key positions only in accordance with paragraph (4) of this definition.

(3) *Article III Judges*. However, each Article III Judge, who is a member of the Ready Reserve and desires to remain in the Ready Reserve, must have his or her position reviewed by the

Chief Judge of the affected Judge's Circuit. If the Chief Judge determines that mobilization of the Article III Judge concerned will not seriously impair the capability of the Judge's court to function effectively, the Chief Judge will provide a certification to that effect to the Secretary of the Military Department concerned. Concurrently, the affected Judge will provide a statement to the Secretary concerned requesting continued service in the Ready Reserve and acknowledging that he or she may be involuntarily called to active duty (AD) under the laws of the United States and the Directives and Regulations of the Department of Defense and pledging not to seek to be excused from such orders based upon his or her judicial duties.

(4) Other Federal positions determined by the Federal Agency heads, or their designees, to be key positions in accordance with the guidelines in the appendix to this part.

*Mobilization*. Involuntary call-up of Reserve component members in accordance with 10 U.S.C. 12301, 12302, or 12304. That includes full mobilization, partial mobilization and, selective mobilization (Presidential Reserve Call-Up Authority).

*Ready reserve*. Reserve unit members or individual Reserve and National Guard members, or both, liable for AD, as provided in 10 U.S.C. 12301, 12302, and, for some members, 10 U.S.C. 12304. It consists of the Selected Reserve, the Individual Ready Reserve, and the Inactive National Guard.

*Selected reserve*. A category of the Ready Reserve in each of the Reserve components. The Selected Reserve consists of units, and, as designated by the Secretary concerned, of individual Reserve members, trained as prescribed in 10 U.S.C. 10147(a)(1) or 32 U.S.C. 502(a), as appropriate.

*Standby reserve*. The Standby Reserve consists of those units or members, or both, of the Reserve components, other than those in the Ready Reserve or the Retired Reserve, who are liable for active duty only as provided for in 10 U.S.C. 12301 and 12306. The Standby Reserve consists of personnel who are maintaining their military affiliation without being in the Ready Reserve, but have been designated ''key civilian employees,'' or have a temporary hardship or disability. Those individuals are not required to perform training and are not part of the Ready Reserve. The Standby Reserve is a pool of trained individuals who may be mobilized as needed to fill manpower needs in specific skills. The Standby Reserve consists of the active status list and the inactive status list categories.

## § 44.4 Policy.

It is DoD policy that:

(a) Members of the Ready Reserve shall be screened (see the appendix to this part for specific screening guidance) at least annually to meet the provisions of 10 U.S.C. 10149 and to provide a Ready Reserve force composed of members who:

(1) Meet Military Service wartime standards of mental, moral, professional, and physical fitness.

(2) Possess the military qualifications required in the various ranks, ratings, and specialties.

(3) Are available immediately for active duty (AD) during a mobilization or as otherwise required by law.

(b) On mobilization under 10 U.S.C. 12301(a) or 10 U.S.C. 12302, all personnel actions relating to the screening program shall be held in abeyance, and all members remaining in the Ready Reserve shall be considered immediately available for AD service. After such a mobilization is ordered, no deferment, delay, or exemption from mobilization shall be granted to Ready Reservists because of their civilian employment. On involuntary activation of Reserve members under 10 U.S.C. 12304 (Presidential Reserve Call-Up Authority), the Secretary of Defense, or designee, shall make a determination regarding the continuation or cessation of personnel actions related to the screening program.

(c) All Ready Reservists shall be retained in the Ready Reserve for the entire period of their statutory obligation or voluntary contract. Exceptions to that policy are made in paragraphs (g), (h), and (i) of this section, or may be made by the Secretaries concerned, in accordance with 10 U.S.C. 10145 and 10146.

(d) A member of the Army National Guard of the United States or the Air

National Guard of the United States may be transferred to the Standby Reserve only with the consent of the governor or other applicable authority of the State, commonwealth, or territory concerned (including the District of Columbia) in accordance with 10 U.S.C. 10146.

(e) Any eligible member of the Standby Reserve may be transferred back to the Ready Reserve when the reason for the member's transfer to the Standby Reserve no longer exists in accordance with 10 U.S.C. 10150 and DoD Instruction 1200.15.[1]

(f) Ready Reservists whose immediate recall to AD during an emergency would create an extreme personal or community hardship shall be transferred to the Standby Reserve or the Retired Reserve, or shall be discharged, as applicable, except as specified in paragraph (b) of this section.

(g) Ready Reservists who are designated key employees or who occupy key positions, as defined in this section, shall be transferred to the Standby Reserve or the Retired Reserve, or shall be discharged, as appropriate, except as specified in paragraph (b) of this section.

(h) Ready Reservists who are also DoD civilian employees may not hold a mobilization assignment to the same positions that they fill as civilian employees. Those Ready Reservists shall be reassigned or transferred, as applicable. Reserve component military technicians (dual status), as members of Reserve units, are excluded from this provision.

(i) Ready Reservists who are preparing for the ministry in an accredited theology or divinity school cannot be involuntarily called to AD or required to participate in inactive duty training (IDT) in accordance with 10 U.S.C. 12317. Accordingly, such Ready Reservists (other than those participating in a military Chaplain Candidate or Theology Student Program) shall be transferred to the Standby Reserve (active status list) for the duration of their ministerial studies and duties at accredited theology or divinity schools. Ready Reservists participating in a military Chaplain Candidate or Theology Student Program may continue their Ready Reserve affiliation and engage in AD and IDT.

(j) Ready Reservists may not be transferred from the Ready Reserve solely because they are students, interns, residents, or fellows in the healthcare professions. On mobilization, they either shall be deferred or shall be mobilized in a student, intern, resident, or fellow status until qualified in the applicable medical specialty, as prescribed by the Secretaries of the Military Departments.

(k) The Secretaries concerned, or their designees, shall make determinations for mobilization availability on a case-by-case basis, consistent with this part, and not by class or group determinations.

### §44.5 Responsibilities.

(a) The *Deputy Secretary of Defense* shall adjudicate, before mobilization, conflicts between the mobilization manpower needs of the civilian sector and the military that the Ready Reserve Screening process has identified, but has not resolved.

(b) The *Assistant Secretary of Defense for Reserve Affairs*, under the *Under Secretary of Defense for Personnel and Readiness*, shall:

(1) Provide oversight and policy support to the overall Ready Reserve screening program, and manage and control the Federal sector screening program in accordance with 10 U.S.C. 10149, Executive Order 11190, and pp. 63–66 of House Appropriations Committee Report 95–451, which is available from the Government Printing Office, Washington, DC 20401.

(2) Annually, provide Federal Agencies with a listing of all Federal employees who are also Ready Reservists to assist them in conducting employer screening activities.

(3) Prepare an annual report on the status of Ready Reservists employed by the Federal Government.

(4) Employ the guidance in appendix A of this part in coordinating the screening program with employers of Ready Reservists.

[1] Copies may be obtained at *http://web7.whs.osd.mil/corres.htm*.

(5) Coordinate conflicts between the mobilization manpower needs of the civilian sector and the military identified but not resolved through the Ready Reserve Screening process.

(c) The *Secretaries of the Military Departments* shall:

(1) Screen, at least annually, all Ready Reservists under their jurisdiction to ensure their immediate availability for active duty (AD) and to ensure compliance with 10 U.S.C. 10149.

(2) Ensure coordination with the Assistant Secretary of Defense for Reserve Affairs to resolve conflicts (identified, but not resolved through the Ready Reserve screening process) between the mobilization manpower needs of the civilian sector and the military.

(3) Review recommendations for removal of both Federal and other civilian employees from the Ready Reserve submitted by employers and take applicable action.

(4) After making a removal determination in response to a petition for such action, promptly transmit the results of that determination to the Ready Reservist concerned and his/her employer.

(5) Transfer Ready Reservists identified as occupying key positions to the Standby Reserve or the Retired Reserve, or discharge them, as applicable.

(6) Ensure that Ready Reservists not on AD are examined as to physical fitness in accordance with DoD Directive 1332.18.[2]

(7) Process members of the Ready Reserve who do not participate satisfactorily in accordance with DoD Instruction 1200.15 and DoD Directive 1215.13.[3]

(8) Ensure that all Ready Reservists have a favorably completed background check for military service suitability on file (*e.g.*, Entrance National Agency Check (ENTNAC), NAC).

(9) Ensure that personnel records systems incorporate information on any factors that limit the mobilization availability of a Ready Reservist.

(10) Develop and maintain current information pertaining to the mobilization availability of Ready Reservists.

[2] See footnote 1 to §44.4(e).

[3] See footnote 1 to §44.4(e).

## APPENDIX A TO PART 44—GUIDANCE

### DEPUTY SECRETARY OF DEFENSE

The Deputy Secretary of Defense shall adjudicate, before mobilization, conflicts between the mobilization manpower needs of the civilian sector and the military that the Ready Reserve screening process has identified, but has not resolved.

### EMPLOYERS OF READY RESERVISTS

*(a) Federal Employers*

(1) To ensure that Federal employees essential to the continuity of the Federal Government are not retained as members of the Ready Reserve, the following guidance is provided:

(i) Conduct annual screening program as provided for by the Assistant Secretary of Defense for Reserve Affairs.

(ii) Responses from Federal Agencies shall be reported under Interagency Report Control Number 0912–DoD-AN, ''Ready Reservists in the Federal Government,'' in accordance with DoD 8910.1–M.[4]

(iii) Federal Agency heads, or their designees, concerned shall designate those positions that are of essential nature to, and within, the organization as ''key positions,'' and shall require that they shall NOT be filled by Ready Reservists to preclude such positions from being vacated during a mobilization. Upon request from Federal Agencies, Secretaries of the Military Departments shall verify the essential nature of the positions being designated as ''key,'' and shall transfer Ready Reservists occupying key positions to the Standby Reserve or the Retired Reserve or shall discharge them, as applicable, under 10 U.S.C. 10149, except as specified in §44.4 (b).

(iv) In determining whether or not a position should be designated as a ''key position,'' the following questions should be considered by the Federal Agency concerned:

(A) Can the position be filled in a reasonable time after mobilization?

(B) Does the position require technical or managerial skills that are possessed uniquely by the incumbent employee?

(C) Is the position associated directly with defense mobilization?

(D) Does the position include a mobilization or relocation assignment in an Agency having emergency functions, as designated by Executive Order 12656?

(E) Is the position directly associated with industrial or manpower mobilization, as designated in Executive Orders 12656 and 12919?

(F) Are there other factors related to the national defense, health, or safety that will make the incumbent of the position unavailable for mobilization?

[4] See footnote 1 to §44.4(e).

(2) [Reserved]

(b) *Non-Federal Employers of Ready Reservists.* Non-Federal employers of Ready Reservists, particularly in the fields of public health and safety and defense support industries, are encouraged to adopt personnel management procedures designed to preclude conflicts between the emergency manpower needs of civilian activities and the military during a mobilization. Employers also are encouraged to use the Federal key position guidelines contained in this appendix for making their own key position designations and, when applicable, for recommending key employees for removal from the Ready Reserve.

(c) All employers who determine that a Ready Reservist is a key employee, in accordance with the guidelines in this appendix, should promptly report that determination, using the letter format at the end of this appendix, to the applicable Reserve personnel center, requesting the employee be removed from the Ready Reserve.

INDIVIDUAL READY RESERVISTS

(a) Each Ready Reservist who is not a member of the Selected Reserve is obligated to notify the Secretary concerned of any change of address, marital status, number of dependents, or civilian employment and any other change that would prevent a member from meeting mobilization standards prescribed by the Military Service concerned (10 U.S.C. 10205).

(b) All Ready Reservists shall inform their employers of their Reserve military obligation.

LIST OF RESERVE PERSONNEL CENTERS TO WHICH RESERVE SCREENING DETERMINATION AND REMOVAL REQUESTS SHALL BE FORWARDED

*Army Reserve*

Army Reserve Personnel Command
1 Reserve Way
ATTN: ARPC-PSP-T
St. Louis, MO 63132

*Naval Reserve*

Commander
Navy Personnel Command (Pers 91)
5720 Integrity Drive
Millington, TN 38055–9100

*Marine Corps Reserve*

Commanding General
Marine Corps Reserve Support Command
ATTN: IRR Division
15303 Andrews Road
Kansas City, MO 64147–1207

*Air Force Reserve*

Commander
Air Reserve Personnel Center/DPAF
6760 E. Irvington Pl. #2600
Denver, CO 80280–2600

*Army and Air National Guard*

Submit requests to the adjutant general of the applicable State, commonwealth, or territory (including the District of Columbia).

*Coast Guard Reserve*

Commander (CGPC-RPM)
U.S. Coast Guard Personnel Command
2100 Second St. S.W.
Washington, DC 20593

LETTER FORMAT TO RESERVE PERSONNEL CENTERS REQUESTING THAT EMPLOYEE BE REMOVED FROM THE READY RESERVE

From: (Employer-Agency or Company)
To: (Appropriate Reserve Personnel Center)
Subject: Request for Employee To Be Removed From the Ready Reserve

This is to certify that the employee identified below is vital to the nation's defense efforts in (his or her) civilian job and cannot be mobilized with the Military Services in an emergency for the following reasons: [STATE REASONS]

Therefore, I request that (he/she) be removed from the Ready Reserve and that you advise me accordingly when this action has been completed.

The employee is:

1. Name of employee (last, first, M.I.):
2. Military grade and Reserve component:
3. Social security number:
4. Current home address (street, city, State, and ZIP code):
5. Military unit to which assigned (location and unit number):
6. Title of employee's civilian position:
7. Grade or salary level of civilian position:
8. Date (YYMMDD) hired or assigned to position:

Signature and Title of Agency or Company Official.

# PART 45—CERTIFICATE OF RELEASE OR DISCHARGE FROM ACTIVE DUTY (DD FORM 214/5 SERIES)

Sec.
45.1 Purpose.
45.2 Applicability and scope.
45.3 Policy and procedures.
45.4 Responsibilities.

APPENDIX A TO PART 45—DD FORM 214
APPENDIX B TO PART 45—DD FORM 214WS
APPENDIX C TO PART 45—DD FORM 215
APPENDIX D TO PART 45—STATE DIRECTORS OF VETERANS AFFAIRS

AUTHORITY: 10 U.S.C. 1168 and 972.

SOURCE: 54 FR 7409, Feb. 21, 1989, unless otherwise noted.

### § 45.1 Purpose.

(a) This document revises 32 CFR part 45.

(b) Prescribes procedures concerning the preparation and distribution of revised DD Form 214 to comport with the requirements of 10 U.S.C. 1168, 972, and 32 CFR part 41 and the control and publication of separation program designators (SPDs).

### § 45.2 Applicability and scope.

(a) The provisions of this part apply to the Office of the Secretary of Defense, the Military Services, the Joint Staff, and the Defense Agencies (hereafter referred to as ''DoD Components''). The term ''Military Services,'' as used here, refers to the Army, Navy, the Air Force, the Marine Corps and, by agreement with the Department of Transportation, to the Coast Guard.

(b) Its provisions include procedures on the preparation and distribution of DD Forms 214, 214WS, 215 (Appendices A, B, and C) which record and report the transfer or separation of military personnel from a period of active duty. (NOTE: Computer-generated formats are acceptable substitutes provided Assistant Secretary of Defense (Force Management and Personnel) approval is obtained.) DD Forms 214 and 215 (or their substitutes) will provide:

(1) *The Military Services* with a source of information relating to military personnel for administrative purposes, and for making determinations of eligibility for enlistment or reenlistment.

(2) *The Service member* with a brief, clear-cut record of the member's active service with the Armed Forces at the time of transfer, release, or discharge, or when the member changes status or component while on active duty.

(3) *Appropriate governmental agencies* with an authoritative source of information which they require in the administration of Federal and State laws applying to personnel who have been discharged, otherwise released, or transferred to a Reserve component while on active duty.

(c) Its provisions include procedures on the control and distribution of all lists of SPDs.

### § 45.3 Policy and procedures.

(a) Administrative issuance or reissuance of DD Forms 214 and 215.

(1) The DD Form 214 will normally be issued by the command from which the member was separated. In those instances where a DD Form 214 was not issued, the Services concerned may establish procedures for administrative issuance.

(2) The DD Form 214, once issued, will not be reissued except:

(i) When directed by appropriate appellate authority, Executive Order, or by the Secretary concerned.

(ii) When it is determined by the Service concerned that the original DD Form 214 cannot be properly corrected by issuance of a DD Form 215 or if the correction would require issuance of more than two DD Forms 215.

(iii) When two DD Forms 215 have been issued and an additional correction is required.

(3) Whenever a DD Form 214 is administratively issued or reissued, an appropriate entry stating that fact and the date of such action will be made in Block 18, Remarks, of the DD Form 214 unless the appellate authority, Executive Order, or Secretarial directive specifies otherwise.

(b) The Military Services will ensure that every member (except as limited in paragraph (b)(2) of this section and excluding those listed in paragraph (c) of this section being separated from the Military Services is given a completed DD Form 214 describing relevant data regarding the member's service, and the circumstances of termination. DD Form 214 may also be issued under other circumstances prescribed by the Military Service concerned. A continuation sheet, if required, will be bond paper, and will reference: The DD Form 214 being continued; information from blocks 1 through 4; the appropriate block(s) being continued; the member's signature, date; and the authorizing official's signature. DD Forms 214 are not intended to have any legal effect on termination of the member's service.

(1) *Release or discharge from active service.* (i) The original of DD Form 214 showing separation from a period of active service with a Military Service, including release from a status that is legally determined to be void, will be

physically delivered to the separate prior to departure from the separation activity on the effective date of separation; or on the date authorized travel time commences.

(A) Copy No. 4, containing the statutory or regulatory authority, reentry code, SPD code, and narrative reason for separation also will be physically delivered to the separatee prior to departure, if he/she so requested by initiating Block 30, Member Requests Copy 4.

(B) Remaining copies of DD Form 214 will be distributed on the day following the effective date of separation.

(ii) When separation is effected under emergency conditions which preclude physical delivery, or when the recipient departs in advance of normal departure time (e.g., on leave in conjunction with retirement; or at home awaiting separation for disability), the original DD Form 214 will be mailed to the recipient on the effective date of separation.

(iii) If the separation activity is unable to complete all items on the DD Form 214, the form will be prepared as completely as possible and delivered to the separatee. The separatee will be advised that a DD Form 215 will be issued by the Military Service concerned when the missing information becomes available; and that it will not be necessary for the separatee to request a DD Form 215 for such information.

(iv) If an optical character recognition format is utilized by a Military Service, the first carbon copy of the document will be physically delivered or mailed to the separatee as prescribed in paragraphs (b) (i) through (iii) of this section.

(2) *Release from active duty for training, full-time training duty, or active duty for special work.* Personnel being separated from a period of active duty for training, full-time training duty, or active duty for special work will be furnished a DD Form 214 when they have served 90 days or more, or when required by the Secretary concerned for shorter periods. Personnel shall be furnished a DD Form 214 upon separation for cause or for physical disability regardless of the length of time served on active duty.

(3) *Continuing on active duty.* Members who change their status or component, as outlined below, while they are serving on active duty will be provided a completed DD form 214 upon:

(i) Discharge for immediate enlistment or reenlistment (optional—at the discretion of the Military Services). However, Military Services not providing the DD Form 214 will furnish the member a DD Form 256, ''Honorable Discharge Certificate,'' and will issue instructions requiring those military offices which maintain a member's records to provide necessary Service data to the member for application to appropriate civilian individuals, groups, and governmental agencies. Such data will include Service component, entry data and grades.

(ii) Termination of enlisted status to accept an appointment to warrant or commissioned officer grade.

(iii) Termination of a temporary appointment to accept a permanent warrant or commission in the Regular or Reserve components of the Armed Forces.

(iv) Termination of an officer appointment in one of the Military Services to accept appointment in another Service.

(c) *DD Form 214 need not be prepared for:* (1) Personnel found disqualified upon reporting for active duty and who do not enter actively upon duties in accordance with orders.

(2) Personnel whose active duty, active duty for training, full-time training duty or active duty for special work is terminated by death.

(3) Personnel being removed from the Temporary Disability Retired List.

(4) Enlisted personnel receiving temporary appointments to warrant or commissioned officer grades.

(5) Personnel whose temporary warrant or commissioned officer status is terminated and who remain on active duty to complete an enlistment.

(6) Personnel who terminate their Reserve component status to integrate into a Regular component.

(7) Personnel separated or discharged who have been furnished a prior edition of this form, unless that form is in need of reissuance for some other reason.

(d) *Preparation*. The Military Departments will issue instructions governing the preparation of DD Form 214, consistent with the following:

(1) DD Form 214 is an important record of service which must be prepared accurately and completely. Any unavoidable corrections and changes made in the unshaded areas of the form during preparation shall be neat, legible and initialed on all copies by the authenticating official. The recipient will be informed that making any unauthorized change or alteration of the form will render it void.

(2) Since DD Form 214 is often used by civilian personnel, abbreviations should be avoided.

(3) Copies of DD Form 214 transmitted to various governmental agencies shall be legible, especially those provided to the Veterans Administration (Department of Veterans Affairs, effective March 15, 1989, in accordance with section 18(a), Public Law 100–527 and the Department of Labor).

(4) The authority for a member's transfer or discharge will be cited by reference to the appropriate Military Service regulation, instruction, or manual, followed by the appropriate separation program designator on copies 2, 4, 7, and 8 only. A narrative description to identify the reason for transfer or separation will not be used on copy 1.

(5) To assist the former Service member in employment placement and job counseling, formal inservice training courses successfully completed during the period covered by the form will be listed in Block 14, Military Education; e.g., medical, dental, electronics, supply, administration, personnel or heavy equipment operations. Training courses for combat skills will not be listed. See 1978 Guide to the Evaluation of Educational Experiences in the Armed Services for commonly accepted course titles and abbreviations.

(6) For the purpose of reemployment rights (DoD Directive 1205.12)[1]) all extensions of service, except those under 10 U.S.C. 972, are considered to be at the request and for the convenience of the Government. In these cases, Block 18 of DD Form 214 will be annotated to indicate ''Extension of service was at the request and for the convenience of the Government.''

(7) When one or more of the data items on the DD Form 214 are not available and the document is issued to the separatee, the applicable block(s) will be annotated ''See Remarks.'' In such cases, Block 18 will contain the entry ''DD Form 215 will be issued to provide missing information.'' When appropriate, Block 18 will also reflect the amount of disability pay, and the inclusive dates of any nonpay/excess leave days.

(8) The authorizing official (E–7, GS–7 or above) will sign the original in ink ensuring that the signature is legible on all carbon copies. If not, a second signature may be necessary on a subsequent carbon copy. The authorized official shall be an E–7, GS–7, or higher grade, except that the Service concerned may authorize chiefs of installation separation activities (E–5, GS–5, or above) to serve in this capacity if designated in writing by the responsible commander and/or director (0–4, or above).

(9) The following are the only authorized entries in Block 24, Character of Service, as appropriate: ''Honorable,'' ''Under Honorable Conditions (General),'' ''Under Other Than Honorable Conditions,'' ''Bad Conduct,'' ''Dishonorable,'' or ''Uncharacterized.'' When a discharge has been upgraded, the DD Form 214 will be annotated on copies 2 through 8 in Block 18 to indicate the character of service has been upgraded; the date the application for upgrade was made; and the effective date of the corrective action.

(10) The date entered in Block 12.a. shall be the date of enlistment for the earliest period of continuous active service for which a DD Form 214 was not previously issued. For members who have previously reenlisted without being issued a DD Form 214, and who are being separated with any discharge characterization except ''Honorable,'' the following statement shall appear as the first entry in Block 18., ''Remarks,'' on the DD Form 214: ''CONTINUOUS HONORABLE ACTIVE

[1] Copies may be obtained if needed, from the U.S. Naval Publications and forms Center, Attn: Code 1062, 5801 Tabor Avenue, Philadelphia, PA.

SERVICE FROM (applicable date) UNTIL (applicable date).'' The ''from'' date shall be the date of initial entry into active duty, or the first day of service for which a DD Form 214 was not previously issued, as applicable; the ''until'' date shall be the date before commencement of the current enlistment.

(11) For Service members retiring from active duty enter in Block 18., ''Subject to active duty recall by Service Secretary.''

(12) For Service members being transferred to the Individual Ready Reserve, enter in Block 18., ''Subject to active duty recall and/or annual screening.''

(e) *Distribution*. The Military Services will prescribe procedures governing the distribution of copies of the DD Forms 214 and 215, consistent with their internal requirements, and the following:

(1) *DD Form 214*—(i) *Copy No. 1 (original)*. To the member.

(ii) *Copy No. 2*. To be used as the Military Services' record copy.

(iii) *Copy No. 3*. To the Veterans Administration (Department of Veterans Affairs, effective March 15, 1989, in accordance with section 18(a), Data Processing Center (214), 1614 E. Woodword Street, Austin, Texas 78772. A reproduced copy will also be provided to the hospital with the medical records if the individual is transferred to a VA hospital. If the individual completes VA Form 21–5267, ''Veterans Application for Compensation or Pension,'' include a copy of the DD Form 214 with medical records forwarded to the VA regional office having jurisdiction over the member's permanent address. When an individual is in Service and enlisting or reenlisting in an active duty status or otherwise continuing on active duty in another status, copy No. 3 will not be forwarded to the VA.

(iv) *Copy No. 4*. To the member, if the member so requested by having initialed Block 30. If the member does not request this copy, it may be retained in the master military personnel record, to be available in case the member requests a copy later.

(v) *Copy No. 5*. To Louisiana UCX/UCFE, Claims Control Center, Louisiana Department of Labor, P.O. Box 94246, Capitol Station, Baton Rouge, Louisiana 70804–9246.

(vi) *Copy No. 6*. To the appropriate State Director of Veterans Affairs (see enclosure 4), if the member so requested by having checked ''Yes'' in Block 20, ''Member Requests Copy Be Sent to Director of Veterans Affairs.'' The member must specify the State. If the member does not request the copy be mailed, it may be utilized as prescribed by the Military Service concerned.

(vii) *Copies No. 7 and 8*. To be distributed in accordance with regulations issued by the Military Service concerned.

(viii) *Additional Copy Requirements*. Discharged Alien Deserters. Provide one reproduced copy of Copy No. 1 to the U.S. Department of State, Visa Office—SCA/VO, State Annex No. 2, Washington, DC 20520, to assist the Visa Office in precluding the unwarranted issuance of visas to discharged and alien deserters in accordance with DoD Directive 1325.2[2]. Place of birth will be entered in Block 18.

(2) *DD Form 214–ws*. Utilized to facilitate the preparation of DD Form 214. The document will be used and disposed of in accordance with regulations issued by the Military Service concerned.

(3) *DD Form 215*. Utilized to correct errors in DD Form 214 discovered after the original has been delivered and/or distribution of copies of the form has been made, and to furnish to separatee information not available when the DD Form 214 was prepared. The distribution of DD Form 215 will be identical to the distribution of DD Form 214.

(4) *Requests for Copies of DD Form 214 Subsequent to Separation*. Agencies maintaining a separatee's DD Form 214 will provide a copy only upon written request by the member. Agencies will provide the member with 1 copy with the Special Additional Information section, and 1 copy with that information deleted. In the case of DD Form 214 issued prior to July 1, 1979, agencies will provide the member with 1 copy containing all items of information completed, and 1 copy with the following items deleted from the form:

[2] See footnote 1 to §545.3(d)(6).

Specific authority and narrative reason for separation, reenlistment eligibility code, and separation program designator/number.

(i) In those cases where the member has supplied an authorization to provide a copy of the DD Form 214 to another individual or group, the copy furnished will not contain the Special Additional Information section or, in the case of DD forms issued prior to July 1, 1979, those items listed in paragraph (e)(4) of this section.

(ii) A copy will be provided to authorized personnel for official purposes only.

(f) *Procurement*. Arrangements for procurement of DD Forms 214, 214–ws, and 215 will be made by the Military Services.

(g) *Modification of Forms*. The modification of the content or format of DD Forms 214, 214–ws, and 215 may not be accomplished without prior authorization of the Assistant Secretary of Defense (Force Management and Personnel) (ASD(FM&P)). Requests to add or delete information will be coordinated with the other Military Services in writing, prior to submission to the ASD(FM&P). If a Military Service uses computer capability to generate forms, the items of information may be arranged, the size of the information blocks may be increased or decreased, and copies 7 and/or 8 may be deleted at the discretion of the Service.

**§ 45.4 Responsibilities.**

(a) The DD Forms 214 and 215 are a source of significant and authoritative information used by civilian and governmental agencies to validate veteran eligibility for benefits. As such, they are valuable forms and, therefore, vulnerable to fraudulent use. Since they are sensitive, the forms must be safeguarded at all times. They will be transmitted, stored, and destroyed in a manner which will prevent unauthorized use. The Military Services will issue instructions consistent with the following:

(1) All DD Forms 214 will be surprinted with a reproducible screen tint using appropriate security ink on Blocks 1, 3, 4.a, 4.b, 12, and 18 through 30. In addition Blocks 1, 3, 5, and 7 of the DD Form 215 will be similarly surprinted to make alterations readily discernible. No corrections will be permitted in the screened areas.

(2) All forms will be secured after duty hours.

(3) All obsolete forms will be destroyed.

(4) All forms to be discarded, including those which are blank or partially completed, and reproduced copies of DD Form 214, will be destroyed. No forms will be discarded intact.

(5) Blank forms given to personnel for educational or instructional purposes, and forms maintained for such use, are to be clearly voided in an unalterable manner.

(6) The commander or commanding officer of each unit or activity authorized to issue DD Form 214 will appoint, in writing, a commissioned officer, warrant officer, enlisted member (grade E–7 or above), or DoD civilian (GS–7 or above) who will requisition, control, and issue blank DD Forms 214 and 215. The Service concerned may authorize an E–5 or GS–5 to serve in this capacity.

(7) The Military Services will monitor the use of DD Form 214 and review periodically its issuance to insure compliance with procedures for safeguarding.

(b) The DD Form 214–ws will contain the word ''WORKSHEET'' on the body of the form (see Appendix B). This DD Form 214–ws will be treated in the same manner as the DD Form 214.

(c) The Military Services will issue appropriate instructions to separation activities stressing the importance of the DD Forms 214 and 215 in obtaining veterans benefits, reemployment rights, and unemployment insurance.

(d) Standard separation program designator (SPD) codes for officer and enlisted personnel developed under the provisions of DoD Instruction 5000.12[3] are published in DoD 5000.12–M.

(1) Requests to add, change, or delete an SPD code shall be forwarded by the DoD Component concerned with appropriate justification to the Assigned Responsible Agency accountable for evaluating, recommending approval of, and maintaining such codes: Department of the Navy, Office of The Chief of Naval

[3] See footnote 1 to § 45.3(d)(6).

Operations, (Attention: OP–161), room 1514, Arlington Annex, Washington, DC 20350–2000.

(2) Requests to add, change, or delete an SPD code will be submitted in accordance with section V., DoD Instruction 5000.12 with prior written approval by the ASD (FM&P), or his/her designee.

(e) All lists of SPD codes, including supplemental lists, published by the DoD Components will be stamped ''For Official Use Only'' and will not be furnished to any agency or individual outside the Department of Defense.

(1) Appropriate provisions of the Freedom of Information Act will be used to deny the release of the lists to the public. An individual being separated or discharged is entitled access only to his/her SPD code. It is not intended that these codes stigmatize an individual in any manner. They are intended for internal use by the Department of Defense in collecting data to analyze statistical reporting trends that may, in turn, influence changes in separation policy.

(2) Agencies or individuals who come into the possession of these lists are cautioned on their use because a particular list may be outdated and not reveal correctly the full circumstances relating to an individual's separation or discharge.

APPENDIX A TO PART 45—DD FORM 214

CAUTION: NOT TO BE USED FOR IDENTIFICATION PURPOSES

THIS IS AN IMPORTANT RECORD. SAFEGUARD IT.

ANY ALTERATIONS IN SHADED AREAS RENDER FORM VOID

## CERTIFICATE OF RELEASE OR DISCHARGE FROM ACTIVE DUTY

| | | |
|---|---|---|
| 1. NAME *(Last, First, Middle)* | 2. DEPARTMENT, COMPONENT AND BRANCH | 3. SOCIAL SECURITY NO. |
| 4.a. GRADE, RATE OR RANK / 4.b. PAY GRADE | 5. DATE OF BIRTH *(YYMMDD)* | 6. RESERVE OBLIG. TERM. DATE: Year / Month / Day |
| 7.a. PLACE OF ENTRY INTO ACTIVE DUTY | 7.b. HOME OF RECORD AT TIME OF ENTRY *(City and state, or complete address if known)* | |
| 8.a. LAST DUTY ASSIGNMENT AND MAJOR COMMAND | 8.b. STATION WHERE SEPARATED | |
| 9. COMMAND TO WHICH TRANSFERRED | | 10. SGLI COVERAGE ☐ None Amount: $ |

11. PRIMARY SPECIALTY *(List number, title and years and months in specialty. List additional specialty numbers and titles involving periods of one or more years.)*

| 12. RECORD OF SERVICE | Year(s) | Month(s) | Day(s) |
|---|---|---|---|
| a. Date Entered AD This Period | | | |
| b. Separation Date This Period | | | |
| c. Net Active Service This Period | | | |
| d. Total Prior Active Service | | | |
| e. Total Prior Inactive Service | | | |
| f. Foreign Service | | | |
| g. Sea Service | | | |
| h. Effective Date of Pay Grade | | | |

13. DECORATIONS, MEDALS, BADGES, CITATIONS AND CAMPAIGN RIBBONS AWARDED OR AUTHORIZED *(All periods of service)*

14. MILITARY EDUCATION *(Course title, number of weeks, and month and year completed)*

| | | | | | | |
|---|---|---|---|---|---|---|
| 15.a. MEMBER CONTRIBUTED TO POST-VIETNAM ERA VETERANS' EDUCATIONAL ASSISTANCE PROGRAM | Yes | No | 15.b HIGH SCHOOL GRADUATE OR EQUIVALENT | Yes | No | 16. DAYS ACCRUED LEAVE PAID |

17. MEMBER WAS PROVIDED COMPLETE DENTAL EXAMINATION AND ALL APPROPRIATE DENTAL SERVICES AND TREATMENT WITHIN 90 DAYS PRIOR TO SEPARATION ☐ Yes ☐ No

18. REMARKS

| | |
|---|---|
| 19.a. MAILING ADDRESS AFTER SEPARATION *(Include Zip Code)* | 19.b. NEAREST RELATIVE *(Name and address - include Zip Code)* |
| 20. MEMBER REQUESTS COPY 6 BE SENT TO _____ DIR, OF VET AFFAIRS ☐ Yes ☐ No | 22. OFFICIAL AUTHORIZED TO SIGN *(Typed name, grade, title and signature)* |
| 21. SIGNATURE OF MEMBER BEING SEPARATED | |

DD Form 214, NOV 88 *Previous editions are obsolete.* MEMBER - 1

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## CERTIFICATE OF RELEASE OR DISCHARGE FROM ACTIVE DUTY

| | | |
|---|---|---|
| 1. NAME *(Last, First, Middle)* | 2. DEPARTMENT, COMPONENT AND BRANCH | 3. SOCIAL SECURITY NO. |
| 4.a. GRADE, RATE OR RANK / 4.b. PAY GRADE | 5. DATE OF BIRTH *(YYMMDD)* | 6. RESERVE OBLIG. TERM. DATE: Year / Month / Day |
| 7.a. PLACE OF ENTRY INTO ACTIVE DUTY | 7.b. HOME OF RECORD AT TIME OF ENTRY *(City and state, or complete address if known)* | |
| 8.a. LAST DUTY ASSIGNMENT AND MAJOR COMMAND | 8.b. STATION WHERE SEPARATED | |
| 9. COMMAND TO WHICH TRANSFERRED | | 10. SGLI COVERAGE ☐ None Amount: $ |

11. PRIMARY SPECIALTY *(List number, title and years and months in specialty. List additional specialty numbers and titles involving periods of one or more years.)*

| 12. RECORD OF SERVICE | Year(s) | Month(s) | Day(s) |
|---|---|---|---|
| a. Date Entered AD This Period | | | |
| b. Separation Date This Period | | | |
| c. Net Active Service This Period | | | |
| d. Total Prior Active Service | | | |
| e. Total Prior Inactive Service | | | |
| f. Foreign Service | | | |
| g. Sea Service | | | |
| h. Effective Date of Pay Grade | | | |

13. DECORATIONS, MEDALS, BADGES, CITATIONS AND CAMPAIGN RIBBONS AWARDED OR AUTHORIZED *(All periods of service)*

14. MILITARY EDUCATION *(Course title, number of weeks, and month and year completed)*

| | | | | | | |
|---|---|---|---|---|---|---|
| 15.a. MEMBER CONTRIBUTED TO POST-VIETNAM ERA VETERANS' EDUCATIONAL ASSISTANCE PROGRAM | Yes | No | 15.b. HIGH SCHOOL GRADUATE OR EQUIVALENT | Yes | No | 16. DAYS ACCRUED LEAVE PAID |

17. MEMBER WAS PROVIDED COMPLETE DENTAL EXAMINATION AND ALL APPROPRIATE DENTAL SERVICES AND TREATMENT WITHIN 90 DAYS PRIOR TO SEPARATION ☐ Yes ☐ No

18. REMARKS

| | |
|---|---|
| 19.a. MAILING ADDRESS AFTER SEPARATION *(Include Zip Code)* | 19.b. NEAREST RELATIVE *(Name and address - include Zip Code)* |
| 20. MEMBER REQUESTS COPY 6 BE SENT TO _____ DIR. OF VET AFFAIRS ☐ Yes ☐ No | 22. OFFICIAL AUTHORIZED TO SIGN *(Typed name, grade, title and signature)* |
| 21. SIGNATURE OF MEMBER BEING SEPARATED | |

SPECIAL ADDITIONAL INFORMATION *(For use by authorized agencies only)*

| | | |
|---|---|---|
| 23. TYPE OF SEPARATION | 24. CHARACTER OF SERVICE *(Include upgrades)* | |
| 25. SEPARATION AUTHORITY | 26. SEPARATION CODE | 27. REENTRY CODE |
| 28. NARRATIVE REASON FOR SEPARATION | | |
| 29. DATES OF TIME LOST DURING THIS PERIOD | | 30. MEMBER REQUESTS COPY 4 _____ Initials |

DD Form 214, NOV 88 *Previous editions are obsolete*

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ANY ALTERATIONS IN SHADED AREAS RENDER FORM VOID

## CERTIFICATE OF RELEASE OR DISCHARGE FROM ACTIVE DUTY

| | | |
|---|---|---|
| 1. NAME *(Last, First, Middle)* | 2. DEPARTMENT, COMPONENT AND BRANCH | 3. SOCIAL SECURITY NO. |
| 4.a. GRADE, RATE OR RANK / 4.b. PAY GRADE | 5. DATE OF BIRTH *(YYMMDD)* | 6. RESERVE OBLIG. TERM. DATE: Year / Month / Day |
| 7.a. PLACE OF ENTRY INTO ACTIVE DUTY | 7.b. HOME OF RECORD AT TIME OF ENTRY *(City and state, or complete address if known)* | |
| 8.a. LAST DUTY ASSIGNMENT AND MAJOR COMMAND | 8.b. STATION WHERE SEPARATED | |
| 9. COMMAND TO WHICH TRANSFERRED | | 10. SGLI COVERAGE ☐ None Amount: $ |

11. PRIMARY SPECIALTY *(List number, title and years and months in specialty. List additional specialty numbers and titles involving periods of one or more years.)*

| 12. RECORD OF SERVICE | Year(s) | Month(s) | Day(s) |
|---|---|---|---|
| a. Date Entered AD This Period | | | |
| b. Separation Date This Period | | | |
| c. Net Active Service This Period | | | |
| d. Total Prior Active Service | | | |
| e. Total Prior Inactive Service | | | |
| f. Foreign Service | | | |
| g. Sea Service | | | |
| h. Effective Date of Pay Grade | | | |

13. DECORATIONS, MEDALS, BADGES, CITATIONS AND CAMPAIGN RIBBONS AWARDED OR AUTHORIZED *(All periods of service)*

14. MILITARY EDUCATION *(Course title, number of weeks, and month and year completed)*

| | | | | | | |
|---|---|---|---|---|---|---|
| 15.a. MEMBER CONTRIBUTED TO POST-VIETNAM ERA VETERANS' EDUCATIONAL ASSISTANCE PROGRAM | Yes | No | 15.b. HIGH SCHOOL GRADUATE OR EQUIVALENT | Yes | No | 16. DAYS ACCRUED LEAVE PAID |

17. MEMBER WAS PROVIDED COMPLETE DENTAL EXAMINATION AND ALL APPROPRIATE DENTAL SERVICES AND TREATMENT WITHIN 90 DAYS PRIOR TO SEPARATION ☐ Yes ☐ No

18. REMARKS

| | |
|---|---|
| 19.a. MAILING ADDRESS AFTER SEPARATION *(Include Zip Code)* | 19.b. NEAREST RELATIVE *(Name and address - include Zip Code)* |
| 20. MEMBER REQUESTS COPY 6 BE SENT TO _____ DIR. OF VET AFFAIRS ☐ Yes ☐ No | 22. OFFICIAL AUTHORIZED TO SIGN *(Typed name, grade, title and signature)* |
| 21. SIGNATURE OF MEMBER BEING SEPARATED | |

SPECIAL ADDITIONAL INFORMATION *(For use by authorized agencies only)*

| | |
|---|---|
| 23. TYPE OF SEPARATION | 24. CHARACTER OF SERVICE *(Include upgrades)* |
| 28. NARRATIVE REASON FOR SEPARATION | |
| 29. DATES OF TIME LOST DURING THIS PERIOD | 30. MEMBER REQUESTS COPY 4 _____ Initials |

DD Form 214, NOV 88 *Previous editions are obsolete.*

**COPY DESIGNATION** *(Printed in lower right margin)*

**MEMBER - 1**
**SERVICE - 2**
**VETERANS ADMINISTRATION - 3**
**MEMBER - 4**
**DEPARTMENT OF LABOR - 5**
**STATE DIRECTOR OF VETERANS AFFAIRS - 6**
**SERVICE - 7**
**SERVICE - 8**

Copy 1 (the original) does not have Items 23 - 30, and the page ends after Item 22.
Copies 2, 4, 7, and 8 contain all items.
Copies 3, 5, and 6 contain all items, but Items 25 through 27 are blacked out.

[54 FR 9985, Mar. 9, 1989]

APPENDIX B TO PART 45—DD FORM 214WS

CAUTION: NOT TO BE USED FOR IDENTIFICATION PURPOSES

THIS IS AN IMPORTANT RECORD. SAFEGUARD IT.

ANY ALTERATIONS IN SHADED AREAS RENDER FORM VOID

## CERTIFICATE OF RELEASE OR DISCHARGE FROM ACTIVE DUTY

| | | |
|---|---|---|
| 1. NAME (Last, First, Middle) | 2. DEPARTMENT, COMPONENT AND BRANCH | 3. SOCIAL SECURITY NO. |
| 4.a. GRADE, RATE OR RANK / 4.b. PAY GRADE | 5. DATE OF BIRTH (YYMMDD) | 6. RESERVE OBLIG. TERM. DATE: Year / Month / Day |
| 7.a. PLACE OF ENTRY INTO ACTIVE DUTY | 7.b. HOME OF RECORD AT TIME OF ENTRY (City and state, or complete address if known) | |
| 8.a. LAST DUTY ASSIGNMENT AND MAJOR COMMAND | 8.b. STATION WHERE SEPARATED | |
| 9. COMMAND TO WHICH TRANSFERRED | | 10. SGLI COVERAGE ☐ None Amount: $ |

11. PRIMARY SPECIALTY (List number, title and years and months in specialty. List additional specialty numbers and titles involving periods of one or more years.)

| 12. RECORD OF SERVICE | Year(s) | Month(s) | Day(s) |
|---|---|---|---|
| a. Date Entered AD This Period | | | |
| b. Separation Date This Period | | | |
| c. Net Active Service This Period | | | |
| d. Total Prior Active Service | | | |
| e. Total Prior Inactive Service | | | |
| f. Foreign Service | | | |
| g. Sea Service | | | |
| h. Effective Date of Pay Grade | | | |

13. DECORATIONS, MEDALS, BADGES, CITATIONS AND CAMPAIGN RIBBONS AWARDED OR AUTHORIZED (All periods of service)

14. MILITARY EDUCATION (Course title, number of weeks, and month and year completed)

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| 15.a. MEMBER CONTRIBUTED TO POST-VIETNAM ERA VETERANS' EDUCATIONAL ASSISTANCE PROGRAM | Yes | No | 15.b. HIGH SCHOOL GRADUATE OR EQUIVALENT | Yes | No | 16. DAYS ACCRUED LEAVE PAID | |

17. MEMBER WAS PROVIDED COMPLETE DENTAL EXAMINATION AND ALL APPROPRIATE DENTAL SERVICES AND TREATMENT WITHIN 90 DAYS PRIOR TO SEPARATION ☐ Yes ☐ No

18. REMARKS

| | |
|---|---|
| 19.a. MAILING ADDRESS AFTER SEPARATION (Include Zip Code) | 19.b. NEAREST RELATIVE (Name and address - include Zip Code) |
| 20. MEMBER REQUESTS COPY 6 BE SENT TO DIR. OF VET AFFAIRS ☐ Yes ☐ No | 22. OFFICIAL AUTHORIZED TO SIGN (Typed name, grade, title and signature) |
| 21. SIGNATURE OF MEMBER BEING SEPARATED | |

SPECIAL ADDITIONAL INFORMATION (For use by authorized agencies only)

| | | |
|---|---|---|
| 23. TYPE OF SEPARATION | 24. CHARACTER OF SERVICE (Include upgrades) | |
| 25. SEPARATION AUTHORITY | 26. SEPARATION CODE | 27. REENTRY CODE |
| 28. NARRATIVE REASON FOR SEPARATION | | |
| 29. DATES OF TIME LOST DURING THIS PERIOD | | 30. MEMBER REQUESTS COPY 4 _____ Initials |

DD Form 214WS, NOV 88 Previous editions are obsolete.

APPENDIX C TO PART 45—DD FORM 215

CAUTION: NOT TO BE USED FOR IDENTIFICATION PURPOSES

ANY ALTERATIONS IN SHADED AREAS RENDER FORM VOID

| 1. NAME *(Last, first, middle)* | 2. DEPARTMENT, COMPONENT AND BRANCH | 3. SOCIAL SECURITY NO. *(Also, Service Number if applicable)* |
|---|---|---|
| 4. MAILING ADDRESS *(Include ZIP Code)* | | |

5. ORIGINAL DD FORM 214 IS CORRECTED AS INDICATED BELOW

| ITEM NO. | CORRECTED TO READ |
|---|---|
| | SEPARATION DATE ON DD FORM 214 BEING CORRECTED - _____ |

| 6. DATE | 7. TYPED NAME, GRADE, TITLE AND SIGNATURE OF OFFICIAL AUTHORIZED TO SIGN |
|---|---|
| | |

DD Form 215, JUL 79
109/050

PREVIOUS EDITIONS OF THIS FORM ARE OBSOLETE

CORRECTION TO DD FORM 214, CERTIFICATE OF RELEASE OR DISCHARGE FROM ACTIVE DUTY

MEMBER - 1

## APPENDIX D TO PART 45—STATE DIRECTORS OF VETERANS AFFAIRS

### ALABAMA

Director, Department of Veterans Affairs, P.O. Box 1509, Montgomery, AL 36192–3701.

### ALASKA

Director, Division of Veterans Affairs, Department of Military & Veterans Affairs, 3601 C Street, suite 620, Anchorage, AK 99503.

### AMERICAN SAMOA

Veterans Affairs Officer, Office of Veterans Affairs, American Samoa Government, P.O. Box 2586, Pago Pago, AS 96799.

### ARIZONA

Director of Veterans Affairs, Arizona Veterans Service Commission, 3225 N. Central Avenue, suite 910, Phoenix, AZ 85012.

### ARKANSAS

Director, 1200 West 3rd, room 105, Box 1280, Little Rock, AR 72201.

### CALIFORNIA

Director, Department of Veterans Affairs, 1227 O Street, room 200A, Sacramento, CA 95814.

### COLORADO

Director, Division of Veterans Affairs, Department of Social Services, 1575 Sherman Street, room 122, Denver, CO 80203.

### DELAWARE

Chairman, Commission of Veterans Affairs, P.O. Box 1401, Dover, DE 19901.

### DISTRICT OF COLUMBIA

Chief, Office of Veterans Affairs, 941 North Capitol Street NE., room 1211 F, Washington, DC 20421.

### FLORIDA

Director, Division of Veterans Affairs, P.O. Box 1437, St. Petersburg, FL 33731.

### GEORGIA

Commissioner, Department of Veterans Service, Floyd Veterans Memorial Bldg, suite E–970, Atlanta, GA 30334.

### GUAM

Office of Veterans Affairs, P.O. Box 3279, Agana, Guam 96910.

### HAWAII

Director, Department of Social Services & Housing, Veterans Affairs Section, 3949 Diamond Head Road, Honolulu, HI 96809–0339.

### IDAHO

Administrator, Division of Veterans Service, P.O. Box 6675, Boise, ID 83707.

### CONNECTICUT

Commandant, Veterans Home and Hospital, 287 West Street, Rocky Hill, CT 06067.

### INDIANA

Director, Department of Veterans Affairs, 707 State Office Building, 100 N. Senate Avenue, Indianapolis, IN 46204.

### IOWA

Administrator, Veterans Affairs Division, 7700 NW. Beaver Drive, Camp Dodge, Johnston, IA 50131–1902.

### KANSAS

Executive Director, Kansas Veterans Commission, Jayhawk Tower, suite 701, 700 SW. Jackson Street, Topeka, KS 66603–3150.

### KENTUCKY

Director, Kentucky Center for Veterans Affairs, 600 Federal Place room 1365, Louisville, KY 40202.

### LOUISIANA

Executive Director, Department of Veterans Affairs, P.O. Box 94095, Capitol Station, Baton Rouge, LA 70804–4095.

### MAINE

Director, Bureau of Veterans Services, State Office Building Station 117, Augusta, ME 04333.

### MARYLAND

Executive Director, Maryland Veterans Commission, Federal Bldg.—room 110, 31 Hopkins Plaza, Baltimore, MD 21201.

### ILLINOIS

Director, Department of Veterans Affairs, 208 West Cook Street, Springfield, IL 62705.

### MICHIGAN

Director, Michigan Veterans Trust Fund, P.O. Box 30026, Ottawa Bldg, No. Tower, 3rd Floor, Lansing, MI 48909.

### MINNESOTA

Commissioner, Department of Veterans Affairs, Veterans Service Building, 2nd Floor, St. Paul, MN 55155.

### MISSISSIPPI

President, State Veterans Affairs Board, 120 North State Street, War Memorial Building, room B–100, Jackson, MS 39201.

MISSOURI

Director, Division of Veterans Affairs, P.O. Drawer 147, Jefferson City, MO 65101.

MONTANA

Administrator, Veterans Affairs Division, P.O. Box 5715, Helena, MT 59604.

NEBRASKA

Director, Department of Veterans Affairs, P.O. Box 95083, State Office Building, Lincoln, NE 68509.

NEVADA

Commissioner, Commission for Veterans Affairs, 1201 Terminal Way, room 108, Reno, NV 89520.

MASSACHUSETTS

Commissioner, Department of Veterans Services, 100 Cambridge Street—room 1002, Boston, MA 02202.

NEW JERSEY

Director, Division of Veterans Programs & Special Services, 143 E. State Street, room 505, Trenton, NJ 08608.

NEW MEXICO

Director, Veterans Service Commission, P.O. Box 2324, Santa Fe, NM 87503.

NEW YORK

Director, Division of Veterans Affairs, State Office Building #6A–19, Veterans Highway, Hauppauge, NY 11788.

NORTH CAROLINA

Asst Secretary for Veterans Affairs, Division of Veterans Affairs, 227 E. Edenton Street, Raleigh, NC 27601.

NORTH DAKOTA

Commissioner, Department of Veterans Affairs, 15 North Broadway, suite 613, Fargo, ND 58102.

OHIO

Director, Division of Soldiers Claims & Veterans Affairs, State House Annex, room 11, Columbus, OH 43215.

OKLAHOMA

Director, Department of Veterans Affairs, P.O. Box 53067, Oklahoma City, OK 73152.

NEW HAMPSHIRE

Director, State Veterans Council, 359 Lincoln Street, Manchester, NH 03103.

OREGON

Director, Department of Veterans Affairs, Oregon Veterans Building, 700 Summer Street NE., suite 150, Salem, OR 97310–1270.

PENNSYLVANIA

Director, Department of Military Affairs, Bureau for Veterans Affairs, Fort Indiantown Gap, Bldg 5–0–47, Annville, PA 17003–5002.

PUERTO RICO

Director, Bureau of Veterans Affairs & Human Resources, Department of Labor, 505 Munoz Rivera Avenue, Hato Rey, PR 00918.

RHODE ISLAND

Chief, Veterans Affairs Office, Metacom Avenue, Bristol, RI 02809.

SOUTH CAROLINA

Director, Department of Veterans Affairs, Brown State Office Building, 1205 Pendleton Street, Columbia, SC 29201.

SOUTH DAKOTA

Director, Division of Veterans Affairs, 500 East Capitol Avenue, State Capitol Building, Pierre, SD 57501–5083.

TENNESSEE

Commissioner, Department of Veterans Affairs, 215 8th Avenue, North, Nashville, TN 37203.

TEXAS

Executive Director, Veterans Affairs Commission of Texas, Box 12277, Capitol Station, Austin, TX 78711.

UTAH

No DVA.

VERMONT

Director, Veterans Affairs Office, State Office Building, Montpelier, VT 05602.

VIRGINIA

Director, Division of War Veterans Claims, 210 Franklin Road, SW., room 1002, P.O. Box 809, Roanoke, VA 24004.

VIRGIN ISLANDS

Director, Division of Veterans Affairs, P.O. Box 890, Christiansted, St. Croix, VI 00820.

WASHINGTON

Director, Department of Veterans Affairs, P.O. Box 9778, Mail Stop PM–41, Olympia, WA 95804.

WEST VIRGINIA

Director, Department of Veterans Affairs, 605 Atlas Building, Charleston, WV 25301–9778.

WISCONSIN

Secretary, Department of Veterans Affairs, P.O. Box 7843, 77 North Dickinson Street, Madison, WI 53707.

# PART 47—ACTIVE DUTY SERVICE FOR CIVILIAN OR CONTRACTUAL GROUPS

Sec.
47.1 Purpose.
47.2 Applicability and scope.
47.3 Definitions.
47.4 Policy.
47.5 Responsibilities.
47.6 Procedures.
APPENDIX A TO PART 47—INSTRUCTIONS FOR SUBMITTING GROUP APPLICATIONS UNDER PUBLIC LAW 95–202
APPENDIX B TO PART 47—THE DOD CIVILIAN/MILITARY SERVICE REVIEW BOARD AND THE ADVISORY PANEL

AUTHORITY: 38 U.S.C. 106 note.

SOURCE: 54 FR 39993, Sept. 29, 1989, unless otherwise noted.

## § 47.1 Purpose.

This document:

(a) Revises 32 CFR part 47 and implements Public Law 95–202.

(b) Directs the Secretary of the Air Force to determine if an established group of civilian employees or contract workers provided service to the U.S. Armed Forces in a manner considered active military service for Department of Veterans Affairs (VA) benefits.

(c) Establishes the DoD Civilian/Military Service Review Board and the Advisory Panel.

(d) Establishes policy, assigns responsibilities, prescribes application procedures for groups and individuals, and clarifies the factors used to determine active duty (AD) service.

## § 47.2 Applicability and scope.

This part:

(a) Applies to the Office of the Secretary of Defense (OSD), the Military Departments, and by agreement with the Department of Transportation (DoT), the U.S. Coast Guard.

(b) Applies to any group application considered under Public Law 95–202 after September 11, 1989 and to any individual who applies for discharge documents as a member of a group recognized by the Secretary of the Air Force.

## § 47.3 Definitions.

*Armed conflict.* A prolonged period of sustained combat involving members of the U.S. Armed Forces against a foreign belligerent. The term connotes more than a military engagement of limited duration or for limited objectives, and involves a significant use of military and civilian forces.

(a) Examples of armed conflict are World Wars I and II, and the Korean and Vietnam Conflicts.

(b) Examples of military actions that are not armed conflicts are as follows:

(1) The incursion into Lebanon in 1958, and the peacekeeping force there in 1983 and 1984.

(2) The incursions into the Dominican Republic in 1965 and into Libya in 1986.

(3) The intervention into Grenada in 1983.

*Civilian or contractual group.* An organization similarly situated to the Women's Air Forces Service Pilots (a group of Federal civilian employees attached to the U.S. Army Air Force in World War II). Those organization members rendered service to the U.S. Armed Forces during a period of armed conflict in a capacity that was then considered civilian employment with the Armed Forces, or the result of a contract with the U.S. Government, to provide direct support to the Armed Forces.

*Recognized group.* A group whose service the Secretary of the Air Force administratively has determined to have been ''active duty for the purposes of all laws administered by the Department of Veterans Affairs''; i.e., VA benefits under 38 U.S.C. 101.

*Similarly situated.* A civilian or contractual group is similarly situated to the Women's Air Forces Service Pilots when it existed as an identifiable group at the time the service was being rendered to the U.S. Armed Forces during a period of armed conflict. Persons who individually provided support through civilian employment or contract, but

who were not members of an identifiable group at the time the services were rendered, are not ''similarly situated'' to the Women's Air Forces Service Pilots of World War II.

**§47.4 Policy.**

(a) *Eligibility for consideration*. To be eligible to apply for consideration under Public Law 95–202 and this part, a group must:

(1) Have been similarly situated to the Women's Air Forces Service Pilots of World War II.

(2) Have rendered service to the United States in what was considered civilian employment with the U.S. Armed Forces either through formal Civil Service hiring or less formal hiring if the engagement was created under the exigencies of war, or as the result of a contract with the U.S. Government to provide direct support to the U.S. Armed Forces.

(3) Have rendered that service during a period of armed conflict.

(4) Consist of living persons to whom VA benefits can accrue.

(5) Not have already received benefits from the Federal Government for the service in question.

(b) A determination of AD service that is considered to be equivalent to active military service is made on the extent to which the group was under the control of the U.S. Armed Forces in support of a military operation or mission during an armed conflict. The extent of control exerted over the group must be similar to that exerted over military personnel and shall be determined by, but not necessarily limited to, the following:

(1) *Incidents favoring equivalency*—(i) *Uniqueness of service*. Civilian service (civilian employment or contractual service) is a vital element of the warfighting capability of the Armed Forces. Civilian service during a period of armed conflict is not necessarily equivalent to active military service, even when performed in a combat zone. Service must be beyond that generally performed by civilian employees and must be occasioned by unique circumstances. For civilian service to be recognized under this part, the following factors must be present:

(A) The group was created or organized by U.S. Government authorities to fill a wartime need or, if a group was not created specifically for a wartime need, but existed before that time, then its wartime mission was of a nature to substantially alter the organization's prewar character.

(B) If the application is based on service in a combat zone, the mission of the group in a combat zone must have been substantially different from the mission of similar groups not in a combat zone.

(ii) *Organizational authority over the group*. The concept of military control is reinforced if the military command authority determines such things as the structure of the civilian organization, the location of the group, the mission and activities of the group, and the staffing requirements to include the length of employment and pay grades of the members of the group.

(iii) *Integration into the military organization*. Integrated civilian groups are subject to the regulations, standards, and control of the military command authority.

(A) Examples include the following:

(*1*) Exchanging military courtesies.

(*2*) Wearing military clothing, insignia, and devices.

(*3*) Assimilating the group into the military organizational structure.

(*4*) Emoluments associated with military personnel; i.e., the use of commissaries and exchanges, and membership in military clubs.

(B) A group fully integrated into the military would give the impression that the members of the group were military, except that they were paid and accounted for as civilians.

(C) Integration into the military may lead to an expectation by members of the group that the service of the group imminently would be recognized as active military service. Such integration acts in favor of recognition.

(iv) *Subjection to military discipline*. During past armed conflicts, U.S. military commanders sometimes restricted the rights or liberties of civilian members as if they were military members.

(A) Examples include the following:

(*1*) Placing members under a curfew.

(*2*) Requiring members to work extended hours or unusual shifts.

(*3*) Changing duty assignments and responsibilities.

(*4*) Restricting proximity travel to and from the military installation.

(*5*) Imposing dress and grooming standards.

(B) Consequences for noncompliance might include a loss of some privilege, dismissal from the group, or trial under military law. Such military discipline acts in favor of recognition.

(v) *Subjection to military justice.* Military members are subject to the military criminal justice system. During times of war, ''persons serving with or accompanying an Armed Force in the field'' are subject to the military criminal justice code. Those who were serving with the U.S. Armed Forces may have been treated as if they were military and subjected to court-martial jurisdiction to maintain discipline. Such treatment is a factor in favor of recognition.

(vi) *Prohibition against members of the group joining the armed forces.* Some organizations may have been formed to serve in a military capacity to overcome the operation of existing laws or treaty or because of a governmentally established policy to retain individuals in the group as part of a civilian force. These factors act in favor of recognition.

(vii) *Receipt of military training and/or achievement of military capability.* If a group employed skills or resources that were enhanced as the result of military training or equipment designed or issued for that purpose, this acts toward recognition.

(2) *Incidents not favoring equivalency*—(i) *Submission to the U.S. Armed Forces for protection.* A group that seeks protection and assistance from the U.S. Armed Forces and submits to military control for its own well-being is not deemed to have provided service to the Armed Forces equivalent to AD military service, even though the group may have been as follows:

(A) Armed by the U.S. military for defensive purposes.

(B) Routed by the U.S. military to avoid the enemy.

(C) Instructed by the U.S. military for the defense of the group when attacked by, or in danger of attack by, the enemy.

(D) Otherwise submitted themselves to the U.S. military for sustenance and protection.

(ii) *Permitted to resign.* The ability of members to resign at will and without penalty acts against military control. Penalty may be direct and severe, such as confinement, or indirect and moderate, such as difficult and costly transportation from an overseas location.

(iii) *Prior recognition of group service.* Recognition of a group's service by agencies of State or local government does not provide support in favor of recognition under this part.

(3) *Status of group in international law.* In addition to other factors, consideration will be given to whether members of the group were regarded and treated as civilians, or assimilated to the Armed Forces as reflected in treaties, customary international law, judicial decisions, and U.S. diplomatic practice.

(c) *Reconsideration.* Applications by groups previously denied a favorable determination by the Secretary of the Air Force shall be reconsidered under this part if the group submits evidence that is new, relevant, and substantive. Any request that the DoD Civilian/Military Service Review Board established hereunder (see § 47.5(b)) determines does not provide new, relevant, and substantive evidence shall be returned to the applicant with the reasons for nonacceptance.

(d) *Counsel Representation.* Neither the Department of Defense nor Department of Transportation shall provide representation by counsel or defray the cost of such representation with respect to any matter covered by this part.

**§ 47.5 Responsibilities.**

(a) The Assistant Secretary of Defense (Force Management and Personnel) (ASD(FM&P)) shall:

(1) Appoint a primary and an alternate member in the grade of O–6 or GM–15 or higher to the DoD Civilian/Military Service Review Board.

(2) Exercise oversight over the Military Departments and the U.S. Coast Guard for compliance with this Directive and in the issuance of discharge documents and casualty reports to members of recognized groups.

(b) The Secretary of the Air Force, as the designated Executive Agent of the Secretary of Defense for the administration of Public Law 95–202 shall:

(1) Establish the DoD Civilian/Military Service Review Board and the Advisory Panel.

(2) Appoint as board president a member or employee of the Air Force in grade O–6 or GM–15 or higher.

(3) Request the Secretary of Transportation to appoint an additional voting member from the U.S. Coast Guard when the board is considering the application of a group claiming active Coast Guard service.

(4) Provide a recorder and an assistant to maintain the records of the board and administer the functions of this part.

(5) Provide nonvoting legal advisors and historians.

(6) Publish notices of group applications and other Public Law 95–202 announcements in the FEDERAL REGISTER.

(7) Consider the rationale and recommendations of the DoD Civilian/Military Service Review Board.

(8) Determine whether the service rendered by a civilian or contractual group shall be considered AD service to the U.S. Armed Forces for all laws administered by the VA. The decision of the Secretary of the Air Force is final. There is no appeal.

(9) Notify the following persons in writing when a group determination is made (if the Secretary of the Air Force disagrees with the rationale or recommendations of the board, the Secretary of the Air Force shall provide the decision and reasons for it in writing to these persons):

(i) The applicant(s) for the group.

(ii) The Secretary of the Department of Veterans Affairs.

(iii) The Secretary of the Army.

(iv) The Secretary of the Navy.

(v) The ASD (FM&P).

(vi) The Secretary of Transportation (when a group claims active Coast Guard service).

(c) The Secretary of the Army, Secretary of the Navy, Secretary of the Air Force, and Commandant of the Coast Guard shall:

(1) Appoint to the board a primary and an alternate member in the grades of O–6 or GM–15 or higher from their respective Military Services.

(2) Process applications for discharge documents from individuals claiming membership in a recognized group in accordance with applicable laws, Directives, the Secretary of the Air Force rationale and instrument effecting a group determination, and any other instructions of the board.

(3) Determine whether the applicant was a member of a recognized group after considering the individual's evidence of membership and verifying the service against available Government records.

(4) Issue a DD Form 214, ''Certificate of Release or Discharge from Active Duty,'' and a DD Form 256, ''Honorable Discharge Certificate,'' or a DD Form 257, ''General Discharge Certificate,'' as appropriate, consistent with DoD Instruction 1336.1[1] and DoD Directive 1332.14[2] and the implementing documents of the appropriate statutes of the Military Department concerned or the DoT and the instructions of the DoD Civilian/Military Service Review Board.

(5) Issue a DD Form 1300, ''Report of Casualty,'' in accordance with DoD Instruction 1300.9[3] if a verified member was killed during the period of AD service.

(6) Ensure that each DD Form 214, ''Certificate of Release or Discharge from Active Duty,'' and each DD Form 1300, ''Report of Casualty,'' have the following statement entered in the ''Remarks'' section:

> This document, issued under Public Law 95–202 (38 U.S.C. 106 Note), administratively establishes active duty service for the purposes of Department of Veterans Affairs benefits.

(7) Determine the equivalent military pay grade, when required by the Department of Veterans Affairs. For VA benefits, a pay grade is needed only in cases when an individual was killed or received service-connected injuries or disease during the recognized period

[1] Copies may be obtained, if needed, from the U.S. Naval Publications and Forms Center, Attn: 1053, 5801 Tabor Avenue, Philadelphia, PA 19120.

[2] See footnote 1 to §47.5(c)(4).

[3] See footnote 1 to §47.5(c)(4).

of AD service. A DD Form 1300 shall be issued with the equivalent pay grade annotated for a member who died during the recognized period of service. A DD Form 214 shall not include pay grade, unless the Department of Veterans Affairs requests that a grade determination be given. Determinations of equivalent grade shall be based on the following criteria in order of importance:

(i) Officially recognized organizational grade or equivalent rank.

(ii) The corresponding rank for civilian pay grade.

(iii) If neither of the criteria in paragraphs (c)(7) (i) and (ii) of this section, and applies, only one of three grades may be issued; i.e., O–1, E–4, or E–1. Selection depends on the nature of the job performed, the level of supervision exercised, and the military privileges to which the individual was entitled.

(8) Adjudicate applicant challenges to the period of AD service, characterization of service, or other administrative aspects of the discharge documents issued.

### § 47.6 Procedures.

(a) *Submitting group applications.* Applications on behalf of a civilian or contractual group shall be submitted to the Secretary of the Air Force using the instructions in appendix A to this part.

(b) *Processing group applications.* (1) When received, the recorder shall review the application for sufficiency and either return it for more information or accept it for consideration and announce acceptance in the FEDERAL REGISTER.

(2) The recorder shall send the application to the appropriate advisory panel for historical review and analysis.

(3) When received, the recorder shall send the advisory panel's report to the applicant for comment. The applicant's comments shall be referred to the advisory panel if significant disagreement requires resolution. Additional comments from the historians also shall be referred to the applicant for comment.

(4) The DoD Civilian/Military Service Board shall consider the group application, as established, in paragraph (a) and paragraphs (b) (1) through (3) of this section.

(5) After the Secretary of the Air Force makes a decision, the recorder shall notify the applicant of the decision and announce it in the ''FEDERAL REGISTER.''

(c) *Submitting individual applications.* When a group is recognized, individual members may apply to the appropriate Military Department or to the Coast Guard for discharge documents. Submit applications on DD Form 2168, ''Application for Discharge of Member or Survivor of Member of Group Certified to Have Performed Active Duty with the Armed Forces of the United States.'' An application on behalf of a deceased or incompetent member submitted by the next of kin must be accompanied by proof of death or incompetence.

## APPENDIX A TO PART 47—INSTRUCTIONS FOR SUBMITTING GROUP APPLICATIONS UNDER PUBLIC LAW 95–202

*A. In Submitting a Group Application:* 1. Define the group to include the time period that your group provided service to the U.S. Armed Forces.

2. Show the relationship that the group had with the U.S. Armed Forces, the manner in which members of the group were employed, and the services the members of the group provided to the Armed Forces.

3. Address each of the factors in § 47.4.

4. Substantiate and document the application. (The burden of proof rests with the applicant.)

*B. Send Completed Group Applications To:* Secretary of the Air Force (SAF/MRC), DoD Civilian/Military Service Review Board, Washington, DC 20330–1000.

## APPENDIX B TO PART 47—THE DOD CIVILIAN/MILITARY SERVICE REVIEW BOARD AND THE ADVISORY PANEL

*A. Organization and Management*

1. The board shall consist of a president selected from the Department of the Air Force and one representative each from the OSD, the Department of the Army, the Department of the Navy, the Department of the Air Force, and the U.S. Coast Guard (when the group claims active Coast Guard service). Each member shall have one vote except that the president shall vote only to break a tie. The board's decision is determined by majority vote. The president and two voting members shall constitute a quorum.

2. The advisory panel shall act as a nonvoting adjunct to the board. It shall consist

of historians selected by the Secretaries of the Military Departments and, if required, by the Secretary of Transportation. The respective Military Departments and the DOT shall ensure that the advisory panel is provided with administrative and legal support.

*B. Functions*

1. The board shall meet in executive session at the call of the president, and shall limit its reviews to the following:

a. Written submissions by an applicant on behalf of a civilian or contractual group. Presentations to the board are not allowed.

b. Written report(s) prepared by the advisory panel.

c. Any other relevant written information available.

d. Factors established in this part for determining AD service.

2. The board shall return to the applicant any application that does not meet the eligibility criteria established in §47.4(a). The board only needs to state the reasons why the group is ineligible for consideration under this part.

3. If the board determines that an application is eligible for consideration under §47.4(a), the board shall provide, to the Secretary of the Air Force, a recommendation on the AD service determination for the group and the rationale for that recommendation that shall include, but not be limited to, a discussion of the factors listed in §47.4.

a. No factors shall be established that require automatic recognition. Neither the board nor the Secretary of the Air Force shall be bound by any method in reaching a decision.

b. Prior group determinations made under Public Law 95–202 do not bind the board or the Secretary of the Air Force. The board and the Secretary of the Air Force fully and impartially shall consider each group on its own merit in relation to the factors listed in section D. of this Directive.

# PART 48—RETIRED SERVICEMAN'S FAMILY PROTECTION PLAN

## Subpart A—General Information

Sec.
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## Subpart A—General Information

### §48.101 Purpose.

The purpose of the Retired Serviceman's Family Protection Plan is to permit each member of the uniformed services to elect to receive a reduced amount of any retired pay which may be awarded him as a result of service in his uniformed service in order to provide an annuity payable after his death (while entitled to retired pay) to his widow, child, or children, subject to certain limitations specified in the law and elaborated in the regulations in this part.

**§ 48.102 Definitions.**

(a) The terms *Plan* or *RSFPP* as hereinafter used means the Retired Serviceman's Family Protection Plan (formerly called the Uniformed Services Contingency Option Act).

(b) The term *uniformed services* means the Army, Navy, Air Force, Marine Corps, Coast Guard, Commissioned Corps of Environmental Science Services Administration, and Commissioned Corps of Public Health Service.

(c) The term *member* means a commissioned officer, commissioned warrant officer, warrant officer, nurse, flight officer, or a person in an enlisted grade (including an aviation cadet) of any of the uniformed services, and a person in any of these categories who is entitled to or is in receipt of retired pay, except persons excluded in title 10, U.S. Code, section 1431(a), as amended.

(d) The term *widow* includes *widower* and refers to the lawful spouse of the member on the date of retirement with pay.

(e) The term *child* means, in all cases, a member's child, who is living on the date of retirement of the member with pay and who meets the following requirements:

(1) A legitimate child under 18 years of age and unmarried.

(2) A stepchild, under 18 years of age and unmarried, who is in fact dependent on the member for support (see paragraphs (f) and (g) of this section).

(3) A legally adopted child, under 18 years of age and unmarried.

(4) A child, as defined above, who is 18 or more years of age and unmarried, and who is incapable of self-support because of being mentally defective or physically incapacitated if that condition existed prior to reaching age 18.

(5) A child as defined above, who is at least 18, but under 23 years of age and unmarried, who is pursuing a full-time course of study or training in a high school, trade school, technical or vocational institute, junior college, college, university, or comparable recognized educational institution. (Applicable only in the case of members who retired on or after Nov. 1, 1968).

(6) A child loses his eligibility for an annuity under this part if he is adopted by a third person before the parent-member's death. His eligibility is not affected if he is adopted by a third person after the parent-member's death (36 Comp. Gen. 325).

(f) The term *stepchild* means a child of a member's spouse by a former marriage. The stepchild relationship terminates upon the divorce of the parent spouse, but not upon the death of the parent spouse.

(g) The term *in fact dependent* means that the stepchild must be dependent on the member for over half of his or her support.

(h) The term *retirement* means retirement with eligibility to receive retired pay.

(i) The term *retired pay* includes retired, retirement, equivalent and retainer pay awarded as a result of service in the uniformed services.

(j) The term *reduced retired pay* means the retired pay remaining after the cost of participation in RSFPP has been subtracted.

(k) The term *department concerned* means (1) the Department of the Army with respect to the Army, (2) the Department of the Navy with respect to the Navy and Marine Corps, (3) the Department of the Air Force with respect to the Air Force, (4) the Department of Transportation with respect to the Coast Guard, (5) the Department of Commerce with respect to the Environmental Science Services Administration, and (6) the Department of Health, Education, and Welfare with respect to the Public Health Service.

(l) The term *dependent* means the prospective annuitants described in paragraphs (d) and (e) of this section.

(m) The term *Board of Actuaries* means the Government Actuary in the Department of the Treasury, the Chief Actuary of the Social Security Administration, and a member of the Society of Actuaries appointed by the President to advise the Secretary of Defense on the administration of the Plan.

(n) The term *Joint Board* means representatives of the uniformed services appointed under the provisions of § 48.602.

(o) The term *years of service* means years of service creditable in the computation of basic pay.

(p) The term *election* means the choice of options made by the member under the RSFPP. This term includes a

modification of a previous election or an election submitted after a revocation of a previous option(s) elected.

(q) The term *elections in effect* means valid elections existing on the day of retirement.

(r) A recognized educational institution is defined as a high school, trade school, technical or vocational institute, junior college, college, university, or comparable recognized educational institution which meets one or more of the following criteria:

(1) It is operated or directly supported by the United States, or a State, or local governmental agency.

(2) It is accredited by a nationally recognized or State recognized accrediting agency.

(3) It is approved as an educational institution by a State or local governmental agency.

(4) Its credits are accepted for transfer (or for admission) by three or more accredited schools on the same basis as credits from an accredited school.

## Subpart B—Election of Options

### §48.201 Options.

As provided in §48.203, a member may elect one or more of the following annuities. The amount must be specified at time of election, and may not be for more than 50 per centum nor less than 12½ per centum of his retired pay, in no case may be less than a $25 monthly annuity be elected. If the election is made in terms of dollars, the amount may be more than 50 per centum of the retired pay that he would receive if he were to retire at the time of election; however, if such elected amount exceeds 50 per centum of his retired pay when he does retire, it shall be reduced to an amount equal to such 50 per centum. Also, if the dollar amount elected is less than 12½ per centum of his retired pay when he does retire, it shall be increased to an amount equal to such 12½ per centum.

(a) Option 1 is an annuity payable to or on behalf of his widow, the annuity to terminate upon her death or remarriage.

(b) Option 2 is an annuity payable to or on behalf of his surviving child or children as defined in §48.102, the annuity to terminate when there ceases to be at least one such surviving child eligible to receive the annuity. Each payment under such annuity shall be paid in equal shares to or on behalf of the surviving children remaining eligible at the time the payment is due. A member who had this option in effect on the date of retirement, and who retired on or after November 1, 1968, may apply to the Secretary concerned to have a child (other than a child described in §48.102(e)(4)) who is at least 18 but less than 23 years of age considered not to be an eligible beneficiary under this paragraph (b) or §48.202. Normally such applications will be approved.

(c) Option 3 is an annuity to or on behalf of his widow and surviving child or children. Such annuity shall be paid to the widow until death or remarriage, and thereafter each payment under such annuity shall be paid in equal shares to or on behalf of the surviving children remaining eligible at the time the payment is due. A member may provide for allocating, during the period of the surviving spouse's eligibility, a part of the annuity under this subpart B for payment to those of his surviving children who are not children of that spouse. The sum allotted will not exceed the equitable share for which such children would be eligible after the death of the widow.

(d) When no eligible beneficiary remains to benefit from the option elected, the member's retired pay will be restored (except as provided in §48.604, for certain members retired before Aug. 13, 1968). All elections on file on Aug. 13, 1968, for members not entitled to receive retired pay will be considered to include the restoration feature with attendant cost factors being applied at time of retirement. For the purpose of this paragraph, a child (other than a child described in §48.102(e)(4)) who is at least 18 but less than 23 years of age, and is not pursuing a course of study as defined in §48.102(e)(5), shall be considered an eligible beneficiary unless an approved application by the member pursuant to §48.201(b) that such a child is not to be considered an eligible beneficiary is in effect (for members who retire on or after Nov. 1, 1968).

**§ 48.202 Limitation on number of annuities.**

When a member desires to provide both the annuity provided by Option 1 and Option 2, he may elect amounts that, in total, meet the limitations specified in § 48.201. The cost of each annuity, and the amount of each annuity shall be determined separately. A member may not elect the combination of Options 1 and 3 or Options 2 and 3 in any case. The combined amount of the annuities may not be more than 50 per centum nor less than 12½ per centum of his retired pay. In no case may less than a $25 per month combined annuity be provided.

**§ 48.203 Election of options.**

(a) A member who has completed less than 19 years of service as defined in § 48.102(o) may elect to receive a reduced amount of retired pay in order to provide one or more of the annuities as specified in §§ 48.201 and 48.202, payable after his death while entitled to retired pay to or on behalf of his surviving widow, child, or children. To be effective, the election by such a member must be dated, signed, witnessed, and delivered to appropriate service officials, or postmarked not later than midnight on the day in which he completes 19 years of service. Such an election will become effective immediately upon subsequent retirement. The latest election, change, or revocation made in accordance with this subsection will, if otherwise valid, be the effective election, unless superseded by a change as provided in paragraph (b) of this section.

(b) Except as provided in paragraph (c) of this section, a member who fails or declines to make an election before completion of 19 years of service may make an election after that time. However, unless the election is made at least 2 years prior to the date the member becomes entitled to receive retired pay, it will not be effective. The same applies to subsequent changes or revocations made prior to retirement.

(c) If an election, revocation, or change was made prior to August 13, 1968, the 19-year and 2-year provisions are automatically in effect on August 13, 1968, for members who were not entitled to retired pay on such date, unless the member applies under § 48.604(d) to remain under the provisions of the law prior to August 13, 1968. In this case the ''18 years of service'' and ''3 years prior to receipt of retired pay'' rules will apply.

(d) A member retired for physical disability on or after November 1, 1968 who is awarded retired pay prior to completion of 19 years of service may make an election which is subject to the restrictions set forth in § 48.507. The election by such member shall be made before the first day for which he is entitled to retired pay. Elections made under this paragraph prior to November 1, 1968, must be made by the member retiring for physical disability prior to completing 18 years.

(e) If, because of military operations, a member is assigned to an isolated station, or is missing, interned in a neutral country, captured by a hostile force, or beleaguered or besieged, and for that reason is unable to make an election before completing 19 years of service, he may make the election within 1 year after he ceases to be assigned to that station or returns to the jurisdiction of his service as the case may be, and such election shall become effective immediately upon subsequent retirement.

(f) A member to whom retired pay is granted retroactively, and who is otherwise eligible to make an election, may make the election within 90 days after receiving notice that such pay has been granted him.

(g) Whenever a member is determined to be mentally incompetent by medical officers of the uniformed services or of the Veterans Administration, or is adjudged mentally incompetent by a court of competent jurisdiction and because of such mental incompetency is incapable of making any election within the time limitations prescribed by the Plan, the Secretary of the Department concerned may make the appropriate election on behalf of such member upon request of the spouse, or if there be no spouse, by or on behalf of the child or children of such member. If such member is subsequently determined to be mentally competent by the Veterans Administration or a court of competent jurisdiction, he may, within 180 days after such determination or

judgment, change or revoke the election made on his behalf. In such a case, the change or revocation will be effective on the date of the member's request for such change or revocation. Deductions previously made shall not be refunded.

(h) All elections on file on August 13, 1968, for members not entitled to receive retired pay shall be subject to the provisions of this section unless the member makes the application specified in § 48.604(d).

(i) A person who was a former member of the armed forces on November 1, 1953, and who is granted retired pay after that date, may, at the time he is granted that pay, make an election as provided in § 48.201.

### § 48.204 Change or revocation of election.

(a) A change of election is a change in the amount of the annuity or annuities under any option, or a change in any option or options selected. A revocation is a cancellation of a previous election and constitutes a withdrawal from coverage under the Plan.

(b) A member may change or revoke his election as often as he desires prior to the completion of 19 years of service. Such a change or revocation must be dated, signed, witnessed, and delivered to appropriate service officials, or postmarked not later than midnight on the day in which the member completes 19 years of service. The latest election, change, or revocation which is submitted in accordance with this subsection will be effective at retirement.

(c) A member who desires to make an election or change or revoke his election after he has completed 19 years of service may do so prior to his retirement. However, such an election, change or revocation will be effective only if at least 2 years elapse between the date of the election, change, or revocation and the date of eligibility to receive retired pay.

(d) A revocation will not prohibit the filing of a new election at a later date which will become valid under applicable validation provisions.

(e) A member may, on or after November 1, 1968, at any time prior to his retirement, change or revoke his election (provided the change does not increase the amount of the annuity elected) to reflect a change in the marital or dependency status of the member of his family caused by death, divorce, annulment, remarriage, or acquisition of a child, if such change or revocation is made within 2 years of such change in status.

(f) Notification of a change in family status is not a change of election.

(g) All changes and revocations on file on August 13, 1968, for members not entitled to retired pay shall be subject to the provisions of this section unless the member makes the application specified in § 48.604(d).

### § 48.205 Election form.

The form for making election after October 31, 1968, is prescribed as Election of Options, Retired Serviceman's Family Protection Plan, DD Form 1688.[1] It will be submitted as directed herein. All copies will be signed, and any otherwise complete, signed copy, when properly submitted, may be used to substantiate the fact of election, modification, revocation, or change in family status.

### § 48.206 Information regarding elections.

(a) All members of the Reserve component who will have accumulated sufficient service to be eligible for retired pay at age 60, will be counseled on the Plan before reaching their 57th birth dates in order to insure that valid elections can be made prior to their 58th birth dates. An election, modification, or revocation submitted subsequent to attaining age 58 will be valid only if it is made and submitted at least 2 years prior to the first date for which retired pay is granted.

(b) It is the responsibility of the department concerned to provide election forms and to promulgate information concerning the benefits of the Plan to all members so as to allow a timely election.

(c) Members retiring for physical disability prior to the completion of 19

[1] Filed as part of the original document. Copies may be obtained from Military Personnel Office.

years of service will, prior to retirement, be counseled and furnished information concerning the operation of the Plan.

## Subpart C—Designation of Beneficiaries

### § 48.301 Designation.

(a) All legal beneficiaries described in § 48.102 must be named at the date of retirement pursuant to the option elected. Although a member without dependents may make an election, it will not be effective unless he has eligible dependents at the time of his retirement.

(b) When a change in family status occurs prior to retirement which would effect a change as provided in § 48.204(e), new DD Form 1688,[1] Election of Options, Retired Servicemen's Family Protection Plan, should be filed to evidence such change.

### § 48.302 Substantiating evidence regarding dependency and age of dependents.

At the time of submitting the election, or prior to retirement, the member must indicate his wife's and youngest child birth date as applicable to the option elected. At or before the time of his retirement, he must submit proof of final dissolution of prior marriages, if any, both for himself and his spouse. The age of the dependents must be substantiated by a birth certificate or other competent evidence. The birth date of a member must be verified by his service record. All required substantiating evidence must be at the disbursing office which would normally pay the member retired pay or retainer pay immediately following retirement so as to permit the establishment of accurate pay accounts and to prevent the creation of indebtedness or overpayments.

### § 48.303 Condition affecting entitlement of widow or widower.

A member may have a different lawful spouse at the time of retirement from the lawful spouse he had at the time of election. The lawful spouse at the time of retirement is the spouse eligible for an annuity at the time of member's death. Divorce of the member will remove the former spouse as a prospective annuitant.

[1] See footnote 1 to § 48.205.

## Subpart D—Reduction of Retired Pay

### § 48.401 Computation of reduction.

(a) The reduction to be made in the retired pay of a member who has made an election shall be computed by the uniformed service concerned in each individual case, based upon tables of factors prepared by the Board of Actuaries. The computation shall be based upon the applicable table in effect on the date of retirement.

(b) An adjustment may be made in the reduction of retired pay upon the finding of an administrative error or a mistake of fact (see § 48.603).

(c) If a member elects to be covered by option 3, and on the date he is awarded retired pay has no children eligible to receive the annuity, or has only a child or children aged 18–22 (other than a child described in § 48.102(e)(4) and elects, at retirement, that such child or children shall not be considered to be eligible beneficiaries, he shall have his costs computed as though he had elected option 1. If he elects option 3, and on the date he is awarded retired pay has no wife eligible for the annuity, he shall have his costs computed as though he had elected option 2.

(d) If a member elects option 3, and after he becomes entitled to retired pay, there is no eligible spouse because of death or divorce, upon the retired member's application, no deductions from his retired pay shall be made after the last day of the month in which there ceases to be an eligible spouse. Children otherwise eligible will continue to be eligible for the annuity in event of the member's death. No amounts by which the member's retired pay is reduced before that date may be refunded to or credited on behalf of that person.

(e) The amount of reduction in retired pay and the annuity payable established for each individual at the time of his retirement shall remain unaltered except as provided in § 48.203(g), paragraphs (b) and (d) of this

section, and § 48.406, regardless of future pay increases or decreases.

**§ 48.402 Effective date of reduction.**

The effective date of reduction in retired pay will be the effective date of retirement with pay. The reduction in retired pay will be terminated on the date the member ceases to be entitled to retired pay or on the first day of the month following that in which there is no eligible beneficiary (for exception to this rule see § 48.604).

**§ 48.403 Payment of nonwithheld reduction of retired pay.**

(a) A member of a uniformed service who is entitled to retired pay and has made an election shall, during any period in which he is not receiving retired pay (including periods of active duty), deposit the amount which would have been withheld from his retired pay had he been receiving that pay.

(b) Such deposit will be payable to Treasurer of the United States and shall be forwarded monthly to the disbursing office which would normally pay the member his retired pay.

(c) The disbursing office will in all cases inform the member of the amount to be deposited and when such deposits are to be made.

(d) In the event deposits are not made within 30 days of the due date, the disbursing office will inform the member concerned that he is delinquent from such due date and thereafter his designated beneficiaries will not be eligible for the annuity provided under the Plan until the arrears have been paid. The notification of delinquency will advise the member that 15 additional days have been granted to him in which to remit his deposit, and that if the arrears are not deposited within that period, the member will be charged interest to include the first day of delinquency. In no case will the expiration date of the 15 days exceed a date later than 45 days from the date the deposit was due. The interest will be computed monthly and the rate will be that used in computing the cost tables in effect on the date of the member's retirement. If such member later becomes in receipt of retired pay, any arrears with compound interest will be withheld.

**§ 48.404 Ages to be used.**

Ages to be used for calculating reductions of retired pay will be the ages of the member and his eligible dependents on their nearest birth dates as of the date of the member's retirement.

**§ 48.405 Action upon removal from temporary disability retired list.**

(a) Any member on the temporary disability retired list established pursuant to title 10, United States Code, chapter 61, who has elected to receive reduced retired pay in order to provide one or more of the annuities specified in the Plan, and who is subsequently removed from the list due to any reason other than permanent retirement, shall have refunded to him a sum which represents the difference between the amount by which his retired pay has been reduced and the cost of an amount of term insurance which is equal to the protection provided his dependents during the period he was on the temporary disability retired list.

(b) If the member concerned is returned to active duty, his election as previously made will continue or he may change or revoke the election as provided in § 48.204.

(c) Time creditable for the purpose of the two year interval required to make a change, revocation or new election valid includes service before, during, and after temporary disability retirement. (See §§ 48.203 and 48.204 and Comptroller Decision B–144158, Dec. 23, 1960.) Active duty after removal from a temporary disability retired list is a necessity in such a case.

**§ 48.406 Withdrawal and reduction of percentage or amount of participation.**

A retired member who is participating in the Plan may revoke his election and withdraw from participation, or he may reduce the amount of the survivor annuity; however, an approved withdrawal or reduction will not be effective earlier than the first day of the seventh month beginning after the date his application is received by the Finance Center controlling his pay record. (For special rules covering participating members retired before Aug. 13, 1968, without option 4, see § 48.604.)

No application for reduction will be approved which requests a change in options. A request to reduce an annuity or to withdraw from the Plan is irrevocable, and a retired member who withdraws may never again participate in the Plan. Approval of a request for a reduction will not be made when such reduction results in an annuity of less than 12½ per centum of the member's retired pay or less than a $25 monthly annuity. The new cost, after such reduction in survivor annuity, will be computed from the applicable cost table at the time of retirement. No amounts by which a member's retired pay is reduced may be refunded to, or credited on behalf of, the member by virtue of an application made by him under this section.

## Subpart E—Annuity

### § 48.501 General information.

Except as provided in § 48.506(a), no annuity payable under the Plan shall be assignable, or subject to execution, levy, attachment, garnishment, or other legal process. Annuities payable under this Plan shall be in addition to any pensions or other payments to which the beneficiaries may now or hereafter be entitled under other provisions of law (except as provided in § 48.507), and may not be considered as income under any law administered by the Veterans Administration, except for the purpose of title 38 U.S. Code, section 415(g) and chapter 15.

### § 48.502 Effective date of annuity.

All annuities payable under this Plan except those payable to beneficiaries described in § 48.102(e)(5) shall accrue from the first day of the month in which the retired member dies and shall be due and payable not later than the 15th day of each month following that month and in equal monthly installments thereafter, except that no annuity shall accrue or be paid for the month in which entitlement to that annuity terminates.

### § 48.503 Claims for annuity payments.

Upon official notification of the death of a retired member who has elected under the Plan, the department concerned shall forward to the eligible surviving beneficiaries the necessary information and forms (DD Form 768. Application for Annuity Under Retired Serviceman's Family Protection Plan) for making application for annuity payments. Such information shall include the place to which the application should be forwarded and to which questions regarding annuity payments should be addressed.

### § 48.504 Payment to children.

(a) Annuities for a child or children will be paid to the child's guardian, or if there is no guardian, to the person(s) who has care, custody, and control of the child or children.

(b) Annuities payable to or on behalf of an eligible child as defined in § 48.102(e)(5) accrue as of the first day of the month in which—

(1) The member (upon whose retired pay the annuity is based) dies if the eligible child's 18th birthday occurs in the same or a preceding month, or

(2) The 18th birthday of an eligible child occurs if the member (upon whose retired pay the annuity is based) died in a preceding month, or

(3) A child first becomes (or again becomes) eligible, if that eligible child's 18th birthday and the death of the member (upon whose retired pay the annuity is based) both occurred in a preceding month or months. An eligible child under this paragraph might become ineligible at age 18 and again become eligible by furnishing proof of pursuit of a full time course of study or training as enumerated in § 48.102(e)(5).

### § 48.505 Establishing eligibility of annuitants.

(a) Eligibility for the annuity will be established by such evidence as may be required by the department concerned.

(b) If a child as defined in § 48.102(e)(4) is a designated annuitant, the department concerned shall require proof that the incapacity for self-support existed prior to the child's reaching age 18. Proof that continued incapacitation exists will be required every 2 years after the child passes the age of 18 years, except in a case where medical prognosis indicates recovery is impossible.

(c) If a child as defined in § 48.102(e)(5) is a designated annuitant, as specified

in § 48.504(b), the department concerned shall require proof from the institution at least semiannually that the child is pursuing a full-time course of training as prescribed. For the purpose of proving eligibility, a child is considered to be pursuing a full-time course of study or training during an interval between school periods that does not exceed 150 days if he has demonstrated to the satisfaction of the department concerned that he has a bona fide intention of commencing, resuming, or continuing to pursue a full-time course of study or training in a recognized educational institution immediately after that interval.

### § 48.506 Recovery of erroneous annuity payments.

(a) The Secretary of the Department concerned is empowered to use any means provided by law to recover amounts of annuities erroneously paid to any individual under the Plan. He may authorize such recovery by adjustment in subsequent payments to which the individual is entitled.

(b) There need be no recovery when in the judgment of the Secretary of the Department concerned and the Comptroller General of the United States, the individual to whom the erroneous payment was made is without fault and recovery would be contrary to the purpose of the Plan or would be against equity and good conscience.

### § 48.507 Restriction on participation.

(a) If a person who has made an election under the Plan retires with a physical disability before the completion of 19 years of service and then dies in retirement, his widow and eligible children can receive monthly survivor annuities only if they are not eligible for Dependency and Indemnity Compensation payments from the Veterans Administration. If either the widow or children are eligible for dependency and indemnity compensation payments, then payment of annuities under the Plan may not be made to any member of the family. If the retired member's death was not service connected and his widow or children are not eligible for payments from the Veterans Administration, they may receive the provided annuity payments under the Plan.

(b) If the beneficiaries on whose behalf the election was made are restricted as in paragraph (a) of this section, from receiving annuities, the amounts withheld from the elector's retired pay as a result of the election will be refunded to the beneficiaries, less the amount of any annuity paid, and without interest.

(c) Upon notification of the death of the member in such a case, the department concerned will take the following actions:

(1) Notify the Central Office of the Veterans Administration of the death of the member and request that the department concerned be advised if an award is made under chapter 11 or 13, title 38 U.S. Code.

(2) Request the Central Office of the Veterans Administration to forward to the eligible widow and/or children an application form for survivor benefits under chapter 11 or 13, title 38 U.S. Code, with instructions for completion and submission.

### § 48.508 Certain 100 percent disability retirement.

An election filed on or after August 13, 1968 is not effective if the member dies within 30 days following retirement from a disability of 100 per centum (under the standard schedule of rating disabilities in use by the Veterans Administration) for which he was retired under chapter 61, title 10 U.S. Code, unless—

(a) Such disability was the result of injury or disease received in line of duty as a direct result of armed conflict, or

(b) His widow or children are not entitled to dependency and indemnity compensation under chapter 13, title 38 U.S. Code.

## Subpart F—Miscellaneous

### § 48.601 Annual report.

Information and data for the preparation of the annual report of the Board of Actuaries will be compiled by the Office of the Secretary of Defense after promulgation of appropriate instructions to each of the uniformed services.

These instructions will be in consonance with Executive Order 10499 directing the Secretary of Defense to administer the provisions of the law.

### § 48.602 Organization.

(a) The Joint Board for the Retired Serviceman's Family Protection Plan shall consist of a principal and alternate member for each of the uniformed services appointed by the Department Secretary concerned. Alternate members will be authorized to act in the absence of the principal. The Board shall meet on call of the Chairman. A quorum shall consist of representatives of at least four of the participating services.

(b) The Board shall establish procedures for the orderly conduct of business to be approved by the Assistant Secretary of Defense (Manpower and Reserve Affairs).

(c) The duties of the Board will include but not be limited to the following:

(1) Making recommendations to the Secretary of Defense for:

(i) Changes to the Executive order delegating to him functions conferred on the President by law,

(ii) Changes to these regulations,

(iii) Changes to the law, and

(iv) Measures to insure uniform operating policies.

(2) Promulgating tables of annuity costs as prescribed by the Board of Actuaries.

(3) Promulgating cost of term insurance as required in § 48.405.

(d) The Chairmanship of the Joint Board will be designated by the Assistant Secretary of Defense (Manpower and Reserve Affairs).

### § 48.603 Correction of administrative deficiencies.

(a) The Secretary of the Department concerned may correct any election or any change or revocation of an election when he considers it necessary to correct an administrative error. Information on such corrections shall be compiled by each department for inclusion in the report prescribed by § 48.601.

(b) Except when procured by fraud, a correction under the section is final and conclusive on all officers of the United States.

(c) Information on all corrections to elections under this Plan which are made under title 10, section 1552, United States Code, shall be compiled and this information forwarded to the Board of Actuaries for an actuarial analysis.

### § 48.604 Transition and protective clauses.

(a) A retired member who is participating in the Plan without inclusion of former option 4, which provided for restoration of retired pay when no eligible beneficiary remained in his election, may before September 1, 1969, elect to have that option included in his election. The election to include such option 4 becomes effective on the first day of the month following the month in which that election was made. The retired member must on or before the effective date agree to pay to the Treasury both the total additional amount to cover the option had it been effective when he retired, and the interest which would have accrued on the additional amount up to the effective date of the new option 4. No such additional amount (except interest) shall accrue for months after the first month for which the individual had no eligible beneficiary. However, if undue hardship or financial burden would result, payments may be made in from 2 to 12 monthly installments when the monthly amount involved is $25 or less, or in from 2 to 36 installments when the monthly amounts involved exceed $25. No amounts by which a member's retired pay was reduced may be refunded to, or credited on behalf of, the retired member by virtue of an application made by him under this section. A retired member who does not make the additional election provided under this section within the time limits will not be allowed to reduce an annuity or withdraw from participation in the Plan as provided by § 48.406.

(b) Members who have elected and are not yet retired will automatically participate under the provisions of § 48.201.

(c) Elections in effect on August 13, 1968, will remain under the cost tables applicable on the date of the member's retirement.

(d) Any member who has filed an election, modification, or revocation prior to August 13, 1968, may before September 1, 1969, submit a written application to the Secretary concerned requesting that such election, modification, or revocation remain under the time-of-election provisions of the law applicable on the date it was filed.

# PART 50—PERSONAL COMMERCIAL SOLICITATION ON DOD INSTALLATIONS

GENERAL PROVISIONS

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APPENDIX A TO PART 50—LIFE INSURANCE PRODUCTS AND SECURITIES
APPENDIX B TO PART 50—OVERSEAS LIFE INSURANCE REGISTRATION PROGRAM

AUTHORITY: 5 U.S.C. 301.

SOURCE: 71 FR 38764, July 10, 2006, unless otherwise noted.

GENERAL PROVISIONS

## §50.1 Purpose.

This part:

(a) Implements section 577 of Public Law No. 109–163 (2006) and establishes policy and procedures for personal commercial solicitation on DoD installations.

(b) Continues the established annual DoD registration requirement for the sale of insurance and securities on DoD installations overseas.

(c) Identifies prohibited practices that may cause withdrawal of commercial solicitation privileges on DoD installations and establishes notification requirements when privileges are withdrawn.

(d) Establishes procedures for persons solicited on DoD installations to evaluate solicitors.

(e) Prescribes procedures for providing financial education programs to military personnel.

## §50.2 Applicability.

This part:

(a) Applies to the Office of the Secretary of Defense, the Military Departments, the Chairman of the Joint Chiefs of 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 in the Department of Defense (hereafter referred to collectively as the ''DoD Components'').

(b) Does not apply to services furnished by residential service companies, such as deliveries of milk, laundry, newspapers, and related services to personal residences on the installation requested by the resident and authorized by the installation commander.

(c) Applies to all other personal commercial solicitation on DoD installations. It includes meetings on DoD installations of private, non-profit, tax-exempt organizations that involve commercial solicitation. Attendance at these meetings shall be voluntary and the time and place of such meetings are subject to the discretion of the installation commander or his or her designee.

## §50.3 Definitions.

*Agent*. An individual who receives remuneration as a salesperson or whose remuneration is dependent on volume of sales of a product or products. (Also referred to as ''commercial agent'' or ''producer''). In this part, the term ''agent'' includes ''general agent'' unless the content clearly conveys a contrary intent.

*''Authorized'' Bank and/or Credit Union*. Bank and/or credit union selected by the installation commander through open competitive solicitation to provide exclusive on-base delivery of financial services to the installation under a written operating agreement.

*Banking institution*. An entity chartered by a State or the Federal Government to provide financial services.

*Commercial sponsorship*. The act of providing assistance, funding, goods, equipment (including fixed assets), or services to an MWR program or event by an individual, agency, association,

company or corporation, or other entity (sponsor) for a specified (limited) period of time in return for public recognition or advertising promotions. Enclosure 9 of DoD Instruction 1015.10[1] provides general policy governing commercial sponsorship.

*Credit union*. A cooperative nonprofit association, incorporated under the Credit Union Act (12 U.S.C. 1751), or similar state statute, for the purpose of encouraging thrift among its members and creating a source of credit at a fair and reasonable rate of interest.

*DoD installation*. For the purposes of this part, any Federally owned, leased, or operated base, reservation, post, camp, building, or other facility to which DoD personnel are assigned for duty, including barracks, transient housing, and family quarters.

*DoD personnel*. For the purposes of this part, all active duty officers (commissioned and warrant) and enlisted members of the Military Departments and all civilian employees, including nonappropriated fund employees and special Government employees, of the Department of Defense.

*Financial services*. Those services commonly associated with financial institutions in the United States, such as electronic banking (e.g., ATMs), in-store banking, checking, share and savings accounts, fund transfers, sale of official checks, money orders and travelers checks, loan services, safe deposit boxes, trust services, sale and redemption of U.S. Savings Bonds, and acceptance of utility payments and any other consumer-related banking services.

*General agent*. A person who has a legal contract to represent a company. See the definition of ''Agent'' in this section.

*Insurance carrier*. An insurance company issuing insurance through an association reinsuring or coinsuring such insurance.

*Insurance product*. A policy, annuity, or certificate of insurance issued by an insurer or evidence of insurance coverage issued by a self-insured association, including those with savings and investment features.

*Insurer*. An entity licensed by the appropriate department to engage in the business of insurance.

*Military services*. See Joint Publication 1–02, ''DoD Dictionary of Military and Associated Terms.''[2]

*Normal home enterprises*. Sales or services that are customarily conducted in a domestic setting and do not compete with an installation's officially sanctioned commerce.

*Personal commercial solicitation*. Personal contact, to include meetings, meals, or telecommunications contact, for the purpose of seeking private business or trade.

*Securities*. Mutual funds, stocks, bonds, or any product registered with the Securities and Exchange Commission except for any insurance or annuity product issued by a corporation subject to supervision by State insurance authorities.

*Suspension*. Temporary termination of privileges pending completion of a commander's inquiry or investigation.

*Withdrawal*. Termination of privileges for a set period of time following completion of a commander's inquiry or investigation.

### § 50.4 Policy.

(a) It is DoD policy to safeguard and promote the welfare of DoD personnel as consumers by setting forth a uniform approach to the conduct of all personal commercial solicitation and sales to them by dealers and their agents. For those individuals and their companies that fail to follow this policy, the opportunity to solicit on military installations may be limited or denied as appropriate.

(b) Command authority includes authority to approve or prohibit all commercial solicitation covered by this part. Nothing in this part limits an installation commander's inherent authority to deny access to vendors or to establish time and place restrictions on commercial activities at the installation.

### § 50.5 Responsibilities.

(a) The Principal Deputy Under Secretary of Defense for Personnel and

[1] Copies may be obtained at *http://www.dtic.mil/whs/directives/*.

[2] See *http://www.dtic.mil/doctrine/jel/doddict/indexs.html*.

Readiness (PDUSD(P&R)), under the Under Secretary of Defense for Personnel and Readiness, shall:

(1) Identify and publish policies and procedures governing personal commercial solicitation on DoD installations consistent with the policy set forth in this part.

(2) Maintain and make available to installation commanders and appropriate Federal personnel the current master file of all individual agents, dealers, and companies who have their privileges withdrawn at any DoD installation.

(3) Develop and maintain a list of all State Insurance Commissioners' points of contact for DoD matters and forward this list to the Military Services.

(b) The Heads of the DoD Components shall:

(1) Ensure implementation of this part and compliance with its provisions.

(2) Require installations under their authority to report each instance of withdrawal of commercial solicitation privileges.

(3) Submit lists of all individuals and companies who have had their commercial solicitation privileges withdrawn at installations under their authority to the PDUSD(P&R) in accordance with this part.

### §50.6 Procedures.

(a) *General.* (1) No person has authority to enter a DoD installation to transact personal commercial solicitation as a matter of right. Personal commercial solicitation may be permitted only if the following requirements are met:

(i) The solicitor is duly licensed under applicable Federal, State, or municipal laws and has complied with installation regulations.

(ii) A specific appointment has been made for each meeting with the individual concerned. Each meeting is conducted only in family quarters or in other areas designated by the installation commander.

(iii) The solicitor agrees to provide each person solicited the personal commercial solicitation evaluation included in DD Form 2885[3] during the initial appointment. The person being solicited is not required to complete the evaluation. However, completed evaluations should be sent by the person who was solicited to the office designated by the installation commander on the back of the evaluation form.

(iv) The solicitor agrees to provide DoD personnel with a written reminder, prior to their making a financial commitment, that free legal advice is available from the Office of the Staff Judge Advocate.

(2) Solicitors on overseas installations shall be required to observe, in addition to the above, the applicable laws of the host country. Upon request, the solicitor must present documentary evidence to the installation commander that the company they represent, and its agents, meet the applicable licensing requirements of the host country.

(b) *Life insurance products and securities.* (1) Life insurance products and securities offered and sold to DoD personnel shall meet the prerequisites described in §50.3.

(2) Installation commanders may permit insurers and their agents to solicit on DoD installations if the requirements of paragraph (a) of this section are met and if they are licensed under the insurance laws of the State where the installation is located. Commanders will ensure the agent's license status and complaint history are checked with the appropriate State or Federal regulators before granting permission to solicit on the installation.

(3) In addition, before approving insurance and financial product agents' requests for permission to solicit, commanders shall review the list of agents and companies currently barred, banned, or limited from soliciting on any or all DoD installations. This list may be viewed via the Personal *Commercial Solicitation Report* ''quick link'' at *http://www.commanderspage.com.* In overseas areas, the DoD Components shall limit insurance solicitation to those insurers registered under the provisions of appendix B to this part.

[3] Copies may be obtained from *http://www.dtic.mil/whs/directives/infomgt/forms/forminfo/forminfopage2239.html.*

(4) The conduct of all insurance business on DoD installations shall be by specific appointment. When establishing the appointment, insurance agents shall identify themselves to the prospective purchaser as an agent for a specific insurer.

(5) Installation commanders shall designate areas where interviews by appointment may be conducted. The opportunity to conduct scheduled interviews shall be extended to all solicitors on an equitable basis. Where space and other considerations limit the number of agents using the interviewing area, the installation commander may develop and publish local policy consistent with this concept.

(6) Installation commanders shall make disinterested third-party insurance counseling available to DoD personnel desiring counseling. Financial counselors shall encourage DoD personnel to seek legal assistance or other advice from a disinterested third-party before entering into a contract for insurance or securities.

(7) In addition to the solicitation prohibitions contained in paragraph (d) of this section, DoD Components shall prohibit the following:

(i) The use of DoD personnel representing any insurer, dealing directly or indirectly on behalf of any insurer or any recognized representative of any insurer on the installation, or as an agent or in any official or business capacity with or without compensation.

(ii) The use of an agent as a participant in any Military Service-sponsored education or orientation program.

(iii) The designation of any agent or the use by any agent of titles (for example, ''Battalion Insurance Counselor,'' ''Unit Insurance Advisor,'' ''Servicemen's Group Life Insurance Conversion Consultant,'') that in any manner, states, or implies any type of endorsement from the U.S. Government, the Armed Forces, or any State or Federal agency or government entity.

(iv) The use of desk space for interviews for other than a specific prearranged appointment. During such appointment, the agent shall not be permitted to display desk signs or other materials announcing his or her name or company affiliation.

(v) The use of an installation ''daily bulletin,'' marquee, newsletter, Web page, or other official notice to announce the presence of an agent and/or his or her availability.

(c) *Supervision of on-base commercial activities.* (1) All pertinent installation regulations shall be posted in a place easily accessible to those conducting and receiving personal commercial solicitation on the installation.

(2) The installation commander shall make available a copy of installation regulations to anyone conducting on-base commercial solicitation activities warning that failure to follow the regulations may result in the loss of solicitation privileges.

(3) The installation commander, or designated representative, shall inquire into any alleged violations of this part or of any questionable solicitation practices. The DD Form 2885 is provided as a means to supervise solicitation activities on the installation.

(d) *Prohibited practices.* The following commercial solicitation practices shall be prohibited on all DoD installations:

(1) Solicitation of recruits, trainees, and transient personnel in a group setting or ''mass'' audience and solicitation of any DoD personnel in a ''captive'' audience where attendance is not voluntary.

(2) Making appointments with or soliciting military or DoD civilian personnel during their normally scheduled duty hours.

(3) Soliciting in barracks, day rooms, unit areas, transient personnel housing, or other areas where the installation commander has prohibited solicitation.

(4) Use of official military identification cards or DoD vehicle decals by active duty, retired or reserve members of the Military Services to gain access to DoD installations for the purpose of soliciting. When entering the installation for the purpose of solicitation, solicitors with military identification cards and/or DoD vehicle decals must present documentation issued by the installation authorizing solicitation.

(5) Procuring, attempting to procure, supplying, or attempting to supply non-public listings of DoD personnel

for purposes of commercial solicitation, except for releases made in accordance with DoD Directive 5400.7.[4]

(6) Offering unfair, improper, or deceptive inducements to purchase or trade.

(7) Using promotional incentives to facilitate transactions or to eliminate competition.

(8) Using manipulative, deceptive, or fraudulent devices, schemes, or artifices, including misleading advertising and sales literature. All financial products, which contain insurance features, must clearly explain the insurance features of those products.

(9) Using oral or written representations to suggest or give the appearance that the Department of Defense sponsors or endorses any particular company, its agents, or the goods, services, and commodities it sells.

(10) DoD personnel making personal commercial solicitations or sales to DoD personnel who are junior in rank or grade, or to the family members of such personnel, except as authorized in Section 2–205 and 5–409 of the Joint Ethics Regulation, DoD 5500.7–R.[5]

(11) Entering into any unauthorized or restricted area.

(12) Using any portion of installation facilities, including quarters, as a showroom or store for the sale of goods or services, except as specifically authorized by DoD Directive 1330.17[6] and DoD Instructions 1015.10, 1000.15[7] and 1330.21.[8] This does not apply to normal home enterprises that comply with applicable State and local laws and installation rules.

(13) Soliciting door to door or without an appointment.

(14) Unauthorized advertising of addresses or telephone numbers used in personal commercial solicitation activities conducted on the installation, or the use of official positions, titles, or organization names, for the purpose of personal commercial solicitation, except as authorized in DoD 5500.7–R. Military grade and Military Service as part of an individual's name (e.g., Captain Smith, U.S. Marine Corps) may be used in the same manner as conventional titles, such as ''Mr.'', ''Mrs.'', or ''Honorable''.

(15) Contacting DoD personnel by calling a government telephone, faxing to a government fax machine, or by sending e-mail to a government computer, unless a pre-existing relationship (i.e., the DoD member is a current client or requested to be contacted) exists between the parties and the DoD member has not asked for contact to be terminated.

(e) *Denial, suspension, and withdrawal of installation solicitation privileges.* (1) The installation commander shall deny, suspend, or withdraw permission for a company and its agents to conduct commercial activities on the base if such action is in the best interests of the command. The grounds for taking these actions may include, but are not limited to, the following:

(i) Failure to meet the licensing and other regulatory requirements prescribed in this part or violations of the State law where the installation is located. Commanders will request that appropriate state officials determine whether a company or agent violated State law.

(ii) Commission of any of the practices prohibited in paragraphs (b)(6) and (d) of this section.

(iii) Substantiated complaints and/or adverse reports regarding the quality of goods, services, and/or commodities, and the manner in which they are offered for sale.

(iv) Knowing and willful violations of Public Law 90–321.

(v) Personal misconduct by a company's agent or representative while on the installation.

(vi) The possession of, and any attempt to obtain supplies of direct deposit forms, or any other form or device used by Military Departments to direct a Service member's pay to a third party, or possession or use of facsimiles thereof. This includes using or assisting in using a Service member's ''MyPay'' account or other similar Internet medium for the purpose of establishing a direct deposit for the purchase of insurance or other investment product.

[4] See footnote 1 to §50.3.
[5] See footnote 1 to §50.3.
[6] See footnote 1 to §50.3.
[7] See footnote 1 to §50.3.
[8] See footnote 1 to §50.3.

(vii) Failure to incorporate and abide by the Standards of Fairness policies contained in DoD Instruction 1344.9.[9]

(2) The installation commander may determine that circumstances dictate the immediate suspension of solicitation privileges while an investigation is conducted. Upon suspending solicitation privileges, the commander shall promptly inform the agent and the company the agent represents, in writing.

(3) In suspending or withdrawing solicitation privileges, the installation commander shall determine whether to limit such action to the agent alone or extend it to the company the agent represents. This decision shall be based on the circumstances of the particular case, including, but not limited to, the nature of the violations, frequency of violations, the extent to which other agents of the company have engaged in such practices and any other matters tending to show the culpability of an individual and the company.

(4) If the investigation determines an agent or company does not possess a valid license or the agent, company, or product has failed to meet other State or Federal regulatory requirements, the installation commander shall immediately notify the appropriate regulatory authorities.

(5) In a withdrawal action, the commander shall allow the individual or company an opportunity to show cause as to why the action should not be taken. To ''show cause'' means an opportunity must be given for the aggrieved party to present facts on an informal basis for the consideration of the installation commander or the commander's designee. The installation commander shall make a final decision regarding withdrawal based upon the entire record in each case. Installation commanders shall report concerns or complaints involving the quality or suitability of financial products or concerns or complaints involving marketing methods used to sell these products to the appropriate State and Federal regulatory authorities. Also, installation commanders shall report any suspension or withdrawal of insurance or securities products solicitation privileges to the appropriate State or Federal regulatory authorities.

(6) The installation commander shall inform the Military Department concerned of any denial, suspension, withdrawal, or reinstatement of an agent or company's solicitation privileges and the Military Department shall inform the Office of the PDUSD(P&R), which will maintain a list of insurance and financial product companies and agents currently barred, banned, or otherwise limited from soliciting on any or all DoD installations. This list may be viewed at *http://www.commanderspage.com*. If warranted, the installation commander may recommend to the Military Department concerned that the action taken be extended to other DoD installations. The Military Department may extend the action to other military installations in the Military Department. The PDUSD(P&R), following consultation with the Military Department concerned, may order the action extended to other Military Departments.

(7) All suspensions or withdrawals of privileges may be permanent or for a set period of time. If for a set period, when that period expires, the individual or company may reapply for permission to solicit through the installation commander or Military Department originally imposing the restriction. The installation commander or Military Department reinstating permission to solicit shall notify the Office of the PDUSD(P&R) and appropriate State and Federal regulatory agencies when such suspensions or withdrawals are lifted.

(8) The Secretaries of the Military Departments may direct the Armed Forces Disciplinary Control Boards in all geographical areas in which the grounds for withdrawal action have occurred to consider all applicable information and take action that the Boards deem appropriate.

(9) Nothing in this part limits the authority of the installation commander or other appropriate authority from requesting or instituting other administrative and/or criminal action against any person, including those who violate the conditions and restrictions upon which installation entry is authorized.

[9] See footnote 1 to § 50.3.

(f) *Advertising and commercial sponsorship*. (1) The Department of Defense expects voluntary observance of the highest business ethics by commercial enterprises soliciting DoD personnel through advertisements in unofficial military publications when describing goods, services, commodities, and the terms of the sale (including guarantees, warranties, and the like).

(2) The advertising of credit terms shall conform to the provisions of 15 U.S.C. 1601 as implemented by Federal Reserve Board Regulation Z according to 12 CFR part 226.

(3) Solicitors may provide commercial sponsorship to DoD Morale, Welfare and Recreation programs or events according to DoD Instruction 1015.10. However, sponsorship may not be used as a means to obtain personal contact information for any participant at these events without written permission from the individual participant. In addition, commercial sponsors may not use sponsorship to advertise products and/or services not specifically agreed to in the sponsorship agreement.

(4) The installation commander may permit organizations to display sales literature in designated locations subject to command policies. In accordance with DoD 7000.14–R,[10] Volume 7(a), distribution of competitive literature or forms by off-base banks and/or credit unions is prohibited on installations where an authorized on-base bank and/or credit union exists.

(g) *Educational programs*. (1) The Military Departments shall develop and disseminate information and provide educational programs for members of the Military Services on their personal financial affairs, including such subjects as insurance, Government benefits, savings, budgeting, and other financial education and assistance requirements outlined in DoD Instruction 1342.27.[11] The Military Departments shall ensure that all instructors are qualified as appropriate for the subject matter presented. The services of representatives of authorized on-base banks and credit unions may be used for this purpose. Under no circumstances shall commercial agents, including representatives of loan, finance, insurance, or investment companies, be used for this purpose. Presentations shall only be conducted at the express request of the installation commander.

(2) The Military Departments shall also make qualified personnel and facilities available for individual counseling on loans and consumer credit transactions in order to encourage thrift and financial responsibility and promote a better understanding of the wise use of credit, as prescribed in DoD 7000.14–R.

(3) The Military Departments shall encourage military members to seek advice from a legal assistance officer, the installation financial counselor, their own lawyer, or a financial counselor, before making a substantial loan or credit commitment.

(4) Each Military Department shall provide advice and guidance to DoD personnel who have a complaint under DoD 1344.9 or who allege a criminal violation of its provisions, including referral to the appropriate regulatory agency for processing of the complaint.

(5) Banks and credit unions operating on DoD installations are required to provide financial counseling services as an integral part of their financial services offerings. Representatives of and materials provided by authorized banks and/or credit unions located on military installations may be used to provide the educational programs and information required by this part subject to the following conditions:

(i) If the bank or credit union operating on a DoD installation sells insurance or securities or has any affiliation with a company that sells or markets insurance or other financial products, the installation commander shall consider that company's history of complying with this part before authorizing the on-base financial institution to provide financial education.

(ii) All prospective educators must agree to use appropriate disclaimers in their presentations and on their other educational materials. The disclaimers must clearly indicate that they do not endorse or favor any commercial supplier, product, or service, or promote the services of a specific financial institution.

[10] See footnote 1 to §50.3.

[11] See footnote 1 to §50.3.

(6) Use of other non-government organizations to provide financial education programs is limited as follows:

(i) Under no circumstances shall commercial agents, including employees or representatives of commercial loan, finance, insurance, or investment companies, be used.

(ii) The limitation in paragraph (g)(6)(i) of this section does not apply to educational programs and information regarding the Survivor Benefits Program and other government benefits provided by tax-exempt organizations under section (c)(23) of 26 U.S.C. 501 or by any organization providing such a benefit under a contract with the Government.

(iii) Educators from non-government, non-commercial organizations expert in personal financial affairs and their materials may, with appropriate disclaimers, provide the educational programs and information required by this part if approved by a Presidentially-appointed, Senate-confirmed civilian official of the Military Department concerned. Presentations by approved organizations shall be conducted only at the express request of the installation commander. The following criteria shall be used when considering whether to permit a non-government, non-commercial organization to present an educational program or provide materials on personal financial affairs:

(A) The organization must qualify as a tax-exempt organization under 5 U.S.C. 501(c)(3) or 5 U.S.C. 501(c)(23).

(B) If the organization has any affiliation with a company that sells or markets insurance or other financial products, the approval authority shall consider that company's history of complying with this part.

(C) All prospective educators must use appropriate disclaimers, in their presentations and on their other educational materials, which clearly indicate that they and the Department of Defense do not endorse or favor any commercial supplier, product, or service or promote the services of a specific financial institution.

### § 50.7 Information requirements.

The reporting requirements concerning the suspension or withdrawal of solicitation privileges have been assigned Report Control Symbol (RCS) DD–P&R(Q)2182 in accordance with DoD 8910.1–M.[12]

## APPENDIX A TO PART 50—LIFE INSURANCE PRODUCTS AND SECURITIES

### A. LIFE INSURANCE PRODUCT CONTENT PREREQUISITES

Companies must provide DoD personnel a written description for each product or service they intend to market to DoD personnel on DoD installations. These descriptions must be written in a manner that DoD personnel can easily understand, and fully disclose the fundamental nature of the policy. Companies must be able to demonstrate that each form to be used has been filed with and approved, where applicable, by the insurance department of the State where the installation is located. Insurance products marketed to DoD personnel on overseas installations must conform to the standards prescribed by the laws of the State where the company is incorporated.

1. Insurance products, other than certificates or other evidence of insurance issued by a self-insured association, offered and sold worldwide to personnel on DoD installations, must:

a. Comply with the insurance laws of the State or country in which the installation is located and the requirements of this part.

b. Contain no restrictions by reason of Military Service or military occupational specialty of the insured, unless such restrictions are clearly indicated on the face of the contract.

c. Plainly indicate any extra premium charges imposed by reason of Military Service or military occupational specialty.

d. Contain no variation in the amount of death benefit or premium based upon the length of time the contract has been in force, unless all such variations are clearly described in the contract.

e. In plain and readily understandable language, and in type font at least as large as the font used for the majority of the policy, inform Service members of:

*1.* The availability and cost of government subsidized Servicemen's Group Life Insurance.

*2.* The address and phone number where consumer complaints are received by the State insurance commissioner for the State in which the insurance product is being sold.

*3.* That the U.S. Government has in no way sanctioned, recommended, or encouraged the sale of the product being offered. With respect to the sale or solicitation of insurance on Federal land or facilitates located outside the United States, insurance products must contain the address and phone number where

[12] See footnote 1 to § 50.3.

consumer complaints are received by the State insurance commissioner for the State which has issued the agent a resident license or the company is domiciled, as applicable.

2. To comply with paragraphs A.1.b., A.1.c. and A.1.d., an appropriate reference stamped on the first page of the contract shall draw the attention of the policyholder to any restrictions by reason of Military Service or military occupational specialty. The reference shall describe any extra premium charges and any variations in the amount of death benefit or premium based upon the length of time the contract has been in force.

3. Variable life insurance products may be offered provided they meet the criteria of the appropriate insurance regulatory agency and the Securities and Exchange Commission.

4. Insurance products shall not be marketed or sold disguised as investments. If there is a savings component to an insurance product, the agent shall provide the customer written documentation, which clearly explains how much of the premium goes to the savings component per year broken down over the life of the policy. This document must also show the total amount per year allocated to insurance premiums. The customer must be provided a copy of this document that is signed by the insurance agent.

B. SALE OF SECURITIES

1. All securities must be registered with the Securities and Exchange Commission.

2. All sales of securities must comply with the appropriate Securities and Exchange Commission regulations.

3. All securities representatives must apply to the commander of the installation on which they desire to solicit the sale of securities for permission to solicit.

4. Where the accredited insurer's policy permits, an overseas accredited life insurance agent—if duly qualified to engage in security activities either as a registered representative of the National Association of Securities Dealers or as an associate of a broker or dealer registered with the Securities and Exchange Commission—may offer life insurance and securities for sale simultaneously. In cases of commingled sales, the allotment of pay for the purchase of securities cannot be made to the insurer.

C. USE OF THE ALLOTMENT OF PAY SYSTEM

1. Allotments of military pay for life insurance products shall be made in accordance with DoD 7000.14–R.

2. For personnel in pay grades E–4 and below, in order to obtain financial counseling, at least seven calendar days shall elapse between the signing of a life insurance application and the certification of a military pay allotment for any supplemental commercial life insurance. Installation Finance Officers are responsible for ensuring this seven-day cooling-off period is monitored and enforced. The purchaser's commanding officer may grant a waiver of the seven-day cooling-off period requirement for good cause, such as the purchaser's imminent deployment or permanent change of station.

D. ASSOCIATIONS—GENERAL

The recent growth and general acceptability of quasi-military associations offering various insurance plans to military personnel are acknowledged. Some associations are not organized within the supervision of insurance laws of either a State or the Federal Government. While some are organized for profit, others function as nonprofit associations under Internal Revenue Service regulations. Regardless of the manner in which insurance is offered to members, the management of the association is responsible for complying fully with the policies contained in this part.

## APPENDIX B TO PART 50—OVERSEAS LIFE INSURANCE REGISTRATION PROGRAM

A. REGISTRATION CRITERIA

*1. Initial Registration*

a. Insurers must demonstrate continuous successful operation in the life insurance business for a period of not less than 5 years on December 31 of the year preceding the date of filing the application.

b. Insurers must be listed in Best's Life-Health Insurance Reports and be assigned a rating of B+ (Very Good) or better for the business year preceding the Government's fiscal year for which registration is sought.

*2. Re-Registration*

a. Insurers must demonstrate continuous successful operation in the life insurance business, as described in paragraph A.1.a. of this appendix.

b. Insurers must retain a Best's rating of B+ or better, as described in paragraph A.1.b. of this appendix.

c. Insurers must demonstrate a record of compliance with the policies found in this part.

*3. Waiver Provisions*

Waivers of the initial registration or re-registration provisions shall be considered for those insurers demonstrating substantial compliance with the aforementioned criteria.

B. APPLICATION INSTRUCTIONS

1. *Applications Filed Annually.* Insurers must apply by June 30 of each year for solicitation privileges on overseas U.S. military

installations for the next fiscal year beginning October 1. Applications e-mailed, faxed, or postmarked after June 30 shall not be considered.

2. *Application prerequisites.* A letter of application, signed by the President, Vice President, or designated official of the insurance company shall be forwarded to the Principal Deputy Under Secretary of Defense (Personnel and Readiness), Attention: Morale, Welfare and Recreation (MWR) Policy Directorate, 4000 Defense, Pentagon, Washington, DC 20301–4000. The registration criteria in paragraph A1.a. or A1.b. of this appendix must be met to satisfy application prerequisites. The letter shall contain the information set forth below, submitted in the order listed. Where criteria are not applicable, the letter shall so state.

a. The overseas Combatant Commands (e.g., U.S. European Command, U.S. Pacific Command, U.S. Central Command, U.S. Southern Command) where the company presently solicits, or plans to solicit, on U.S. military installations.

b. A statement that the company has complied with, or shall comply with, the applicable laws of the country or countries wherein it proposes to solicit. ''Laws of the country'' means all national, provincial, city, or county laws or ordinances of any country, as applicable.

c. A statement that the products to be offered for sale conform to the standards prescribed in appendix A to this part and contain only the standard provisions such as those prescribed by the laws of the State where the company's headquarters are located.

d. A statement that the company shall assume full responsibility for the acts of its agents with respect to solicitation. If warranted, the number of agents may be limited by the overseas command concerned.

e. A statement that the company shall only use agents who have been licensed by the appropriate State and registered by the overseas command concerned to sell to DoD personnel on DoD installations.

f. Any explanatory or supplemental comments that shall assist in evaluating the application.

g. If the Department of Defense requires facts or statistics beyond those normally involved in registration, the company shall make separate arrangements to provide them.

h. A statement that the company's general agent and other registered agents are appointed in accordance with the prerequisites established in section C of this appendix.

3. If a company is a life insurance company subsidiary, it must be registered separately on its own merits.

C. AGENT REQUIREMENTS

The overseas Combatant Commanders shall apply the following principles in registering agents:

1. An agent must possess a current State license. This requirement may be waived for a registered agent continuously residing and successfully selling life insurance in foreign areas, who, through no fault of his or her own, due to State law (or regulation) governing domicile requirements, or requiring that the agent's company be licensed to do business in that State, forfeits eligibility for a State license. The request for a waiver shall contain the name of the State or jurisdiction that would not renew the agent's license.

2. General agents and agents may represent only one registered commercial insurance company. This principle may be waived by the overseas Combatant Commander if multiple representations are in the best interest of DoD personnel.

3. An agent must have at least 1 year of successful life insurance underwriting experience in the United States or its territories, generally within the 5 years preceding the date of application, in order to be approved for overseas solicitation.

4. The overseas Combatant Commanders may exercise further agent control procedures as necessary.

5. An agent, once registered in an overseas area, may not change affiliation from the staff of one general agent to another and retain registration, unless the previous employer certifies in writing that the release is without justifiable prejudice. Overseas Combatant Commanders will have final authority to determine justifiable prejudice. Indebtedness of an agent to a previous employer is an example of justifiable prejudice.

D. ANNOUNCEMENT OF REGISTRATION

1. Registration by the Department of Defense upon annual applications of insurers shall be announced as soon as practicable by notice to each applicant and by a list released annually in September to the appropriate overseas Combatant Commanders. Approval does not constitute DoD endorsement of the insurer or its products. Any advertising by insurers or verbal representation by its agents, which suggests such endorsement, is prohibited.

2. In the event registration is denied, specific reasons for the denial shall be provided to the applicant.

a. The insurer shall have 30 days from the receipt of notification of denial of registration (sent certified mail, return receipt requested) in which to request reconsideration of the original decision. This request must be in writing and accompanied by substantiating data or information in rebuttal of the

specific reasons upon which the denial was based.

b. Action by the Office of the PDUSD(P&R) on a request for reconsideration is final.

c. An applicant that is presently registered as an insurer shall have 90 calendar days from final action denying registration in which to close operations.

3. Upon receiving an annual letter approving registration, each company shall send to the applicable overseas Combatant Commander a verified list of agents currently registered for overseas solicitation. Where applicable, the company shall also include the names and prior military affiliation of new agents for whom original registration and permission to solicit on base is requested. Insurers initially registered shall be furnished instructions by the Department of Defense for agent registration procedures in overseas areas.

4. Material changes affecting the corporate status and financial condition of the company that occur during the fiscal year of registration must be reported to the MWR Policy Directorate at the address in paragraph B.2. of this appendix as they occur.

a. The Office of the PDUSD(P&R) reserves the right to terminate registration if such material changes appear to substantially affect the financial and operational standards described in section A of this appendix on which registration was based.

b. Failure to report such material changes may result in termination of registration regardless of how it affects the standards.

5. If an analysis of information furnished by the company indicates that unfavorable trends are developing that could adversely affect its future operations, the Office of the PDUSD(P&R) may, at its option, bring such matters to the attention of the company and request a statement as to what action, if any, is considered to deal with such unfavorable trends.

# PART 53—WEARING OF THE UNIFORM

Sec.
53.1 Purpose.
53.2 Policy.

AUTHORITY: 5 U.S.C. 301, 10 U.S.C. 772.

## §53.1 Purpose.

This part prescribes limitations on wearing of the uniform by members of the Armed Forces, and establishes policy with respect to wearing of the uniform by former members of the Armed Forces.

[35 FR 1236, Jan. 30, 1970]

## §53.2 Policy.

(a) *Members of the Armed Forces* (including retired members and members of reserve components). The wearing of the uniform is prohibited under any of the following circumstances:

(1) At any meeting or demonstration which is a function of, or sponsored by an organization, association, movement, group, or combination of persons which the Attorney General of the United States has designated, pursuant to E.O. 10450 as amended, as totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under The Constitution of the United States, or as seeking to alter the form of Government of the United States by unconstitutional means.

(2) During or in connection with the furtherance of political activities, private employment or commercial interests, when an inference of official sponsorship for the activity or interest could be drawn.

(3) Except when authorized by competent Service authority, when participating in activities such as public speeches, interviews, picket lines, marches, rallies or any public demonstrations (including those pertaining to civil rights), which may imply Service Sanction of the cause for which the demonstration or activity is conducted.

(4) When wearing of the uniform would tend to bring discredit upon the Armed Forces.

(5) When specifically prohibited by regulations of the department concerned.

(b) *Former members of the Armed Forces*. (1) Unless qualified under another provision of this part or under the provisions of 10 U.S.C. 772, former members who served honorably during a declared or undeclared war and whose most recent service was terminated under honorable conditions may wear the uniform in the highest grade held during such war service only upon the following occasions and in the course of travel incidents thereto:

(i) Military funerals, memorial services, weddings, and inaugurals.

(ii) Parades on national or State holidays; or other parades or ceremonies of a patriotic character in which any active or reserve U.S. military unit is taking part.

(2) Wearing of the uniform or any part thereof at any other time or for any other purpose is prohibited.

(c) *Medal of Honor holders.* Persons who have been awarded the Medal of Honor may wear the uniform at their pleasure except under the circumstances set forth in paragraph (a) of this section.

[35 FR 1236, Jan. 30, 1970]

# PART 54—ALLOTMENTS FOR CHILD AND SPOUSAL SUPPORT

Sec.
54.1 Purpose.
54.2 Applicability and scope.
54.3 Definitions.
54.4 Policy.
54.5 Responsibilities.
54.6 Procedures.

AUTHORITY: 15 U.S.C. 1673, 37 U.S.C. 101, 42 U.S.C. 665.

SOURCE: 51 FR 23755, July 1, 1986, unless otherwise noted.

## § 54.1 Purpose.

Under section 65 of title 42, United States Code, this part provides policy on statutorily required child or child and spousal support allotments, assigns responsibilities, and prescribes procedures. The policy and procedures for this part are also located in the DoD Financial Management Regulation (''DoDFMR''), Volume 7B, Chapter 43, section 4304, ''Allotments for Child Support and Spousal Support'' (DoD 7000.14–R).

[51 FR 23755, July 1, 1986, as amended at 71 FR 40656, July 18, 2006]

## § 54.2 Applicability and scope.

(a) This part applies to the Office of the Secretary of Defense (OSD) and the Military Departments. The term ''Military Services,'' as used herein, refers to the Army, Navy, Air Force, and Marine Corps.

(b) Its provisions cover members of the Military Services on extended active duty. This does not include a member under a call or order to active duty for a period of less than 30 days.

## § 54.3 Definitions.

(a) *Authorized person.* Any agent or attorney of any State having in effect a plan approved under part D of title IV of the Social Security Act (42 U.S.C. 651–664), who has the duty or authority to seek recovery of any amounts owed as child or child and spousal support (including, when authorized under the State plan, any official of a political subdivision); and the court that has authority to issue an order against a member for the support and maintenance of a child or any agent of such court.

(b) *Child support.* Periodic payments for the support and maintenance of a child or children, subject to and in accordance with State or local law. This includes, but is not limited to, payments to provide for health care, education, recreation, and clothing or to meet other specific needs of such a child or children.

(c) *Designated official.* The representative of the Military Service concerned who is authorized to receive and to process notices under this part. See § 54.6(f) for a listing of designed officials.

(d) *Notice.* A court order, letter, or similar documentation issued by an authorized person providing notification that a member has failed to make periodic support payments under a support order.

(e) *Spousal support.* Periodic payments for the support and maintenance of a spouse or former spouse, in accordance with State and local law. It includes, but is not limited to, separate maintenance, alimony while litigation continues, and maintenance. Spousal support does not include any payment for tranfer of property or its value by an individual to his or her spouse or former spouse in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses or former spouses.

(f) *Support order.* Any order providing for child or child and spousal support issued by a Court of competent jurisdiction within any State, territory, or

possession of the United States, including Indian tribal courts, or in accordance with administrative procedures established under State law that affords substantial due process and is subject to judicial review.

### §54.4 Policy.

The Department of Defense is obligated by 42 U.S.C. 665 to require child, or child and spousal, support allotments from the pay and allowances of a member who has failed to make periodic payments under a support order in a total amount equal to the support payable for 2 months or longer. The member's allotment shall be established by the Secretary of the Military Department concerned, or the Secretary's designee, provided all requirements of this part have been met.

### §54.5 Responsibilities.

(a) The Assistant Secretary of Defense (Comptroller) (ASD(C)) shall provide guidance, monitor compliance with this part, and have the authority to change or modify the procedures in §54.6.

(b) The Secretaries of the Military Departments shall comply with this part.

### §54.6 Procedures.

(a) *Notice to designated official*. (1) An authorized person shall send to the designated official of the member's Military Service a signed notice that includes:

(i) A statement that delinquent support payments equal or exceed the amount of support payable for 2 months under a support order, and a request that an allotment be initiated pursuant to 42 U.S.C. 665.

(ii) A certified copy of the support order.

(iii) The amount of the monthly support payment. Such amount may include arrearages, if a support order specifies the payment of such arrearages. The notice shall indicate how much of the amount payable shall be applied toward liquidation of the arrearages.

(iv) A statement that delinquent support payments are more than 12 weeks in arrears, if appropriate.

(v) Sufficient information identifying the member to enable processing by the designated official. The following information is requested:

(A) Full name;

(B) Social Security Number;

(C) Military Service (Army, Navy, Air Force, or Marine Corps).

(vi) The full name and address of the allottee. The allottee shall be an authorized person, the authorized person's designee, or the recipient named in the support order.

(vii) Any limitations on the duration of the support allotment.

(viii) A certificate that the official sending the notice is an authorized person.

(2) The notice shall be sent by mail or delivered in person to the appropriate designated official of the Military Service. The designated official shall note the date and time of receipt on the notice.

(3) The notice is effective when it is received in the office of the designated official.

(4) When the notice does not sufficiently identify the member, it shall be returned directly to the authorized person with an explanation of the deficiency. However, before the notice is returned, if there is sufficient time, an attempt shall be made to inform the authorized person who sent the notice that it will not be honored unless adequate information is supplied.

(5) Upon receipt of effective notice of delinquent support payments, together with all required supplementary documents and information, the designated official shall identify the member from whom moneys are due and payable. Under §54.6(d), the allotment shall be established in the amount necessary to comply with the support order and to liquidate arrearages if provided by a support order when the maximum amount to be allotted under this provision, together with any other moneys withheld for support from the member, does not exceed:

(i) Fifty percent of the member's disposable earnings for any month in which the member asserts by affidavit or other acceptable evidence that he or she is supporting a spouse, dependent child, or both, other than a party in the support order. When the member

submits evidence, copies shall be sent to the authorized person, together with notification that the member's support claim shall be honored. If the support claim is contested by the authorized person, that authorized person may refer this matter to the appropriate court or other authority for resolution.

(ii) Sixty percent of the member's disposable earnings for any month in which the member fails to assert by affidavit or other acceptable evidence that he or she is supporting a spouse, dependent child, or both.

(iii) Regardless of the limitations above, an additional 5 percent of the member's disposable earnings shall be withheld when the notice states that the total amount of the member's support payments is 12 or more weeks in arrears.

(b) *Disposable Earnings.* (1) In determining disposable earnings for a member assigned within the contiguous United States, include the following payments. For definitions of these items, see DoD 5000.12–M.

(i) Basic pay (including Military Service academy cadet and midshipman pay).

(ii) Basic allowance for quarters for members with dependents, and for members without dependents in grade E–7 or higher.

(iii) Basic allowance for subsistence for commissioned and warrant officers.

(iv) Special pay for physicians, dentists, optometrists, and veterinarians.

(v) Submarine pay.

(vi) Flying pay (all crew members).

(vii) Diving pay.

(viii) Proficiency pay or special duty assignment pay.

(ix) Career sea pay.

(2) To determine disposable earnings for a member assigned outside of the contiguous United States, the following shall supplement the payments listed in paragraph (b)(1) of this section:

(i) Foreign duty pay.

(ii) Special pay for duty subject to hostile fire (applies only to members permanently assigned in a designated area).

(iii) Family separation allowances (only under certain type-II conditions).

(iv) Special pay for overseas extensions

(c) Calculations of disposable earnings shall exclude:

(1) Amounts owed by the member to the United States.

(2) Amounts mandatorily withheld for the U.S. Soldiers' and Airmen's Home.

(3) Fines and forfeitures ordered by a court-martial or by a commanding officer.

(4) Federal and State employment and income taxes withheld to the extent that the amount deducted is consistent with the member's tax liability.

(5) Deductions for the Servicemen's Group Life Insurance coverage.

(6) Advances of pay received by the member before receipt of notice (see paragraph (c)(1) of this section) that may be due and payable by the member at some future date. Requests for advances received after notice for a statutorily required support allotment shall be reduced by the amount of the statutorily required support allotment.

(7) Other amounts required by law to be deducted.

(d) Notice to member and member's Commanding Officer.

(1) As soon as possible, but not later than 15 calendar days after the date of receipt of notice, the designated official shall send to the member, at his or her duty station, written notice:

(i) That notice has been received from an authorized person, including a copy of the documents submitted.

(ii) Of the maximum limitations provided in 15 U.S.C. 1673, with a request that the member submit supporting affidavits or other documentation necessary for determining the applicable percentage limitation.

(iii) That the member may submit supporting affidavits or other documentation as evidence that the information contained in the notice is in error.

(iv) That by submitting supporting affidavits or other necessary documentation, the member consents to the disclosure of such information to the party requesting the support allotment.

(v) Of the amount or percentage that will be deducted if the member fails to submit the documentation necessary to

enable the designated official to respond to the notice within the prescribed time limits.

(vi) That a consultation with a judge advocate or legal officer will be provided by the Military Service, if possible, and that the member should immediately contact the nearest legal services office.

(vii) Of the date that the allotment is scheduled to begin.

(2) The designated official shall notify the member's commanding officer, or designee, of the need for consultation between the member and a judge advocate or legal officer. The designated official shall provide the member's commanding officer, or designee, with a copy of the notice and other legal documentation served on the designated official.

(3) The Military Services shall provide the member with the following:

(i) When possible, an in-person consultation with a judge advocate or legal officer of the Military Service concerned, to discuss the legal and other factors, involved in the member's support obligation and failure to make payment.

(ii) Copies any other documents submitted with the notice.

(4) The member's commanding officer, or designee, shall confirm in writing to the designated official within 30 days of notice that the member received a consultation concerning the member's support obligation and the consequences of failure to make payments, or when appropriate, of the inability to arrange such consultation and the status of continuing efforts to fulfill the consultation requirement.

(5) If, within 30 days of the date of the notice, the member has furnished the designated official affidavits or other documentation showing the information in the notice to be in error, the designated official shall consider the member's response. The designated official may return to the authorized person, without action, the notice for a statutorily required support allotment together with the member's affidavit and other documentation, if the member submits substantial proof of error, such as:

(i) The support payments are not delinquent.

(ii) The underlying support order in the notice has been amended, superseded, or set aside.

(e) *Payments.* (1) Except as provided in paragraph (e)(3) the Secretary of the Military Department concerned, or designee, shall make the support allotment by the first end-of-month payday after the designated official is notified that the member has had a consultation with a judge advocate or legal officer, or that a consultation was not possible, but not later than the first end-of-month payday after 30 days have elapsed from the date of the notice to the member. The Military Services will not be required to vary their normal military allotment payment cycle to comply with the notice.

(2) If several notices are sent with respect to the same member, payments shall be satisfied on a first-come, first-served basis within the amount limitations in paragraph (a)(5) of this section.

(3) When the member identified in the notice is found not to be entitled to money due from or payable by the Military Service, the designated official shall return the notice to the authorized person and shall advise him or her that no money is due from or payable by the Military Service to the named individual. When it appears that amounts are exhausted temporarily or otherwise unavailable, the authorized person shall be told why, and for how long, any money is unavailable, if known. If the member separates from active duty, the authorized person shall be informed that the allotment is discontinued.

(4) Payment of statutorily required allotments shall be enforced over other voluntary deductions and allotments when the gross amount of pay and allowances is not sufficient to permit all authorized deductions and collections.

(5) The authorized person or allottee shall notify the designated official promptly if the operative court order upon which the allotment is based is vacated, modified, or set aside. The designated official shall also be notified of any events affecting the allottee's eligibility to receive the allotment, such as the former spouse's remarriage, if a part of the payment is for spousal support, and notice of a change in eligibility for child support

payments under circumstances of death, emancipation, adoption, or attainment of majority of a child whose support is provided through the allotment.

(6) An allotment established under this Directive shall be adjusted or discontinued upon notice from the authorized person.

(7) Neither the Department of Defense, nor any officer or employee thereof, shall be liable for any payment made from moneys due from, or payable by, the Department of Defense to any individual pursuant to notice regular on its face, if such payment is made in accordance with this part. If a designated official receives notices based on a support order which, on its face, appears to conform to the laws of the jurisdiction from which it was issued, the designated official shall not be required to ascertain whether the authority that issued the order had obtained personal jurisdiction over the member.

(f) *List of designated officials.*

Army—Commander, U.S. Army Finance and Accounting Center, ATTN: FINCL-G, Indianapolis, IN 46249–0160, (317) 542–2155.

Navy—Director, Navy Family Allowance Activity, Anthony J. Celebrezze Federal Building, Cleveland, OH 44199, (216) 522–5301.

Air Force—Commander, Air Force Accounting and Finance Center, ATTN: JA, Denver, CO 80279, (303) 370–7524.

Marine Corps—Commanding Officer, Marine Corps Finance Center (Code AA), Kansas City, MO 64197, (816) 926–7103.

# PART 56—NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS AND ACTIVITIES ASSISTED OR CONDUCTED BY THE DEPARTMENT OF DEFENSE

Sec.

56.1 Purpose.
56.2 Applicability and scope.
56.3 Definitions.
56.4 Policy.
56.5 Responsibilities.
56.6 Information requirements.
56.7 Programs and activities subject to this part.
56.8 Guidelines for determining discriminatory practices.
56.9 Ensuring compliance with this part in Federal financial assistance programs and activities.
56.10 Ensuring compliance with this part in programs and activities conducted by the Department of Defense.

AUTHORITY: Pub. L. 93–112, sec. 504 29 U.S.C. 794, as amended by Pub. L. 95–602, 92 Stat. 2982; Pub. L. 93–112, sec. 7, 29 U.S.C. 706, as amended by Pub. L. 93–516, 88 Stat. 1619; Executive Order 12250; Executive Order 12291; Executive Order 12067.

SOURCE: 47 FR 15124, Apr. 8, 1982, unless otherwise noted.

## § 56.1 Purpose.

This part implements section 504 of Public Law 93–112, ''Rehabilitation Act of 1973,'' September 26, 1973 (29 U.S.C. 794) (1976); section 111 of Pub. L. 93–516, ''Rehabilitation Act Amendments of 1974,'' December 7, 1974 (29 U.S.C. 706, 780, 790) (1976); section 119 of Pub. L. 95–602, ''Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978,'' November 6, 1978 (29 U.S.C. 794) (supp. III 1979); and Department of Justice Regulation, ''Implementation of Executive Order 12250, Nondiscrimination on the Basis of Handicap in Federally Assisted Programs,'' August 11, 1981 (28 CFR part 41) to prohibit discrimination based on handicap in programs and activities receiving Federal financial assistance disbursed by the Department of Defense and in programs and activities conducted by the Department of Defense.

## § 56.2 Applicability and scope.

(a) This part applies to the Office of the Secretary of Defense, the Military Departments, the Organization of the Joint Chiefs of Staff, the National Guard Bureau, and the Defense Agencies (hereafter referred to as ''DoD Components'') insofar as they:

(1) Extend Federal financial assistance to programs and activities that affect handicapped persons in the United States and that are covered by this part (see § 56.7(b)).

(2) Conduct programs and activities that affect handicapped persons in the United States and that are covered by this part (see § 56.7(c)).

(b) This part also applies to each recipient of Federal financial assistance disbursed by the Department of Defense and to each program and activity

that receives or benefits from such assistance, insofar as such recipient, program, or activity affects a handicapped person in the United States.

**§56.3 Definitions.**

(a) *Facility*. All or any portion of buildings, structures, equipment, roads, walks, parking lots, or other real or personal property or any interest in such property.

(b) *Federal financial assistance*. Any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the Federal Government provides or otherwise makes available assistance in the form of:

(1) Funds.

(2) Services performed by Federal personnel, including technical assistance, counseling, training, and provision of statistical or expert information.

(3) Real and personal property or any interest in or use of such property, including:

(i) Transfers or leases of such property for less than fair market value or for reduced consideration.

(ii) Proceeds from a subsequent transfer or lease of such property if the Federal share of its fair market value is not returned to the Federal government.

(c) *Handicapped person*. Any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment. For purposes of this Directive as it relates to employment programs of recipients, such term does not include any individual who is an alcoholic or drug abuser and whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question, or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or to the safety of others. As used in this paragraph:

(1) *Physical or mental impairment*. Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal and special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term includes such diseases and conditions as orthopedic, visual, speech, and hearing impairments; cerebral palsy, epilepsy, and muscular dystrophy; multiple sclerosis; cancer; heart disease; diabetes; drug abuse; and alcoholism.

(2) *Major life activities*. Functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(3) *Has a record of such an impairment*. Has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(4) *Is regarded as having an impairment*. Has: (i) A physical or mental impairment that does not substantially limit major life activities but is treated by a recipient or DoD Component as constituting such a limitation;

(ii) A physical or a mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) None of the impairments defined above, but is treated by a recipient or DoD Component as having such an impairment.

(d) *Historic properties*. Those properties listed or eligible for listing in the National Register of Historic Places.

(e) *Include; such as*. Not all the possible items are covered, whether like or unlike the ones named.

(f) *Qualified handicapped person*. A handicapped person who:

(1) With respect to employment, can perform the essential functions of the job in question with reasonable accommodation.

(2) With respect to services, meets the essential eligibility requirements for receiving the services in question.

(g) *Recipient*. Any State or political subdivision or instrumentality thereof,

any public or private agency, institution, organization, or other entity, or any person that receives Federal financial assistance directly or through another recipient, including any successor, assignee, or transferee of a recipient, but not the ultimate beneficiary of the assistance. The term includes persons and entities applying to be recipients.

(h) *Substantial impairment.* A significant loss of the integrity of finished materials, design quality, or special character resulting from a permanent alteration.

### § 56.4 Policy.

It is DoD policy that no qualified handicapped person shall be subjected to discrimination on the basis of handicap under any program or activity that receives or benefits from Federal financial assistance disbursed by a DoD Component or under any Federal program or activity that is conducted by a DoD Component. Guidelines for determining actions that discriminate against handicapped persons are prescribed in § 56.8.

### § 56.5 Responsibilities.

(a) The *Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics) (ASD(MRA&L))*, or designee, shall monitor compliance with this part. In discharging this responsibility, the ASD(MRA&L), or designee, shall:

(1) Coordinate efforts of DoD Components to enforce this part.

(2) Assist in the development of standards and procedures promulgated pursuant to § 56.9.

(3) Perform the responsibilities assigned to the ASD(MRA&L) in § 56.8, 9, and 10.

(4) Otherwise assist DoD Components in implementing this part.

(b) The *Heads of DoD Components* shall comply with this part. In discharging this responsibility, they shall:

(1) Designate a policy-level official to ensure compliance with this part receive and investigate complaints filed under this part and otherwise manage DoD Component responsibilities under this part.

(2) Notify the ASD(MRA&L), or designee, of the name, position, location, and telephone number of persons selected by them to be policy-level officials within 15 calendar days of such a selection.

(3) Issue guidelines pursuant to § 56.9.

(4) Cooperate fully with the ASD(MRA&L), or designee, in that official's performance of the responsibilities assigned herein, including furnishing to the ASD(MRA&L), or designee, in a timely fashion any requested reports and information.

(5) Assign sufficient personnel to implement and to ensure effective enforcement of this part.

### § 56.6 Information requirements.

(a) Each DoD Component shall maintain a log of all complaints that are filed with it or its recipients under this part. The log shall contain the complainant's name (last name, first, and middle initial) and address (street address, city, State, and zip code), the recipient's name (if this refers to a person, last name, first, and middle initial) and address (street address, city, State, and zip code), the nature of the complaint, and the current status of the complaint investigation or resolution. Each DoD Component shall submit a narrative summary report on complaints by memorandum to the ASD(MRA&L), or designee, before July 15 and January 15 of each year. This reporting requirement has been assigned Report Control Symbol DD-M(SA)1596.

(b) Each DoD Component shall submit a narrative report by memorandum to the ASD(MRA&L), or designee, whenever, pursuant to enclosure 4 of this directive, the DoD Component notifies an applicant or recipient that noncompliance with this part is indicated. The report shall include the recipient's name (if this refers to a person, last name, first, and middle initial) and address (street address, city, State, and zip code), the date (YYMMDD) and nature of the finding, and the name of the applicable federally assisted program or activity. This reporting requirement has been assigned Report Control Symbol DD-M(AR)1597.

(c) The recordkeeping requirements contained in § 56.9(c)(2), have been approved by the Office of Management and Budget (OMB) under 44 U.S.C.

chapter 35 and have been assigned OMB No. 0704–0102.

### §56.7 Programs and activities subject to this part.

(a) This part applies to all DoD Components and recipients of Federal financial assistance disbursed by a DoD Component insofar as the programs and activities of the DoD Components and recipients affect handicapped persons in the United States. Existing programs and activities that are assisted or conducted by a DoD Component and that are subject to this part but do not appear in paragraph (b) or (c) of this section, are covered even though not listed. DoD Components must report new programs and activities that are subject to this part to the ASD (MRA&L), or designee, within 15 calendar days of their creation or funding.

(b) Federal financial assistance programs subject to this part include: (1) title 32, United States Code, sections 101–716 (1976 and supp. III 1979): the Army and Air National Guard.

(2) Title 40, U.S. Code, sections 483, 484, and 512 (1976); title 49, U.S. Code, sections 1101 and 1107 (1976); and title 10, U.S. Code, sections 2541, 2544, 2571, 2576, 2662, 7308, 7541, 7542, 7545, 7546, and 7547 (1976 and supp. IV 1980): Various programs involving the loan or other disposition of surplus, obsolete, or unclaimed property.

(3) Title 10 U.S. Code, sections 4307–4311 (1976), and the annual Department of Defense Appropriations Act: National Program for the Promotion of Rifle Practice.

(4) Secretary of the Navy Instruction 5720.19E, ''Navy Science Cruiser Program,'' February 24, 1977.

(5) Title 10 U.S. Code, section 9441 (1976 and supp. IV 1980): Civil Air Patrol.

(6) Title 41 U.S. Code, sections 501–509 (supp. III 1979): Federal grants and cooperative agreements.

(7) Title 33 U.S. Code, section 426 (1976 and supp. III 1979): Army Corps of Engineers participation in cooperative investigations and studies concerning the erosion of shores of coastal and lake waters.

(8) Title 33 U.S. Code, sections 426e–426h (1976): Army Corps of Engineers assistance in the construction of works for the restoration and protection of shores.

(9) Title 16 U.S. Code, section 460d (1976): Construction and operation of public park and recreational facilities in water resource development projects under the administrative jurisdiction of the Department of the Army.

(10) Title 33 U.S. Code, section 701c–3 (1976): Payment to States of lease receipts from lands acquired by the United States for flood control, navigation, and allied purposes.

(11) Title 33 U.S. Code, sections 558c and 702d–1 (1976); title 10, U.S. Code, sections 2668 and 2669 (1976); title 43, U.S. Code, section 961 (1976); and title 40, U.S. Code, section 319 (1976): Grants of easements without consideration, or at a nominal or reduced consideration, on land under the control of the Department of the Army at water resource development projects.

(12) Title 33 U.S. Code, sections 540 and 577 (1976): Army Corps of Engineers assistance in the construction of small boat harbor projects.

(13) Title 33 U.S. Code, section 701s (1976): Emergency bank protection works constructed by the Army Corps of Engineers for protection of highways, bridge approaches, and public works.

(14) Title 33 U.S. Code, section 633 (1976): Army Corps of Engineers contracts for the protection, alteration, reconstruction, relocation, or replacement of structures and facilities.

(15) Title 50 U.S. Code, section 453 (1976): Defense Logistics Agency loans of industrial equipment to educational institutions (Tools for Schools).

(16) Title 33 U.S. Code, section 610 (1976): Provision of specialized services or technical information by the Army Corps of Engineers to State and local governments for the control of aquatic plant growths in rivers, harbors, and allied waters.

(17) Title 42 U.S. Code, section 1962d–16 (1976): Provision of specialized services by the Army Corps of Engineers to any State for the preparation of comprehensive plans for drainage basins located within the boundaries of said State.

(18) Title 33 U.S. Code, section 603a (1976): Provision of specialized services

by the Army Corps of Engineers to improve channels for navigation.

(19) Title 33 U.S. Code, section 701g (1976): Provision of specialized services by the Army Corps of Engineers to reduce flood damage.

(20) Title 24 U.S. Code, sections 44c and 47 (1976): United States Soldiers' and Airmen's Home.

(21) Title 10 U.S. Code, chapter 55, as implemented by DoD 6010.8–R, ''Civilian Health and Medical Program of the Uniformed Services (CHAMPUS),'' January 10, 1977.

(c) All programs and activities conducted by the Department of Defense that affect handicapped persons in the United States are subject to this part. They include:

(1) Promulgation of rules and regulations for public comment in a manner that grants handicapped persons a reasonable opportunity for such comment (such as by making cassette recordings of proposed rules).

(2) Public meetings, conferences, or seminars sponsored or conducted by a DoD Component but held in nongovernmental buildings.

(3) Public meetings, conferences, or seminars sponsored or conducted by a DoD Component or by a non-DoD organization but held in a DoD building.

(4) Open houses, memorial services, tours, or other ceremonies held on or in DoD property.

(5) Military museums.

(6) Historic vessels.

(7) Historic buildings and properties maintained by a DoD Component and properties designated as historic under a statute of the appropriate State or local governmental body.

(8) Schools operated by the Department of Defense within the United States pursuant to section 6 of Public Law 81–874, title 20, U.S. Code, section 241 (1976).

### § 56.8 Guidelines for determining discriminatory practices.

(a) *General prohibitions against discrimination.* (1) No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefit of, or otherwise be subjected to discrimination under any program or activity that is conducted by the Department of Defense or that receives or benefits from Federal financial assistance disbursed by the Department of Defense.

(2) A recipient or DoD Component may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap:

(i) Provide different or separate aid, benefits, or services to handicapped persons than is provided to others unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are equal to those provided to others;

(ii) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;

(iii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iv) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective as that afforded to others; or

(v) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity granted to others receiving the aid, benefit, or service.

(3) A recipient or DoD Component may not deny a qualified handicapped person the opportunity to participate in programs or activities that are not separate or different from regular programs or activities, even if such separate or different programs and activities are permissible under paragraph (a)(2)(i) of this section.

(4) A recipient or DoD Component may not provide assistance to an agency, organization, or person that discriminates on the basis of handicap in providing any aid, benefit, or service to beneficiaries of the recipient's program or activity.

(5) A recipient of DoD Component may not deny, on the basis of handicap, a qualified handicapped person the opportunity to participate as a member of planning or advisory boards.

(6) A recipient or DoD Component may not use, directly or through contractual or other arrangements, criteria or methods of administration that:

(i) Subject qualified handicapped persons to discrimination on the basis of handicap;

(ii) Defeat or substantially impair accomplishment of the objectives of the recipient's or DoD Component's program or activity with respect to handicapped persons; or

(iii) Perpetuate discrimination by another recipient if both recipients are subject to common administrative control or are agencies of the same State.

(7) In determining the site or location of a facility, a recipient or DoD Component may not make selections that:

(i) Exclude handicapped persons from, deny them the benefits of, or otherwise subject them to discrimination under any program or activity that receives or benefits from Federal financial assistance; or

(ii) Defeat or substantially impair, with respect to handicapped persons, the accomplishment of the objectives of the program or activity.

(8) Recipients and DoD Components shall administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons.

(9) Recipients and DoD Components shall take appropriate steps to make communications with their applicants, employees, and beneficiaries available to persons with impaired vision and hearing.

(10) This section may not be interpreted to prohibit the exclusion of:

(i) Persons who are not handicapped from benefits, programs, and activities limited by Federal statute or Executive order to handicapped persons; or

(ii) One class of handicapped persons from a program or activity limited by Federal statute or Executive order to a different class of handicapped persons.

(11) Recipients and DoD Components shall take appropriate steps to ensure that no handicapped individual is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under any program or activity receiving or benefiting from Federal financial assistance disbursed by the Department of Defense or under any program or activity conducted by the Department of Defense because of the absence of auxiliary aids, such as certified sign-language interpreters, telecommunication devises (TDDs), or other telephonic devices for individuals with impaired sensory, manual, or speaking skills.

(b) *Prohibitions against employment discrimination by recipients.* (1) No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity that receives or benefits from Federal financial assistance disbursed by the Department of Defense.

(2) The prohibition against discrimination in employment applies to the following:

(i) Recruitment, advertising, and processing of applications for employment.

(ii) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring.

(iii) Rates of pay or any other form of compensation and changes in compensation.

(iv) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists.

(v) Leaves of absence, sick leave, or any other leave.

(vi) Fringe benefits available by virtue of employment, whether or not administered by the recipient.

(vii) Selection and financial support for training, including apprenticeship, professional meetings, conferences and other related activities, and selection for leaves of absence for training.

(viii) Programs and activities sponsored by the employer, including social and recreational programs.

(ix) Any other term, condition, or privilege of employment.

(3) A recipient may not participate in a contractual or other relationship that subjects qualified handicapped applicants or employees to discrimination prohibited by this section, including relationships with employment and referral agencies, labor unions, organizations providing or administering fringe benefits to employees of the recipient, and organizations providing training and apprenticeship programs.

(4) A recipient shall make reasonable accommodation to the known physical

or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program. Reasonable accommodation includes providing ramps, accessible restrooms, drinking fountains, interpreters for deaf employees, readers for blind employees, amplified telephones, TDDs such as Teletypewriters or Telephone Writers (TTYs), and tactile signs on elevators.

(5) A recipient may not use employment tests or criteria that discriminate against handicapped persons, and shall ensure that employment tests are adapted for use by persons who have handicaps that impair sensory, manual, or speaking skills.

(6) A recipient may not conduct a preemployment medical examination or make a preemployment inquiry about whether an applicant is a handicapped person or about the nature or severity of a handicap. A recipient may make, however, a preemployment inquiry into an applicant's ability to perform job-related functions.

(7) When a recipient is taking remedial action to correct the effects of past discrimination or is taking voluntary action to overcome the effects of conditions that have resulted in limited participation by handicapped persons in its federally assisted program or activity, the recipient may invite applicants for employment to indicate whether and to what extent they are handicapped if:

(i) The recipient makes clear to the applicants that the information is intended for use solely in connection with its remedial action obligations or its voluntary affirmative action efforts.

(ii) The recipient makes clear to the applicants that the information is being requested on a voluntary basis, that it will be kept confidential as provided in paragraph (b)(9) in this section, that refusal to provide it will not subject the applicants to any adverse treatment, and that it will be used only in accordance with this part.

(8) Nothing in this section shall prohibit a recipient from conditioning an offer of employment on the results of a medical examination conducted prior to the employee's entrance on duty if:

(i) All entering employees are subjected to such an examination, regardless of handicap.

(ii) The results of such an examination are used only in accordance with this part which prohibits discrimination against a qualified handicapped person on the basis of handicap.

(9) Information obtained under this section concerning the medical condition or history of applicants shall be collected and maintained on separate forms that shall be accorded confidentiality as medical records, except that:

(i) Supervisors and managers may be informed about restrictions on the work or duties of handicapped persons and about necessary accommodations.

(ii) First aid and safety personnel may be informed, when appropriate, if a handicapping condition might require emergency treatment.

(iii) Government officials investigating compliance with section 504, Pub. L. 93–112, and this part shall be provided relevant information upon request.

(c) *Program accessibility*—(1) *General requirements*. No qualified handicapped person shall, because a recipient's or DoD Component's facilities are inaccessible to or not usable by handicapped persons, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity that receives or benefits from Federal financial assistance disbursed by the Department of Defense or under any program or activity conducted by the Department of Defense.

(2) *Existing facilities*. (i) A recipient or DoD Component shall operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and usable by handicapped persons. This does not necessarily require a recipient or DoD Component to make each of its existing facilities or every part of an existing facility accessible to and usable by handicapped persons. For guidance in determining the accessibility of facilities, see chapter 18 of DoD 4270.1–M, ''Department of Defense Construction Criteria Manual,'' June 1, 1978, and Department of the Army, Office of the

Chief of Engineers, Manual EM 1110–1–103, ''Design for the Physically Handicapped,'' October 15, 1976. Inquiries on specific accessibility design problems may be addressed to the ASD (MRA&L), or designee.

(ii) When structural changes are necessary to make programs or activities in existing facilities accessible to the exent required by paragraph (c)(1) of this section.

(A) Such changes shall be made as soon as practicable, but not later than 3 years after the effective date of this part however, if the program or activity is a particular mode of transportation (such as a subway station) that can be made accessible only through extraordinarily expensive structural changes to, or replacement of, existing facilities and if other accessible modes of transportation are available, the DoD Component concerned may extend this period of time. This extension shall be for a reasonable and definite period, which shall be determined after consultation with the ASD(MRA&L), or designee.

(B) The recipient or DoD Component shall develop, with the assistance of interested persons or organizations and within a period to be established in each DoD Component's guidelines, a transition plan setting forth the steps necessary to complete such changes.

(C) The recipient or DoD Component shall make a copy of the transition plan available for public inspection. At a minimum, the plan shall:

(*1*) Identify physical obstacles in the recipient's or DoD Component's facilities that limit the accessibility of its program or activity to handicapped persons.

(*2*) Describe in detail the methods that will be used to make the facilities accessible.

(*3*) Specify the schedule for taking the steps necessary to achieve full program accessibility and, if the time period of the transition plan is longer than 1 year, identify steps that will be taken during each year of the transition period.

(*4*) Indicate the person (last name, first, and middle initial) responsible for implementation of the transition plan.

(iii) A recipient or DoD Component may comply with paragraphs (c)(2)(i) and (c)(2)(ii) of this section, through such means as the acquisition or redesign of equipment, such as telecommunication or other telephonic devices; relocation of classes or other services to accessible buildings; assignment of aides to beneficiaries, such as readers or certified sign-language interpreters; home visits; delivery of health, welfare, or other services at accessible alternate sites; alteration of existing facilities and construction of new facilities in conformance with paragraph (c)(3) in this section; or any other method that results in making the program or activity of the recipient or DoD Component accessible to handicapped persons.

(iv) A recipient or DoD Component is not required to make structural changes in existing facilities when other methods are effective in achieving compliance with this section.

(v) In choosing among available methods for meeting the requirements of this section, a recipient or DoD Component shall give priority to those methods that offer programs and activities to handicapped persons in the most integrated setting appropriate with nonhandicapped persons.

(3) *New Construction*. New facilities shall be designed and constructed to be readily accessible to and usable by handicapped persons. Alterations to existing facilities shall be designed and constructed, to the maximum extent feasible, to be readily accessible to and usable by handicapped persons. For guidance in determining the accessibility of facilities, see chapter 18 of DoD 4270.1–M and Department of the Army, Office of the Chief of Engineers, Manual EM 1110–1–103. Inquiries about specific accessibility design problems may be addressed to the ASD(MRA&L), or designee.

(4) *Historic properties*. (i) In the case of historic properties, program accessibility shall mean that, when viewed in their entirety, programs are readily accessible to and usable by handicapped persons. Because the primary benefit of historic properties is the experience of the property itself, DoD Components and recipients shall give priority to those methods of achieving program accessibility that make the historic

property, or portions thereof, physically accessible to handicapped persons.

(ii) Methods of achieving program accessibility include:

(A) Making physical alterations that give handicapped persons access to otherwise inaccessible areas or features of historic properties.

(B) Using audiovisual materials and devices to depict otherwise inaccessible areas or features of historic properties.

(C) Assigning individuals to guide handicapped persons into or through otherwise inaccessible portions of historic properties.

(D) Adopting other innovative methods.

(iii) When program accessibility cannot be achieved without causing a substantial impairment of significant historic features, the DoD Component or recipient may seek a modification or waiver of access standards from the ASD (MRA&L), or designee.

(A) A decision to grant a modification or waiver shall be based on consideration of the following:

(*1*) Scale of the property, reflecting its ability to absorb alterations.

(*2*) Use of the property, whether primarily for public or private purposes.

(*3*) Importance of the historic features of the property to the conduct of the program.

(*4*) Costs of alterations in comparison to the increase in accessibility.

(B) The ASD(MRA&L), or designee, shall review periodically any waiver granted under this paragraph and may withdraw it if technological advances or other changes warrant.

(iv) The decision by the ASD(MRA&L), or designee, to grant a modification or waiver of access standards is subject to section 106 of the National Historic Preservation Act, as amended, and shall be made in accordance with the Advisory Council on Historic Preservation regulation on ''Protection of Historic and Cultural Properties'' (36 CFR part 800). When the property is federally owned or when Federal funds may be used for alterations, the ASD(MRA&L), or designee, shall obtain the comments of the Advisory Council on Historic Preservation when required by section 106 of the National Historic Preservation Act and the Advisory Council on Historic Preservation regulation on ''Protection of Historic and Cultural Properties'' (36 CFR part 800) prior to effectuation of structural alterations.

(v) DoD Component guidelines prepared in accordance with § 56.10 shall include a listing of all historic properties, including historic ships, subject to this part and a plan for compliance with paragraph (c)(4) of this section.

(5) *Military museums.* (i) In the case of military museums, program accessibility shall mean that exhibits, displays, tours, lectures, circulating or traveling exhibits, and other programs of military museums are accessible to and usable by handicapped persons. Methods of meeting this requirement include the following:

(A) Museum programs may be made accessible to deaf and hearing-impaired persons by means such as training museum staff, such as docents, in sign language; providing qualified sign-language interpreters to accompany deaf or hearing-impaired visitors; ensuring that clear, concise language is used on all museum signs and display labels; providing amplification devices; or providing printed scripts for films, videotapes, lectures, or tours. DoD Components are encouraged to use ''Museums and Handicapped Students: Guidelines for Educators,'' published by the National Air and Space Museum, Smithsonian Institution, Washington, DC 20560.

(B) Museum programs may be made accessible to blind and visually-impaired persons by means such as providing museum catalogues in a large-print edition printed over braille; providing cassette tapes, records, or discs for museum tours or exhibits; providing readers to accompany blind or visually impaired visitors; using large-print and braille display cards at exhibits; providing raised-line maps of the museum building; using raised-line drawings, reproductions, or models of large exhibits to facilitate tactile experiences when touching exhibits is prohibited; placing large-print and braille signs to identify galleries, elevators, restrooms, and other service areas; and permitting guide dogs in all museum facilities.

(C) Museum programs may be made accessible to other physically impaired persons by means such as lowering display cases; spacing exhibits to facilitate movement; using ramps in galleries; increasing lighting in exhibit areas to facilitate viewing from a distance; providing places to sit in exhibit areas; making restrooms accessible; using large-print exhibit display cards to facilitate reading from a distance; and sensitizing museum staff to consider the needs of handicapped visitors when organizing exhibits.

(ii) DoD Component guidelines developed in accordance with paragraph (c)(5) of this section shall identify military museums subject to paragraph (c) of this section and shall contain a plan for making museum programs accessible to handicapped persons. Technical assistance in the preparation and content of these plans may be obtained from the National Access Center, 1419 27th Street, NW., Washington, DC 20007 ((202) 333–1712 or TTY (202) 333–1339). In addition, community organizations that serve handicapped persons and handicapped persons themselves shall be consulted in the preparation of these plans.

(d) *Reasonable accommodation.* (1) A recipient or DoD Component shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient or DoD Component demonstrates to the ASD(MRA&L), or designee, that the accommodation would impose an undue hardship on the operation of its program.

(2) Reasonable accommodation includes the following:

(i) Making facilities used by employees readily accessible to and usable by handicapped persons.

(ii) Job restructuring; part-time or modified work schedules; acquisition or modification of equipment or devices, such as telecommunication or other telephonic instruments; the provision of readers or certified sign-language interpreters; and similar actions.

(3) In determining whether an accommodation would impose an undue hardship on the operation of a recipient's or DoD Component's program, the ASD(MRA&L), or designee, shall consider the following factors, at a minimum:

(i) The overall size of the recipient's or DoD Component's program or activity, such as the number of employees, number and type of facilities, and size of budget.

(ii) The size of the recipient's or DoD Component's operations, including the composition and structure of the recipient's or DoD Component's workforce.

(iii) The nature and cost of the accommodation needed.

(4) A recipient or DoD Component may not deny any employment opportunity to a qualified handicapped employee or applicant for employment if the basis for the denial is the need to make reasonable accommodation to the physical or mental limitations of the employee or applicant.

### §56.9 Ensuring compliance with this part in Federal financial assistance programs and activities.

(a) *Supplementary guidelines issued by DoD Components.* (1) Whenever necessary, DoD Components shall publish supplementary guidelines for each type of program or activity to which they disburse Federal financial assistance within 120 days of the effective date of this part or of the effective date of any subsequent statute authorizing Federal financial assistance to a new type of program or activity. DoD Components shall obtain approval of these supplementary guidelines from the ASD(MRA&L), or designee, before issuing them. Prior to their issuance, the ASD(MRA&L), or designee, shall submit supplementary guidelines prepared pursuant to paragraph (a)(1) of this section to the Coordination and Review Section, Civil Rights Division, Department of Justice, for review and approval. To the extent that supplementary guidelines issued by DoD Components deal with the employment of civilians in programs and activities subject to this part the ASD(MRA&L), or designee, shall also obtain the approval of the Equal Employment Opportunity Commission (EEOC) in accordance with Executive Order 12067.

(2) The ASD(MRA&L), or designee, and DoD Components shall ensure that

their supplementary guidelines conform to the requirements of this part and that they provide:

(i) A description of the types of programs and activities covered.

(ii) Examples of prohibited practices likely to arise with respect to those types of programs and activities.

(iii) A list of the data collection and reporting requirements of the recipients.

(iv) Procedures for processing and investigating complaints.

(v) Procedures for hearings to determine compliance by recipients with this part.

(vi) Requirements or suggestions for affirmative action on behalf of qualified handicapped persons.

(vii) Requirements for the dissemination of program and complaint information to the public.

(viii) A description of the form of the assurances that must be executed pursuant to paragraph (b) of this section, and sample assurances.

(ix) Requirements concerning the frequency and nature of postapproval reviews conducted pursuant to paragraph (h) of this section.

(x) A period of time, provided for by § 56.8(c)(2)(ii)(B), for the development of a transition plan that sets out the steps necessary to complete structural changes that might be required by § 56.8(c).

(xi) The maximum period of time that may be allowed for extensions that might be granted pursuant to § 56.8(c)(2)(ii).

(xii) An appendix that contains a list of identified programs and activities of the type covered by the supplementary guidelines, including the names of the programs and activities and the authorizing statute, regulation, or directive for each program and activity.

(xiii) Requirements for the recipient to designate a responsible official to coordinate the implementation of supplementary guidelines.

(xiv) Requirements for any other actions or procedures necessary to implement this part.

(3) When the head of a DoD Component determines that it would not be appropriate to include on or more of the provisions described in paragraph (a)(2) of this section, in the supplementary guidelines of that DoD Component or that it is not necessary to issue such guidelines at all, the reasons for such determination shall be stated in writing and submitted to the ASD(MRA&L), or designee, for review and approval. Once that determination is approved, the DoD Component shall make it available to the public upon request.

(4) The heads of DoD Components, or designees, shall be responsible for keeping the supplementary guidelines current and accurate. When a DoD Component determines that a program or activity should be added to or deleted from the guidelines, the DoD Component shall notify the ASD(MRA&L), or designee, in writing.

(b) *Required assurances.* (1) DoD Components shall require all recipients to file written assurances that their programs or activities will be conducted in accordance with this part and supplementary guidelines promulgated by DoD Components. If a recipient fails to provide an assurance that conforms to the requirements of this section, the DoD Component shall attempt to effect compliance pursuant to paragraphs (f) through (h) of this section, provided that if assistance is due and payable to the recipient based on an application approved prior to the effective date of this part the DoD Component shall continue the assistance while any proceedings required by paragraphs (n) through (v) of this section, are pending.

(2) DoD Components shall advise each recipient of the required elements of the assurance and, with respect to each program or activity, of the extent to which those receiving assistance from recipients shall be required to execute similar assurances.

(3) DoD Component shall ensure that each assurance:

(i) Obligates the recipient to advise the DoD Component of any complaints received that allege discrimination against handicapped persons.

(ii) Obligates the recipient to collect and provide the items of information that the DoD Component lists in its supplementary guidelines pursuant to paragraph (a)(2)(iii) of this section.

(iii) Is made applicable to any Federal financial assistance that might be

disbursed by a DoD Component without the submission of a new application.

(iv) Obligates the recipient, when the financial assistance is in the form of proprerty, for the period during which the property is used under a financial assistance agreement or is possessed by the recipient.

(v) Includes a provision recognizing that the U.S. Government has the right to seek judicial enforcement of section 504 and this part.

(c) *Self-evaluation and consultation with interested persons and organizations.* (1) DoD Components shall require recipients to conduct, within 6 months of the effective date of this part or of first receiving Federal financial assistance disbursed by the Department of Defense, a self-evaluation with the assistance of interested persons, including handicapped persons or organizations that represent them. When appropriate, DoD Components also shall require recipients to consult at least annually with such persons. The ''Department of Health, Education, and Welfare Section 504 Technical Assistance Reserve Directory,'' April 1980, shall be consulted to identify likely sources for consultation. In conducting its self-evaluation, each recipient shall:

(i) Evaluate the effects of its policies and practices with respect to its compliance with this part and the applicable DoD Component's supplementary guidelines.

(ii) Modify any policies that do not meet such requirements.

(iii) Take appropriate remedial steps to eliminate the discriminatory effects of any such policies or practices.

(2) For at least 3 years following the completion of a self-evaluation required under paragraph (c)(1) of this section, a recipient shall maintain on file, make available for public inspection, and provide to the ASD(MRA&L), or designee, upon request:

(i) A list of the interested persons (last names, first names, and middle initials) consulted.

(ii) A description of areas examined and problems identified, if any, with respect to those areas.

(iii) A description of any modification made and remedial steps taken.

(d) *Dissemination of information.* (1) Within 90 days of the effective date of this part or of first receiving assistance from the Department of Defense and on a continuing basis thereafter, each recipient shall notify beneficiaries and employees of their rights under this part and shall take appropriate steps to notify participants, beneficiaries, applicants for employment and employees, including those with impaired vision or hearing, and unions or professional organizations involved in collective bargaining or professional agreements with the recipient that the recipient does not discriminate on the basis of handicap in violation of this part. The notification shall state, when appropriate, that the recipient does not discriminate in admitting or providing access to or treating or employing persons in its programs and activities. Such notification may be accomplished by posting notices, publishing announcements in newspapers and magazines, placing notices in its publications, or distributing memoranda or other written communications.

(2) If a recipient publishes or uses and makes available to participants, beneficiaries, applicants for employment, or employees recruitment materials or publications containing general information about the recipient's programs and activities, it shall include in those materials or publications a statement of the policy described in paragraph (d)(1) of this section. This may be accomplished by including appropriate inserts in existing materials and publications or by revising and reprinting the materials and publications.

(3) Understandable materials developed in accordance with this section shall be provided to ensure that all beneficiaries and employees of the recipient understand the information. In addition, recipients shall disseminate appropriate and comprehensive information about formal and informal complaint and appeal procedures, including directions on how and where to file complaints and to appeal DoD Component decisions.

(e) *Intimidation and interference.* Recipients and DoD Components shall take reasonable steps to ensure that no person intimidates, threatens, coerces, or discriminates against any individual

for the purpose of retaliating against, interfering with, or discouraging the filing of a complaint, furnishing of information, or assisting or participating in an investigation, compliance review, hearing, or other activity related to the administration of this part.

(f) *Staff responsibilities.* All DoD Component determinations of recipient compliance with this part shall be subject to reviews by the ASD(MRA&L), or designee. When responsibility for approving applications for Federal financial assistance disbursed by a DoD Component is assigned to regional or area offices of the DoD Component, personnel in such offices shall be designated to perform the functions described in paragraphs (h) and (o) through (w) of this section.

(g) *Access to records and facilities.* Each recipient shall permit access to its premises by DoD officials during normal business hours when such access is necessary for conducting onsite compliance reviews or complaint investigations, and shall allow such officials to photograph facilities and to inspect and copy any books, records, accounts, and other material relevant to determining the recipient's compliance with this part. Information so obtained shall be used only in connection with the administration of this part. If the recipient does not have the information requested, it shall submit to the DoD Component a written report that contains a certification that the information is not available and describes the good-faith efforts made to obtain the information.

(h) *Compliance review.* DoD Components shall determine the compliance of each recipient with this part as follows: (1) *General.* Whenever possible, DoD Components shall perform compliance reviews in conjunction with their review and audit efforts implementing title VI of the Civil Rights Act of 1964.

(2) *Desk audit application review.* Before approving an application for Federal financial assistance, the DoD Component concerned shall make a written determination as to whether the recipient is in compliance with this part, based on a review of the assurance of compliance executed by a recipient pursuant to paragraph (b) of this section, and other data submitted by the recipient. When a determination cannot be made from the assurance and other data submitted by the recipient, the DoD Component concerned shall require the recipient to submit additional information and shall take other steps as necessary to determine the recipient's compliance with this part. If this additional information demonstrates that the recipient is in compliance with this part, the DoD Component shall notify the recipient promptly that it is in compliance.

(3) *Preapproval onsite review.* (i) When a desk audit application review conducted pursuant to paragraph (h)(2) of this section indicates that the recipient might not be in compliance with this part, the DoD Component concerned may conduct a preapproval onsite review at the recipient's facilities before approving the disbursement of Federal financial assistance to the recipient. The DoD Component shall conduct such a review:

(A) When appropriate, if a desk audit application review reveals that the recipient's compliance posture is questionable because of a history of discrimination complaints, current discrimination complaints, a noncompliance determination by another government agency or DoD Component, or other indications of possible noncompliance; or

(B) If Federal financial assistance is requested for construction, except under extraordinary circumstances, to determine whether the location and design of the project would provide service on a nondiscriminatory basis, in conformity with § 56.8(c).

(ii) Preapproval onsite reviews shall be conducted under DoD Component supplementary guidelines and in accordance with the provisions of paragraph (h)(4) of this section, concerning postapproval reviews.

(4) *Postapproval reviews.* DoD Components shall: (i) Establish and maintain effective programs of postapproval reviews.

(ii) Conduct such reviews of each recipient, the frequency and the nature of which shall be prescribed in the DoD Component supplemetary guidelines implementing this part.

(iii) Require recipients periodically to submit compliance reports to them.

(iv) Record the results of the reviews, including findings of fact and recommendations.

(5) A DoD Component shall complete a review within 180 calendar days of initiating it unless an extension of time is granted by the ASD(MRA&L), or designee, for good cause shown, and shall either:

(i) Find the recipient to be in compliance and notify the recipient of that finding; or

(ii) Notify the recipient and the ASD(MRA&L), or designee, of a finding of probable noncompliance, pursuant to paragraph (o) of this section.

(i) *Filing of complaints against recipients.* (1) DoD Components shall establish and publish in their supplementary guidelines procedures for the prompt processing and disposition of complaints against recipients, consistent with this section.

(2) A DoD Component shall consider all complaints that: (i) Are filed with it within 180 days of the alleged discrimination or within a longer period of time if an extension is granted for good cause by the DoD Component with the approval of the ASD(MRA&L), or designee.

(ii) Include the name, address, and telephone number, if any, of the complainant; the name and address of the recipient committing the alleged discrimination; a description of the acts or omissions considered to be discriminatory; and other pertinent information.

(iii) Are signed by the complainant or the complainant's authorized representative (legal counsel or a person with power of attorney granted by the complainant).

(3) DoD Components shall transmit a copy of each complaint filed with them to the ASD(MRA&L), or designee, within 10 calendar days after its receipt.

(4) If the information in a complaint is incomplete, the DoD Component shall request the complainant to provide the additional information required. If the DoD Component does not receive this requested information within 30 calendar days of the date of the request, the case may be closed and the complainant so notified in writing.

(5) If a complaint concerning a program or activity is filed with a DoD Component that does not have jurisdiction over it, the DoD Component shall refer the complaint to the ASD(MRA&L), or designee, and advise the complainant in writing of such referral. The ASD(MRA&L), or designee, then shall refer the complaint to the appropriate DoD Component and so notify the complainant in writing.

(j) *Investigation by DoD components.* (1) DoD Components shall investigate complaints that involve recipients and that meet the standards described in paragraph (i) of this section, unless good cause for not investigating is stated in a written notification of the disposition of the complaint provided to the complainant.

(2) If an investigation of a complaint is conducted, the DoD Component concerned shall maintain a case record that contains:

(i) The name (last name, first, and middle initial), address (street address, city, State, and zip code), and telephone number of each person interviewed.

(ii) Copies, transcripts, or summaries of pertinent documents.

(iii) A reference to at least one program or activity conducted by the recipient and receiving Federal financial assistance disbursed by a DoD Component, and a description of the amount and nature of the assistance.

(iv) A narrative report of the results of the investigation that contains references to relevant exhibits and other evidence that relates to the alleged violations.

(k) *Investigations by recipients.* (1) A DoD Component may require or permit recipients to investigate complaints alleging violation of this part. In such cases, the DoD Component shall:

(i) Ensure that the recipient investigates the complaints in accordance with the standards, procedures, and requirements prescribed in paragraph (j) of this section.

(ii) Require the recipient to submit a written report of each complaint and investigation to the DoD Component.

(iii) Retain a review responsibility over the investigation and disposition of each complaint.

(iv) Ensure that each complaint investigation is completed within 180 calendar days of the receipt of the complaint by the proper DoD Component, unless an extension of time is granted for good cause by the ASD(MRA&L), or designee.

(v) Require the recipient to maintain a log of all complaints filed against it, as described in § 56.6(a)(1).

(2) DoD Components that require or permit complaint investigations to be conducted by recipients shall review recipient complaint investigations pursuant to paragraphs (k) and (l) of this section.

(l) *Results of investigations.* (1) Within 180 days of the receipt of a complaint, the DoD Component, recipient, or the ASD(MRA&L), or designee, shall give written notification:

(i) Of the disposition of the complaint to the complainant and, as the case may be, to the recipient or DoD Component.

(ii) To the complainant that within 30 calendar days of receipt of the written notification, the complainant may request that the ASD(MRA&L), or designee, review the findings in the notification pursuant to paragraph (m) of this section.

(2) If the complaint investigation results in a determination by the DoD Component that a recipient is not complying with this part the DoD Component shall proceed as prescribed in paragraph (n) through (v) of this section. If the DoD Component determines that the recipient is in compliance, the DoD Component shall submit the complete case file to the ASD(MRA&L), or designee, within 15 calendar days after the notification of the disposition of the investigation to the complainant.

(m) *Reviewing completed investigations.* (1) The ASD(MRA&L), or designee, may review all completed investigations.

(2) The ASD(MRA&L), or designee, shall review the results of any investigation of a complaint if the complainant requests such a review pursuant to paragraph (l)(1)(ii) of this section.

(3) After reviewing the results of an investigation, the ASD(MRA&L), or designee, may:

(i) Find that no further investigation is necessary and approve the results of the investigation;

(ii) Request further investigation by the DoD Component; or

(iii) Require the DoD Component to take appropriate corrective action.

(n) *Effecting compliance.* (1) When a compliance review or complaint investigation indicates that a recipient has violated this part, the applicable DoD Component's supplementary guidelines, or the assurances executed pursuant to paragraph (b) of this section, the responsible DoD Component or the ASD(MRA&L), or designee, shall attempt to effect compliance in accordance with paragraphs (o) and (p) of this section. The inability of a DoD Component to comply with any time frame prescribed by this part does not relieve a recipient of the responsibility for compliance with this part.

(2) The DoD Component may require, when necessary to overcome the effects of discrimination in violation of this part, a recipient to take remedial action:

(i) With respect to handicapped persons who are no longer participants in the recipient's program or activity but who were participants in the program or activity when such discrimination occurred.

(ii) With respect to handicapped persons who would have been participants in the recipient's program or activity had the discrimination not occurred.

(iii) With respect to handicapped persons presently in the recipient's program or activity, but not receiving full benefits or equal and integrated treatment within the program or activity.

(o) *Written notice.* After evaluating the investigative report, the DoD Component shall issue to the recipient and, pursuant to paragraph (n)(2) of this section to the ASD(MRA&L), or designee, a written notice that:

(1) Describes the apparent violation and the corrective actions necessary to achieve compliance.

(2) Extends an offer to meet informally with the recipient.

(3) Informs the recipient that failure to respond to the notice within 15 calendar days of its receipt shall result in

the initiation of enforcement procedures described in paragraphs (r) through (v), of this section.

(p) *Attempting to achieve voluntary compliance by recipients.* (1) If a DoD Component issues a notice pursuant to paragraph (o) of this section, the DoD Component shall attempt to meet with the recipient and shall attempt to persuade it to take the steps necessary to achieve compliance with this part.

(2) If a recipient agrees to take remedial steps to achieve compliance, the DoD Component shall require that the agreement be in writing and:

(i) Be signed by the head of the DoD Component concerned, or designee, and by the principal official of the recipient.

(ii) Specify the action necessary to achieve compliance.

(iii) Be made available to the public upon request.

(iv) Be subject to the approval of the ASD(MRA&L), or designee.

(3) If satisfactory adjustment or a written agreement has not been achieved within 60 calendar days of the recipient's receipt of the notice issued pursuant to paragraph (o) of this section, the DoD Component shall notify the ASD(MRA&L), or designee, and state the reasons therefor.

(4) The DoD Component shall initiate the enforcement actions prescribed in paragraphs (r) through (v) of this section if:

(i) The recipient does not respond to a notice pursuant to paragraph (o) of this section, within 15 calendar days of its receipt and satisfactory adjustments are not made within 45 calendar days of the date of the recipient's response; or

(ii) The DoD Component or the ASD (MRA&L) determines at any time within 90 days after the recipient receives a notice pursuant to paragraph (o) of this section, that, despite reasonable efforts, it is not likely that the recipient will comply promptly and voluntarily.

(5) If, pursuant to paragraph (p)(4) of this section, the DoD Component initiates enforcement action, it also shall continue its attempts to persuade the recipient to comply voluntarily.

(q) *Imposing sanctions*—(1) *Sanctions available.* If a DoD Component has taken action pursuant to paragraphs (o) and (p) of this section, the DoD Component may, by order, subject to paragraph (q)(2) and (q)(3) of this section:

(i) Terminate, suspend, or refuse to grant or continue assistance to such recipient.

(ii) Refer the case to the Department of Justice for the initation of enforcement proceedings at a Federal, State, or local level.

(iii) Pursue any remedies under State or local law.

(iv) Impose other sanctions upon consultation with the ASD (MRASL), or designee.

(2) *Terminating, suspending, or refusing to grant or continue assistance.* A DoD Component may not terminate or refuse to grant or continue Federal financial assistance unless:

(i) Such action has been approved by the Secretary of Defense.

(ii) The DoD Component has given the recipient an opportunity for a hearing pursuant to the procedures set out in paragraph (r) of this section, and a finding of noncompliance has resulted.

(iii) Thirty calendar days have elapsed since the Secretary of Defense has filed a written report describing the violation and action to be taken with the committees of the House of Representatives and Senate that have jurisdiction over the program or activity in which the violation of this part exists.

(iv) Such action is limited to affect only the particular activity or program, or portion thereof, of the recipient where the violation exists.

(3) *Other sanctions.* A DoD Component may not impose the sanctions set out in paragraphs (q)(1) (iii) and (iv) of this section, unless:

(i) The DoD Component has given the recipient an opportunity for a hearing pursuant to paragraph (r) of this section, and a finding of noncompliance has resulted.

(ii) The action has been approved by the Secretary of Defense.

(iii) Ten calendar days have elapsed since the mailing of a notice informing the recipient of its continuing failure to comply with this part the action necessary to achieve compliance, and the sanction to be imposed.

(iv) During those 10 calendar days the DoD Component has made additional efforts to persuade the recipient to comply.

(r) *Hearings for recipients*—(1) *General*. When, pursuant to paragraph (q)(2)(ii) of this section, an opportunity for a hearing is given to a recipient, the DoD Component involved shall follow the procedures prescribed in paragraphs (r)(2) through (r)(6) of this section.

(2) *Notice*. The DoD Component concerned shall notify the recipient of the opportunity for a hearing by registered or certified mail, return receipt requested, when the recipient denies a tentative finding of noncompliance with this part.

(i) The DoD Component shall ensure that the notice:

(A) Describes the proposed sanctions to be imposed.

(B) Cites the section of this part under which the proposed action is to be taken.

(C) States the name and office of the DoD Component official who is responsible for conducting the hearing (hereafter referred to as the ''responsible DoD official'').

(D) Outlines the issues to be decided at the hearing.

(E) Advises the recipient either of a date, not less than 20 calendar days after the date that the notice is received, by which the recipient may request that the matter be scheduled for a hearing, or of a reasonable time and place of a hearing that is subject to change for good cause shown.

(ii) When a time and place for a hearing are set, the DoD Component shall give the recipient and the complainant, if any, reasonable notice of such time and place.

(3) *Waiver of a hearing*. A recipient may waive a hearing and submit to the responsible DoD official, in writing, information or arguments on or before the date stated pursuant to paragraph (r)(2)(i)(E) of this section.

(i) A recipient waives its right to a hearing if it fails to request a hearing on or before a date stated pursuant to paragraph (r)(2)(i)(E) of this section, or fails to appear at a hearing that has been scheduled pursuant to that paragraph.

(ii) If a recipient waives its right to a hearing under this section, the responsible DoD official shall decide the issues and render a final decision that is based on the information available and that conforms to the requirements of paragraph (s)(4) of this section.

(4) *Hearing examiner*. Hearings shall be conducted by the responsible DoD official or by a hearing examiner designated by the official, provided that the hearing examiner shall be a field grade officer or civilian employee above the grade of GS–12 (or the equivalent) who is admitted to practice law before a Federal court or the highest court of a State, territory, commonwealth, or the District of Columbia.

(5) *Right to counsel*. In all proceedings under this section, the recipient and the DoD Component may be represented by counsel. The representation of the recipient will not be at U.S. Government expense.

(6) *Procedures*. Hearings authorized under this section shall be subject to the following: (i) Hearings shall be open to the public.

(ii) Formal rules of evidence will not apply. The DoD Component concerned and the recipient shall be entitled to introduce all relevant evidence on the issues stated in the notice of hearing issued pursuant to paragraph (r)(2) of this section, and those designated by the responsible DoD official or the hearing examiner at the outset of or during the hearing. The responsible DoD official or hearing examiner, however, may exclude irrelevant, immaterial, or repetitious evidence.

(iii) All witnesses may be examined or cross-examined, as the case may be, by each party.

(iv) All parties shall have the opportunity to examine all evidence offered or admitted for the record.

(v) A transcript of the proceedings shall be maintained in either electronic or typewritten form and made available to all parties.

(s) *Decisions*—(1) *Initial or proposed decisions by a hearing examiner*. If a hearing is conducted by a hearing examiner who is designated by the responsible DoD official pursuant to paragraph (r)(4) of this section, the hearing examiner shall either:

(i) Make an initial decision, if so authorized, that conforms to the requirements of paragraph (s)(4) of this section; or

(ii) Certify the entire record and submit to the responsible DoD official recommended findings and a proposed decision.

(2) *Review of initial decisions.* Initial decisions made by a hearing examiner pursuant to paragraph (s)(1)(i) of this section, shall be reviewed as follows:

(i) A recipient may file exceptions to an initial decision within 30 calendar days of receiving notice of such initial decision. Reasons shall be stated for each exception.

(ii) If the recipient does not file exceptions pursuant to paragraph (s)(2)(i) of this section, the responsible DoD official may notify the recipient within 45 calendar days of the initial decision that the responsible DoD official will review the decisions.

(iii) If exceptions are filed pursuant to paragraph (s)(2)(i) of this section, or a notice of review is issued pursuant to paragraph (s)(2)(ii) of this section, the responsible DoD official shall review the initial decision and, after giving the recipient reasonable opportunity to file a brief or other written statement of its contentions, issue a final decision that addresses each finding and conclusion in the initial decision and each exception, if any.

(iv) If the exceptions described in paragraph (s)(2)(i) of this section are not filed and the responsible DoD official does not issue the notice of review described in paragraph (s)(2)(ii) of this section, the initial decision of the hearing examiner shall constitute the final decision of the responsible DoD official.

(3) *Decisions by the responsible DoD official who conducts a hearing or receives a certified record.* If a hearing examiner who is designated by the responsible DoD official certifies the entire record and submits recommended findings and a proposed decision to the responsible DoD official pursuant to paragraph (s)(1)(ii) of this section, or if the responsible DoD official conducts the hearing, after giving the recipient a reasonable opportunity to file a brief or other written statement of its contentions, the responsible DoD official shall render a final decision that conforms to paragraph (s)(4) of this section.

(4) *Contents of decisions.* Each decision of a hearing examiner or responsible DoD official shall state all findings and conclusions and identify each violation of this part. The final decision may contain an order pursuant to paragraph (q) of this section, providing for the suspension or termination of or refusal to grant or continue all or some of the Federal financial assistance under the program or activity involved and contain terms, conditions, and other provisions that are consistent with and intended to achieve compliance with this Directive.

(5) *Notice of decisions and certifications.* The responsible DoD official shall provide a copy of any certified record of a hearing and any initial or final decision to the recipient and the complainant, if any.

(6) *Review by the Secretary of Defense.* The responsible DoD official shall transmit promptly any final decision that orders a suspension, termination, or denial of Federal financial assistance through the ASD(MRA&L) to the Secretary of Defense. The Secretary may;

(i) Approve the decision;

(ii) Vacate the decision; or

(iii) Remit or mitigate any sanction imposed.

(t) *Restoring eligibility for financial assistance.* (1) A recipient that is affected adversely by a final decision issued under paragraph (s) of this section, may at any time request the responsible DoD official to restore fully its eligibility to receive Federal financial assistance.

(2) If the responsible DoD official determines that the information supplied by the recipient demonstrates that it has satisfied the terms and conditions of the order entered pursuant to paragraph (s) of this section, and that is complying with and has provided reasonable assurance that it will continue to comply with this part the responsible DoD official shall restore such eligibility immediately.

(3) If the responsible DoD official denies a request for restoration of eligibility, the recipient may submit a written request for a hearing that states

why it believes the responsible DoD official erred in denying the request. Following such a written request, the recipient shall be given an expeditious hearing under rules of procedure issued by the responsible DoD official to determine whether the requirements described in paragraph (t)(2) of this section, have been met. While any such proceedings are pending, the sanctions imposed by the order issued under paragraph (s) of this section, shall remain in effect.

(u) *Interagency cooperation and delegation.* (1) When several recipients are receiving assistance for the same or similar purposes from a DoD Component and another Federal agency, the DoD Component shall notify the ASD (MRA&L), or designee. Such notification shall be in writing and shall contain:

(i) A description of the programs and activities involved.

(ii) A statement of the amount of money expended on the programs and activities in the previous and current fiscal year by the DoD Component and the agency.

(iii) A list of the known primary recipients.

(2) The ASD(MRA&L), or designee, shall attempt to negotiate with the Federal agency a written delegation agreement that designates the agency or the DoD Component as the primary agency for purposes of ensuring compliance with section 504 of Public Law 93–112, as amended, and this part depending upon which of them administers a larger financial assistance program with the common recipients and other relevant factors. If necessary, the agreement shall establish procedures to ensure the enforcement of section 504 of Public Law 93–112, as amended, and this part. The ASD(MRA&L), or designee, shall provide written notification to recipients of an agreement reached under this subsection.

(3) When several recipients are receiving assistance for the same or similar purposes from two or more DoD Components, the DoD Components may negotiate a proposed written delegation agreement that:

(i) Assigns responsibility for ensuring that the recipient complies with this part to one of the DoD Components.

(ii) Provides for the notification to recipients and the responsible program officials of the DoD Components involved of the assignment of enforcement responsibility.

(4) No delegation agreement reached in accordance with paragraph (u)(3) to this section shall be effective until it is approved by the ASD(MRA&L), or designee.

(5) When possible, existing delegation agreements relating to title VI of the Civil Rights Act of 1964 shall be amended to provide for the enforcement of this part.

(6) Any DoD Component conducting a compliance review or investigating a complaint of an alleged violation by a recipient shall notify any other affected agency or DoD Component through the ASD(MRA&L), or designee, upon discovery that the agency or DoD Component has jurisdiction over the program or activity in question and shall subsequently inform it of the finding made. Such reviews or investigations may be conducted on a joint basis.

(7) When a compliance review or complaint investigation under this part reveals a possible violation of Executive Order 11246, titles VI or VII of the Civil Rights Act of 1964, or any other Federal law, the DoD Component shall notify the appropriate agency, through the ASD(MRA&L), or designee.

(v) *Coordination with sections 502 and 503.* (1) DoD Components shall use DoD 4270.1–M and Department of the Army, Office of the Chief of Engineers, Manual EM 1110–1–103, in developing requirements for the accessibility of facilities. If DoD Components encounter issues with respect to section 502 of the Rehabilitation Act of 1973, as amended, that are not covered by these publications, the ASD(MRA&L), or designee, may be consulted. If necessary, the ASD(MRA&L), or designee, shall consult with the Architectural and Transportation Barriers Compliance Board in resolving such problems.

(2) DoD Components may advise recipients to consult directly with the Architectural and Transportation Barriers Compliance Board in developing accessibility criteria.

(3) DoD Components shall coordinate enforcement actions relating to the accessibility of facilities with the Architectural and Transportation Barriers Compliance Board and shall notify the ASD(MRA&L), or designee, of such coordination.

(4) If a recipient is also a Federal contractor subject to section 503 of the Rehabilitation Act of 1973, as amended, and the regulations thereunder (41 CFR part 60–741) and if a DoD Component has reason to believe that the recipient is in violation thereof, the DoD Component shall coordinate enforcement actions with the Department of Labor, Office of Federal Contract Compliance Programs. The DoD Component shall notify the ASD(MRA&L), or designee, of such coordination.

**§56.10 Ensuring compliance with this part in programs and activities conducted by the Department of Defense.**

(a) *Supplementary guidelines.* (1) Whenever necessary, the ASD(MRA&L), or designee, shall publish supplementary guidelines for programs and activities that are conducted by DoD Components and that are subject to this Directive. Prior to their issuance, the ASD(MRA&L), or designee, shall submit supplementary guidelines prepared pursuant to this subsection to the Coordination and Review Section, Civil Rights Division, Department of Justice, for review.

(2) The heads of DoD Components, or designees, shall be responsible for keeping the supplementary guidelines described in this section current and accurate. When a DoD Component head determines that a program or activity should be added to or deleted from the guidelines, that official shall notify the ASD(MRA&L), or designee, in writing.

(b) *Staff responsibilities.* The ASD(MRA&L), or designee, shall determine DoD Component compliance with this part as it pertains to programs and activities that are conducted by DoD Components and are subject to this part.

(c) *Filing of complaints.* (1) Complaints of discrimination in a program or activity conducted by a DoD Component may be filed directly with the ASD(MRA&L), or designee.

(2) DoD Components shall develop procedures, such as posters or other devices, to notify participants in the programs and activities listed in §56.7(c) of their right to be free of discrimination because of handicap in those programs and activities and of their right to file complaints of discrimination with the ASD(MRA&L), or designee.

(d) *Investigations of complaints.* (1) The ASD(MRA&L), or designee, shall investigate complaints of discrimination in programs and activities that are conducted by DoD Components and are subject to this part.

(2) A case record of each investigation shall be compiled in accordance with §56.9(j)(2).

(e) *Results of investigations.* If the complaint investigation results in a determination by the ASD(MRA&L), or designee, that a DoD Component's program or activity is not complying with §56.9, the ASD(MRA&L), or designee, shall proceed as prescribed in §56.9 (n) through (v). Hearings prescribed under §56.9(r) however, need not be conducted. If the ASD(MRA&L), or designee, determines that the DoD Component is in compliance, the ASD(MRA&L), or designee, shall notify the complainant within 15 calendar days of such determination.

(f) *Written notice.* If an investigative report concludes that there has been a violation of this part in a program or activity conducted by a DoD Component and the ASD(MRA&L), or designee, accepts that conclusion, that official shall issue to the head of the DoD Component a written notice describing the apparent violation, the corrective actions necessary to achieve compliance, and a suspense date for completion of the corrective actions.

(g) *Effecting compliance.* When necessary to overcome the effects of discrimination in violation of this part the ASD(MRA&L), or designee, may require a DoD Component to take remedial action similar to that in §56.9(n)(2).

(h) *Employment.* DoD Components that conduct Federal programs or activities covered by this part that involve employment of civilian persons to conduct such a program or activity must comply with section 501 of the Rehabilitation Act of 1973, as amended,

and the implementing rules and regulations of the EEOC.

# PART 57—PROVISION OF EARLY INTERVENTION AND SPECIAL EDUCATION SERVICES TO ELIGIBLE DOD DEPENDENTS

Sec.
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APPENDIX H TO PART 57—MONITORING

AUTHORITY: 20 U.S.C. 921 and 1400.

SOURCE: 69 FR 32662, June 10, 2004, unless otherwise noted.

## § 57.1 Purpose.

This part:

(a) Implements policy, assigns responsibilities, and prescribes procedures under 20 U.S.C. chapter 33 and 20 U.S.C. 921–932, 10 U.S.C. 2164, DoD Directive 1342.6[1], DoD Directive 1342.21, DoD Instruction 1342.26, DoD Directive 1342.13, and DoD Directive 5105.4 for the following:

(1) Provision of early intervention services (EIS) to infants and toddlers with disabilities (birth through 2 years, inclusive) and their families, and special education and related services (hereafter referred to as ''special services'') to children with disabilities (ages 3 through 21 years, inclusive) entitled to receive special services from the Department of Defense in accordance with 10 U.S.C. 2164, DoD Directive 1342.6, DoD Directive 1342.21, DoD Instruction 1342.26, DoD Directive 1342.13, and DoD Directive 5105.4.

(2) Implementation of a comprehensive, multidisciplinary program of EIS for infants and toddlers (birth through 2 years, inclusive) with disabilities, and their families.

(3) Provision of a free, appropriate public education (FAPE) including special education and related services for children with disabilities enrolled in the DoD school systems, as specified in their Individualized Educational Programs (IEP).

(4) Monitoring of DoD programs providing EIS, special education, and related services for compliance with this part.

(5) Establishment of a DoD Advisory Panel (DoD-AP) on Early Intervention, Special Education, and Related Services and a DoD Coordinating Committee (DoD-CC) on Early Intervention, Special Education, and Related Services in accordance with DoD Directive 5105.4.

(b) Authorizes implementing instructions, a DoD Manual entitled ''Standard Operating Procedures for the Provision of Early Intervention, Special Education and Related Services,'' consistent with DoD 5025.1–M and DoD forms consistent with DoD 8910.1–M, DoD Instruction 7750.7, and Hospital Accreditation Standards.

## § 57.2 Applicability and scope.

This part:

(a) Applies to the Office of the Secretary of Defense, the Military Departments, the Chairman of the Joint Chiefs of 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 in the Department of Defense (hereafter referred to collectively as ''the DoD Components'').

[1] All unclassified DoD Directives, DoD Instructions, and DoD Publications mentioned in this part may be obtained via Internet at *http://www.dticmil/whs/directives*.

(b) Applies to infants, toddlers, and children receiving or entitled to receive special services from the Department of Defense, and their parents.

(c) Applies to DoD Domestic Dependents Elementary and Secondary Schools (DDESS) operated by the Department of Defense within the continental United States, Alaska, Hawaii, and territories, commonwealths and possessions of the United States (hereafter referred to as ''domestic'').

(d) Applies to DoD Dependents Schools (DoDDS) operated by the Department of Defense outside the continental United States and its territories, commonwealths and possessions (hereafter referred to as ''overseas'').

(e) Does not create any rights or remedies and may not be relied upon by any person, organization, or other entity to allege a denial of such rights or remedies.

**§57.3 Definitions.**

(a) *Age of Majority*. The age when a person acquires the rights and responsibilities of being an adult. For purposes of this part, a child attains majority at age 18.

(b) *Alternate Assessment*. A process that measures the performance of students with disabilities unable to participate, even with accommodations provided, in system-wide assessment.

(c) *Alternative Educational Setting (AES)*. A temporary setting other than the school (*e.g.*, home, installation library) normally attended by the student. The interim AES shall:

(1) Be selected so as to enable the child to continue to progress in the general curriculum, although in another setting, and to continue to receive those services and modifications, including those described in the child's current IEP, that shall enable the child to meet the goals set out in that IEP; and

(2) Include services and modifications to address the behavior that resulted in the child being considered or placed in an AES.

(d) *Assessment*. The ongoing procedures used by appropriately qualified personnel throughout the period of a child's eligibility determination to identify the child's unique needs; the family's strengths and needs related to development of the child; and the nature and extent of early intervention services that are needed by the child and the child's family to meet their unique needs.

(e) *Assistive Technology Device*. Any item, piece of equipment, or product system, whether acquired commercially or off the shelf, modified, or customized, that is used to increase, maintain, or improve functional capabilities of children with disabilities.

(f) *Assistive Technology Service*. Any service that directly assists an individual with a disability in the selection, acquisition, or use of an assistive technology device. The term includes the following:

(1) The evaluation of the needs of an individual with a disability, including a functional evaluation in the individual's customary environment.

(2) Purchasing, leasing, or otherwise providing for the acquisition of assistive technology devices by individuals with disabilities.

(3) Selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing assistive technology devices.

(4) Coordinating and using other therapies, interventions, or services with assistive technology devices, such as those associated with existing educational and rehabilitative plans and programs.

(5) Training or technical assistance for an individual with disabilities or the family of an individual with disabilities.

(6) Training or technical assistance for professionals (including individuals providing educational rehabilitative services), employers, or other individuals who provide services to, employ, or are otherwise substantially involved in the major life functions of an individual with a disability.

(g) *Attention Deficit Disorder (ADD)*. As used in this part, encompasses attention-deficit hyperactivity disorder (ADHD) and ADD without hyperactivity. The essential features of the disorder are developmentally inappropriate degrees of inattention, impulsiveness, and in some instances, hyperactivity.

(1) Either diagnosis must be made by appropriate medical personnel.

(2) ADD and ADHD are not specific disabling conditions under this part, although a child with either may be eligible for EIS and/or special education and related services as ''other health impaired'' by reason of the disability if the child's alertness or vitality is sufficiently compromised. The majority of children with ADD/ADHD generally do not meet the eligibility criteria as outlined in this part.

(h) *Audiology*. A service that includes the following:

(1) Identification of children with hearing loss.

(2) Determination of the range, nature, and degree of hearing loss, and communication functions including referral for medical or other professional attention for the habilitation of hearing.

(3) Provision of habilitative activities, such as language habilitation, auditory training, speech-reading (lip-reading), hearing evaluation, and speech conservation.

(4) Creation and administration of programs for the prevention of hearing loss.

(5) Counseling and guidance of children concerning the prevention of hearing loss.

(6) Determination of a child's need for group and individual amplification, selecting and fitting an aid, and evaluating the effectiveness of amplification.

(i) *Autism*. A developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age 3 years that adversely affects educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. The term does not apply if a child's educational performance is adversely affected primarily because the child has an emotional disturbance as defined in paragraph (z) of this section.

(j) *Case Study Committee (CSC)*. A school-level team comprised of, among others, an administrator or designee who is qualified to supervise or provide special education, one or more of the child's regular education teachers, one or more special education teachers, parents, and related service providers (if appropriate) who do the following:

(1) Oversee screening and referral of children who may require special education.

(2) Oversee the multidisciplinary evaluation of such children.

(3) Determine the eligibility of children for special education and related services.

(4) Formulate individualized instruction as reflected in an IEP, in accordance with this part.

(5) Monitor the development, review, and revision of IEPs.

(k) *Child-Find*. An outreach program used by the DoD school systems, the Military Departments, and the other DoD Components to seek and identify children from birth to age 21, inclusive, who may require EIS or special education and related services. Child-find includes all children who are eligible to attend a DoD school. Child-find activities include the dissemination of information to military members and DoD employees, the identification and screening of children, and the use of referral procedures.

(l) *Children with Disabilities (Ages 3 through 21, Inclusive)*. Children, before graduation from high school or completion of the General Education Degree, who have one or more impairments, as determined by a CSC and who need and qualify for special education and related services.

(m) *Consent*. The permission obtained from the parent or legal guardian. This includes the following:

(1) The parent is fully informed of all information about the activity for which consent is sought in the native language or in another mode of communication, if necessary.

(2) The parent understands and agrees in writing to the implementation of the activity for which permission is sought. That consent describes the activity, lists the child's records (if any) to be released outside the Department of Defense, and specifies to whom the records shall be sent.

(i) The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at anytime.

(ii) If a parent revokes consent, that revocation is not retroactive (*i.e.*, it does not negate an action that has occurred after the consent was given and before the cognizant authorities received the notice of revocation of the consent).

(n) *Continuum of Alternative Placements*. Instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; includes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

(o) *Counseling Service*. A service provided by a qualified social worker, psychologist, guidance counselor, or other qualified personnel.

(p) *Deaf-Blindness*. Concomitant hearing and visual impairments, the combination of which causes such severe communication, developmental, and educational problems that it cannot be accommodated in special education programs solely for children with deafness or blindness.

(q) *Deafness*. A hearing loss or deficit so severe that it impairs a child's ability to process linguistic information through hearing, with or without amplification, and affects the child's educational performance adversely.

(r) *Developmental Delay*. A significant discrepancy in the actual functioning of an infant, toddler, or child, birth through age 5, when compared with the functioning of a non-disabled infant, toddler, or child of the same chronological age in any of the following areas: physical, cognitive, communication, social or emotional, and adaptive development as measured using standardized evaluation instruments and confirmed by clinical observation and judgment. A child classified with a developmental delay before the age of 5 may maintain that eligibility classification through the age 8.

(1) *A Significant Discrepancy*. The child is experiencing a developmental delay as measured by diagnostic instruments and procedures of 2 standard deviations below the mean in at least one area, or by a 25 percent delay in at least one area on assessment instruments that yield scores in months, or a developmental delay of 1.5 standard deviations below the mean in two or more areas, or by a 20 percent delay on assessment instruments that yield scores in months in two or more of the following areas of development: cognitive, physical, communication, social or emotional, or adaptive.

(2) *High Probability for Developmental Delay*. An infant or toddler, birth through age 2, with a diagnosed physical or mental condition, such as chromosomal disorders and genetic syndromes, that places the infant or toddler at substantial risk of evidencing a developmental delay without the benefit of EIS.

(s) *DoD Dependents Schools (DoDDS)*. The overseas schools (kindergarten through grade 12) established by 20 U.S.C. 921. The DoDDS are operated under DoD Directive 1342.6.

(t) *DoD Domestic Dependent Elementary and Secondary Schools (DDESS)*. The schools (pre-kindergarten through grade 12) established by 20 U.S.C. 921–932. The DoD DDESS are operated under DoD Directive 1342.21.

(u) *DoD School Systems*. The DDESS and DoDDS school systems.

(v) *Early Identification and Assessment*. The implementation of a formal plan for identifying a disability as early as possible in a child's life.

(w) *Early Intervention Services*. Developmental services that meet the following criteria:

(1) Are provided under the supervision of a Military Medical Department.

(2) Are provided using Military Health Services System resources at no cost to the parents.

(3) Evaluation, Individualized Family Service Plan (IFSP) development and revision, and Service coordination services are provided at no cost to the infant's or toddler's parents. Parents may be charged incidental fees (identified in Service guidance) that are normally charged to infants, toddlers, and children without disabilities or to their parents.

(4) Are designed to meet the developmental needs of an infant or toddler with a disability in any one or more of the following areas:

(i) Physical.

(ii) Cognitive.

(iii) Communication.

(iv) Social or emotional.

(v) Adaptive development.

(5) Meet the standards developed or adopted by the Department of Defense.

(6) Are provided by qualified personnel including early childhood special educators, speech and language pathologists and audiologists, occupational therapists, physical therapists, psychologists, social workers, nurses, nutritionists, family therapists, orientation and mobility specialists, pediatricians and other physicians, and certified and supervised paraprofessional assistants, such as certified occupational therapy assistants.

(7) Maximally, are provided in natural environments including the home and community settings where infants and toddlers without disabilities participate.

(8) Are provided in conformity with an IFSP.

(9) Developmental services include, but are not limited to, the following services: Family training, counseling, and home visits; special instruction; speech pathology and audiology; occupational therapy; physical therapy; psychological services; Service coordination services; medical services only for diagnostic or evaluation purposes; early identification, screening and assessment services; vision services; and social work services. Also included are assistive technology devices and assistive technology services; health services necessary to enable the infant or toddler to benefit from the above EIS; and transportation and related costs necessary to enable an infant or toddler and the family to receive EIS.

(x) *Educational and Developmental Intervention Services (EDIS).* Programs operated by the Military Medical Departments to provide EIS and related services in accordance with this part.

(y) *Eligible.* Children who meet the age, command sponsorship, and dependency requirements established by 10 U.S.C. 2164, DoD Directive 1342.6, DoD Directive 1342.13, and DoD Directive 5105.4.

(1) In DoDDS, children without disabilities who meet these requirements, and are ages 5 to 21 years, inclusive, are entitled to receive educational instruction.

(2) In DDESS, children without disabilities who meet these requirements, and are ages 4 to 21 years, inclusive, are entitled to receive educational instruction.

(3) In both DoDDS and DDESS, children with disabilities, ages 3 through 21 years, inclusive, are authorized to receive educational instruction. Additionally, an eligible infant or toddler with disabilities is a child from birth through age 2 years who meets either the DoDDS or DDESS eligibility requirements except for the age requirement.

(z) *Emotional Disturbance.* A condition confirmed by clinical evaluation and diagnosis and that, over a long period of time and to a marked degree, adversely affects educational performance, and exhibits one or more of the following characteristics:

(1) Inability to learn that cannot be explained by intellectual, sensory, or health factors.

(2) Inability to build or maintain satisfactory interpersonal relationships with peers and teachers.

(3) Inappropriate types of behavior or feelings under normal circumstances.

(4) A tendency to develop physical symptoms or fears associated with personal or school problems.

(5) A general pervasive mood of unhappiness or depression. Includes children who are schizophrenic, but does not include children who are socially maladjusted unless it is determined they are seriously emotionally disturbed.

(aa) *Evaluation.* The synthesis of assessment information by a multidisciplinary team used to determine whether a particular child has a disability, the type and extent of the disability, and the child's eligibility to receive early intervention or special education and/or related services.

(bb) *Family Training, Counseling, and Home Visits.* Services provided, as appropriate, by social workers, psychologists, and other qualified personnel to assist the family of a child eligible under this part in understanding the special needs of the child and enhancing the child's development.

(cc) *Free Appropriate Public Education (FAPE).* Special education and related services that:

(1) Are provided at no cost to parents of a child with a disability, and are under the general supervision and direction of the DoDDS or DDESS, including children with disabilities who have been suspended or expelled from school.

(2) Are provided in the least restrictive environment at a preschool, elementary, or secondary school.

(3) Are provided in conformity with an IEP.

(4) Meet the requirements of this part.

(dd) *Functional Behavioral Assessment*. A process for identifying the events that predict and maintain patterns of problem behavior.

(ee) *Functional Vocational Evaluation*. A student-centered appraisal process for vocational development and career decision-making. It allows students, educators, and others to gather information about such development and decision-making. Functional vocational evaluation includes activities for transitional, vocational, and career planning; instructional goals; objectives; and implementation.

(ff) *General Curriculum*. The curriculum adopted by the DoD school systems for all children from preschool through secondary school. To the extent applicable to an individual child with a disability, the general curriculum can be used in any educational environment along a continuum of alternative placements, described in paragraph (l) of this section.

(gg) *Health Services*. Services necessary to enable an infant or toddler to benefit from the other EIS being received under this part. That term includes the following:

(1) Services such as clean intermittent catheterization, tracheotomy care, tube feeding, changing of dressings or colostomy collection bags, and other health services.

(2) Consultation by physicians with other service providers about the special healthcare needs of infants and toddlers with disabilities that need to be addressed in the course of providing other EIS.

(3) That term does not include the following:

(i) Services that are surgical or solely medical.

(ii) Devices necessary to control or treat a medical condition.

(iii) Medical services routinely recommended for all infants or toddlers.

(hh) *Hearing Impairment*. An impairment in hearing, whether permanent or fluctuating, that adversely affects a child's educational performance, but is not included under the definition of deafness.

(ii) *Illegal Drug*. Means a controlled substance as identified in the Controlled Substances Act (21 U.S.C. 812(c)) but does not include a substance that is legally possessed or used under the supervision of a licensed healthcare professional or that is legally possessed or used under any other authority under that Act or under any other provision of Federal law.

(jj) *Independent Evaluation*. An evaluation conducted by a qualified examiner who is not employed by either the DoD school or EDIS that conducted the initial evaluation.

(kk) *Individualized Education Program (IEP)*. A written document defining specially designed instruction for a student with a disability, ages 3 through 21 years, inclusive. That document is developed and implemented in accordance with appendix B of this part.

(ll) *Individualized Family Service Plan (IFSP)*. A written document for an infant or toddler, age birth through 2 years, with a disability and the family of such infant or toddler that is developed, reviewed, and revised in accordance with appendix A of this part.

(mm) *Infants and Toddlers with Disabilities*. Children, ages birth through 2 years, who need EIS because they:

(1) Are experiencing a developmental delay, defined at paragraph (r) of this section.

(2) Have a high probability for developmental delay as defined at paragraph (r)(2) of this section.

(nn) *Inter-Component*. Cooperation among DoD organizations and programs, ensuring coordination and integration of services to infants, toddlers, children with disabilities, and their families.

(oo) *Medical Services*. Those evaluative, diagnostic, therapeutic, and supervisory services provided by a licensed and/or credentialed physician to

assist CSCs and to implement IEPs. Medical services include diagnosis, evaluation, and medical supervision of related services that, by statute, regulation, or professional tradition, are the responsibility of a licensed and credentialed physician.

(pp) *Meetings to Determine Eligibility or Placement of a Child*. All parties to such a meeting shall appear personally at the meeting site on issuance of written notice and establishment of a date convenient to the concerned parties. When a necessary participant is unable to attend, electronic communication suitable to the occasion may be used to involve the unavailable party. Parents generally shall be responsible for the cost of travel to personally attend meetings about the eligibility or placement of their child.

(qq) *Mental Retardation*. Significantly sub-average general intellectual functioning, existing concurrently with deficits in adaptive behavior. This disability is manifested during the developmental period and adversely affects a child's educational performance.

(rr) *Multidisciplinary*. The involvement of two or more disciplines or professions in the integration and coordination of services, including evaluation and assessment activities, and development of an IFSP or an IEP.

(ss) *Native Language*. When used with reference to an individual of limited English proficiency, the home language normally used by such individuals, or in the case of a child, the language normally used by the parents of the child.

(tt) *Natural Environments*. Settings that are natural or normal (*e.g.*, home or day care setting) for the infant, toddler, or child's same-age peers who have no disability.

(uu) *Non-DoD Placement*. An assignment by the DoD school system of a child with a disability to a non-DoD school or facility. The term does not include a home schooling arrangement, except pursuant to an IEP.

(vv) *Non-DoD School or Facility*. A public or private school or other institution not operated by the Department of Defense. That term includes DDESS special contractual arrangements.

(ww) *Nutrition Services*. Those services to infants and toddlers that include, but are not limited to, the following:

(1) Conducting individual assessments in nutritional history and dietary intake; anthropometric, biochemical, and clinical variables; feeding skills and feeding problems; and food habits and food preferences.

(2) Developing and monitoring plans to address the nutritional needs of infants and toddlers eligible for EIS.

(3) Making referrals to community resources to carry out nutrition goals.

(xx) *Occupational Therapy*. Services provided by a qualified occupational therapist or a certified occupational therapist assistant (under the supervision of a qualified occupational therapist). That term includes services to address the functional needs of children (birth through age 21, inclusive) related to adaptive development; adaptive behavior and play; and sensory, motor, and postural development. Those services are designed to improve the child's functional ability to perform tasks in home, school, and community settings, and include the following:

(1) Identification, assessment, and intervention.

(2) Adaptation of the environment and selection, design, and fabrication of assistive and orthotic devices to help development and promote the acquisition of functional skills.

(3) Prevention or minimization of the impact of initial or future impairment, delay in development, or loss of functional ability.

(yy) *Orthopedic Impairment*. A severe orthopedic impairment that adversely affects a child's educational performance. That term includes congenital impairments such as club foot or absence of some member; impairments caused by disease, such as poliomyelitis and bone tuberculosis; and impairments from other causes such as cerebral palsy, amputations, and fractures or burns causing contractures.

(zz) *Orientation and Mobility*. Services provided to blind or visually impaired students by qualified personnel to enable those students to attain systematic orientation to and safe movement within their environments in school, home and community; and includes teaching students the following, as appropriate:

(1) To understand spatial and environmental concepts and use of information received by the senses (such as sound, temperature and vibrations) orientation and mobility to establish, maintain, or regain orientation and line of travel (*e.g.*, using sound at a traffic light to cross the street);

(2) To use the long cane to supplement visual travel skills or as a tool for safely negotiating the environment for students with no available travel vision;

(3) To understand and use remaining vision and distance low vision aids; and other concepts, techniques, and tools.

(aaa) *Other Health Impairment*. Limited strength, vitality, or alertness due to chronic or acute health problems that adversely affect a child's educational performance. Such impairments may include ADD, heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle cell anemia, hemophilia, seizure disorder, lead poisoning, leukemia, or diabetes.

(bbb) *Parent*. The biological father or mother of a child; a person who, by order of a court of competent jurisdiction, has been declared the father or mother of a child by adoption; the legal guardian of a child; or a person in whose household a child resides, if such person stands in loco parentis to that child and contributes at least one-half of the child's support.

(ccc) *Parent Counseling and Training*. A service that assists parents in understanding the special needs of their child's development and that provides them with information on child development and special education.

(ddd) *Personally Identifiable Information*. Information that would make it possible to identify the infant, toddler, or child with reasonable certainty. Information includes:

(1) The name of the child, the child's parent, or other family member; the address of the child;

(2) A personal identifier, such as the child's social security number or student number; or

(3) A list of personal characteristics or other information that would make it possible to identify the child with reasonable certainty.

(eee) *Physical Therapy*. Services provided by a qualified physical therapist or a certified physical therapist (under the supervision of a qualified physical therapist). That term includes services to children (birth through age 21, inclusive) to address the promotion of sensorimotor function through enhancement of musculoskeletal status, neurobehavioral organization, perceptual and motor development, cardiopulmonary status, and effective environmental adaptation. Those services include the following:

(1) Screening, evaluation, and assessment to identify movement dysfunction.

(2) Obtaining, interpreting, and integrating information to appropriate program planning to prevent, alleviate, or compensate for movement dysfunction and related functional problems.

(3) Providing individual and group services or treatment to prevent, alleviate, or compensate for movement dysfunction and related functional problems.

(fff) *Primary Referral Source*. Parents and the DoD Components, including child development centers, pediatric clinics, and newborn nurseries, that suspect an infant or toddler has a disability and bring the child to the attention of the EDIS.

(ggg) *Psychological Services*. Services that include the following:

(1) Administering psychological and educational tests and other assessment procedures.

(2) Interpreting test and assessment results.

(3) Obtaining, integrating, and interpreting information about a child's behavior and conditions relating to learning.

(4) Consulting with other staff members, including service providers, to plan programs to meet the special needs of children, as indicated by psychological tests, interviews, and behavioral evaluations.

(5) Planning and managing a program of psychological services, including psychological counseling for children and parents, family counseling, consultation on child development, parent training, and education programs.

(hhh) *Public Awareness Program*. Activities or print materials focusing on early identification of infants and toddlers with disabilities. Materials may

include information prepared and disseminated by a military medical department to all primary referral sources and information for parents on the availability of EIS. Procedures to determine the availability of information on EIS to parents are also included in that program.

(iii) *Qualified.* A person who meets the DoD-approved or recognized certification, licensing, or registration requirements or other comparable requirements in the area in which the person provides special education or related services or EIS to an infant, toddler, or child with a disability.

(jjj) *Recreation.* A related service that includes the following:

(1) Assessment of leisure function.

(2) Therapeutic recreational activities.

(3) Recreational programs in schools and community agencies.

(4) Leisure education.

(kkk) *Rehabilitation Counseling.* Services provided by qualified personnel in individual or group sessions that focus specifically on career development, employment preparation, achieving independence, and integration in the workplace and community of the student with a disability. The term also includes vocational rehabilitation services provided to a student with disabilities by vocational rehabilitation programs funded under the Rehabilitation Act of 1973, as amended.

(lll) *Related Services.* Transportation and such developmental, corrective, and other supportive services, as required, to assist a child, age 3 through 21 years, inclusive, with a disability to benefit from special education under the child's IEP. The term includes speech-language pathology and audiology, psychological services, physical and occupational therapy, recreation including therapeutic recreation, early identification and assessment of disabilities in children, counseling services including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluative purposes. That term also includes school health services, social work services in schools, and parent counseling and training. The sources for those services are school, community, and medical treatment facilities.

(mmm) *Related Services Assigned to the Military Medical Departments Overseas.* Services provided by EDIS to DoDDS students, under the development or implementation of an IEP, necessary for the student to benefit from special education. Those services may include medical services for diagnostic or evaluative purpose, social work, community health nursing, dietary, occupational therapy, physical therapy, audiology, ophthalmology, and psychological testing and therapy.

(nnn) *School Health Services.* Services provided by a qualified school nurse or other qualified person.

(ooo) *Separate Facility.* A school or a portion of a school, regardless of whether it is operated by the Department of Defense, attended exclusively by children with disabilities.

(ppp) *Service Coordination.* Activities of a service coordinator to assist and enable an infant or toddler and the family to receive the rights, procedural safeguards, and services that are authorized to be provided under appendix B of this part. Those activities include the following:

(1) Coordinating the performance of evaluations and assessments.

(2) Assisting families to identify their resources, concerns, and priorities.

(3) Facilitating and participating in the development, review, and evaluation of IFSPs.

(4) Assisting in identifying available service providers.

(5) Coordinating and monitoring the delivery of available services.

(6) Informing the family of support or advocacy services.

(7) Coordinating with medical and health providers.

(8) Facilitating the development of a transition plan to preschool services.

(qqq) *Service Provider.* Any individual who provides services listed in an IEP or an IFSP.

(rrr) *Social Work Services in Schools.* A service that includes the following:

(1) Preparing a social or developmental history on a child with a disability.

(2) Counseling a child and the family on a group or individual basis.

(3) Working with those problems in a child's home, school, or community that adversely affect adjustment in school.

(4) Using school and community resources to enable a child to benefit from the educational program.

(sss) *Special Education*. Specially designed instruction, including physical education, which is provided at no cost to the parent or guardians to meet the unique needs of a child with a disability, including instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings.

(1) That term includes speech-language pathology or any other related service if the service consists of specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability.

(2) That term also includes vocational education if it consists of specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability.

(3) *At No Cost*. For a child eligible to attend a DoD school without paying tuition, specially designed instruction and related services are provided without charge. Incidental fees normally charged to non-disabled students or their parents as a part of the regular educational program may be imposed.

(4) *Physical Education*. The development of the following:

(i) Physical and motor fitness.

(ii) Fundamental motor skills and patterns.

(iii) Skills in aquatics, dance, and individual and group games and sports, including intramural and lifetime sports.

(iv) A program that includes special physical education, adapted physical education, movement education, and motor development.

(ttt) *Specially Designed Instruction*. That term means adapting content, methodology or delivery of instruction to:

(1) Address the unique needs of an eligible child under this part; and

(2) Ensure access of the child to the general curriculum, so that she or he can meet the educational standards within the DoD school systems.

(uuu) *Specific Learning Impairment*. A disorder in one or more of the basic psychological processes involved in understanding or in using spoken or written language that may manifest itself as an imperfect ability to listen, think, speak, read, write, spell, remember, or do mathematical calculations. That term includes such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. The term, commonly called, ''specific learning disability,'' does not include learning problems that are primarily the result of visual, hearing, or motor disabilities; mental retardation; emotional disturbance; or environmental, cultural, or economic differences.

(vvv) *Speech and Language Impairments*. A communication disorder, such as stuttering, impaired articulation, voice impairment, or a disorder in the receptive or expressive areas of language that adversely affects a child's educational performance.

(www) *Speech-Language Pathology Services*. Services provided by a qualified speech/language therapist or a certified speech/language assistant (under the supervision of a qualified speech/language therapist), that include the following:

(1) Identification of children with speech or language impairments.

(2) Diagnosis and appraisal of specific speech or language impairments.

(3) Referral for medical or other professional attention for the habilitation or prevention of speech and language impairments.

(4) Provision of speech and language services for the habilitation or prevention of communicative impairments.

(5) Counseling and guidance of children, parents, and teachers for speech and language impairments.

(xxx) *Supplementary Aids and Services*. Include aids, services, and other supports that are provided in regular education classes or other educational-related settings to enable children with disabilities to be educated with non-disabled children to the maximum extent appropriate.

(yyy) *Transition Services*. (1) A coordinated set of activities for a student

that may be required to promote movement from early intervention, preschool, and other educational programs into different educational settings or programs.

(2) For students 14 years of age and older, transition services are designed in an outcome-oriented process that promotes movement from school to post-school activities; including, related services, post-secondary education, vocational training, integrated employment; and also including supported employment, continuing and adult education, adult services, independent living, or community participation. The coordinated set of activities are based on the individual student's needs, considering the student's preferences and interests, and include instruction, community experiences, the development of employment and other post-school adult living objectives, and acquisition of daily living skills and functional vocational evaluation.

(zzz) *Transportation*. A service that includes the following:

(1) Transportation and related costs for EIS includes the cost of travel (*e.g.*, mileage or travel by taxi, common carrier, or other means) and other costs (*e.g.*, tolls and parking expenses) that are necessary to enable an eligible child and the family to receive EIS.

(2) Services rendered under the IEP of a child with a disability:

(i) Travel to and from school and between schools, including travel necessary to permit participation in educational and recreational activities and related services.

(ii) Travel in and around school buildings.

(3) Specialized equipment, including special or adapted buses, lifts, and ramps, if required to provide transportation for a child with a disability.

(aaaa) *Traumatic Brain Injury*. An acquired injury to the brain caused by an external physical force resulting in total or partial functional disability or psychosocial impairment that adversely affects educational performance. That term includes open or closed head injuries resulting in mild, moderate, or severe impairments in one or more areas including cognition, language, memory, attention, reasoning, abstract thinking, judgment, problem solving, sensory, perceptual and motor abilities, psychosocial behavior, physical function, information processing, and speech. That term does not include brain injuries that are congenital or degenerative, or brain injuries that are induced by birth trauma.

(bbbb) *Vision Services*. Services necessary to habilitate or rehabilitate the effects of sensory impairment resulting from a loss of vision.

(cccc) *Visual Impairment*. An impairment of vision that, even with correction, adversely affects a child's educational performance. That term includes both partial sight and blindness.

(dddd) *Vocational Education*. Organized educational programs for the preparation of individuals for paid or unpaid employment or for additional preparation for a career requiring other than a baccalaureate or advanced degree.

(eeee) *Weapon*. Items carried, presented, or used in the presence of other persons in a manner likely to make reasonable persons fear for their safety. They include, but are not limited to, guns, look-alike (replica) guns, knives, razors, box or carpet cutters, slingshots, nunchucks, any flailing instrument such as a fighting chain or heavy studded or chain belt, objects designed to project a missile, explosives, mace, pepper spray, or any other similar propellant, or any other object concealed, displayed, or brandished in a manner that reasonably provokes fear.

## § 57.4 Policy.

It is DoD policy that:

(a) Eligible infants and toddlers with disabilities and their families shall be provided EIS consistent with appendix A of this part.

(b) Eligible children with disabilities, ages 3 through 21 years, inclusive, shall be provided a FAPE in the least restrictive environment, consistent with appendix B of this part.

(c) The Military Medical Departments and DoDDS shall cooperate in the delivery of related services to eligible children with disabilities, ages 3

through 21 years, inclusive, that require such services to benefit from special education. Related services assigned to the Military Medical Departments are defined in §57.3 and are provided in accordance with appendix C of this part. DDESS is responsible for the delivery of all related services to eligible children with disabilities, ages 3 through 21 years, inclusive, served by DDESS.

(d) The Military Medical Departments shall provide EIS in both domestic and overseas areas, and related services assigned to them in overseas areas, at the same priority as medical care is provided to active duty military members.

**§57.5 Responsibilities.**

(a) *The Under Secretary of Defense (Personnel and Readiness)* (USD (P&R)) shall:

(1) Establish a DoD-AP consistent with appendix D of this part.

(2) Establish and chair, or designate a ''Chair,'' of the DoD-CC consistent with appendix E of this part.

(3) Ensure that inter-Component agreements or other mechanisms for inter-Component coordination are in effect between the DoD Components providing services to infants, toddlers and children.

(4) Ensure the implementation of procedural safeguards consistent with appendix F of this part.

(5) In consultation with the General Counsel of the Department of Defense (GC, DoD) and the Secretaries of the Military Departments:

(i) Ensure that eligible infants and toddlers with disabilities and their families are provided comprehensive, coordinated and multidisciplinary EIS under 20 U.S.C. 921–932 and 10 U.S.C. 2164 as provided in appendix A of this part.

(ii) Ensure that eligible children with disabilities (ages 3 through 21 years, inclusive) are provided a FAPE under U.S.C. 921–932 and 10 U.S.C. 2164 as provided in appendix A of this part.

(iii) Ensure that eligible DoDDS students are provided related services, as provided in appendix C of this part.

(iv) Ensure that all eligible DDESS students are provided related services by DDESS.

(v) Ensure the development of a DoD-wide comprehensive child-find system to identify eligible infants, toddlers, and children ages birth through 21 years, inclusive, under DoD Directive 1342.6 who may require early intervention or special education services.

(vi) Ensure that personnel are identified to provide the mediation services specified in appendix 7 of this part.

(vii) Ensure that transition services are available to promote movement from early intervention, preschool, and other educational programs into different educational settings and post-secondary environments.

(viii) Ensure compliance with this Part in the provision of special services, in accordance with appendix H of this part and other appropriate guidance.

(ix) Ensure that personnel are identified and trained to provide the monitoring specified in appendix H of this part

(x) Ensure that the Military Departments deliver the following:

(A) In overseas and domestic areas, a comprehensive, coordinated, and multidisciplinary program of EIS for eligible infants and toddlers (birth through 2 years, inclusive) with disabilities.

(B) In overseas areas, the related services as defined in §57.3 for eligible children with disabilities, ages 3 through 21 years, inclusive.

(xi) Ensure the development and implementation of a comprehensive system of personnel development in the area of special services for the Department of Defense Education Activity (DoDEA) and the Military Departments. That system shall include professionals, paraprofessionals, and primary referral source personnel in the areas of special services, and may also include:

(A) Implementation of innovative strategies and activities for the recruitment and retention of personnel providing special services, ensuring that personnel requirements are established consistent with recognized certification, licensing, registration, or other comparable requirements for personnel providing special services, and allow the use of paraprofessionals and assistants who are appropriately

trained and supervised to assist in the provision of special services.

(B) Training personnel to coordinate transition services for infants and toddlers from an early intervention program to preschool or other appropriate services

(C) Ensuring that training is provided in and across disciplines.

(xii) Develop procedures to compile data on the numbers of eligible infants and toddlers with disabilities and their families in need of EIS, and children in need of special education and related services, in accordance with DoD Directives 5400.7 and 5400.11. Those data elements shall include, at a minimum, the following:

(A) The number of infants and toddlers and their families served.

(B) The number of children served.

(C) The types of services provided.

(D) Other information required to evaluate and monitor the provision of services.

(xiii) Resolve disputes among the DoD Components involving appendix A of this part.

(xiv) Ensure the assigned responsibilities for the delivery of special services are reviewed at least every 5 years to determine the most appropriate distribution of responsibilities.

(b) The *Assistant Secretary of Defense (Health Affairs)* (ASD(HA)), under the *Principal Deputy Under Secretary of Defense for Personnel and Readiness* (PDUSD(P&R)), shall:

(1) Ensure the provision of advice and consultation about the provision of EIS and related services to the USD(P&R) and the GC, DoD.

(2) Ensure the development of healthcare provider workload standards and performance levels to determine staffing requirements of designated centers. These standards shall take into account the provider training needs, the requirements of this part, and the additional time required to provide EIS (in domestic and overseas areas) and related services (in overseas areas) as defined in § 57.3 for assessment and treatment and for coordination with other DoD Components, such as the DoD school systems.

(3) Assign the Military Medical Departments geographical areas of responsibility for providing related services and EIS under paragraph (c)(1) of this section. Periodically review the alignment of geographic areas to ensure that base closures and other resourcing issues are considered in the cost effective delivery of services.

(4) Establish a system for compiling data required by this part.

(c) The *Secretaries of the Military Departments* shall:

(1) In consultation with DoDEA, establish Educational and Developmental Intervention Services (EDIS) within the following areas:

(i) Designated overseas areas of geographical responsibility, capable of providing necessary related services and EIS to support the needs of eligible beneficiaries.

(ii) Domestic areas, capable of providing necessary EIS to support the needs of eligible beneficiaries.

(2) Staff EDIS with appropriate professional staff, as necessary based on services required, which should include occupational therapist(s) with pediatric experience; physical therapist(s) with pediatric experience; audiologist(s) with pediatric experience; child psychiatrist(s); clinical psychologist(s) with pediatric experience; social worker(s) with pediatric experience; speech language pathologists; community health nurse(s) or the equivalent; pediatrician(s) with experience and/or training in developmental pediatrics; certified assistants (for example, certified occupational therapy assistants or physical therapy assistants); and early childhood special educators.

(3) Provide a comprehensive, coordinated, inter-Component, community-based system of EIS for eligible infants and toddlers with disabilities (birth through 2 inclusive) and their families using the procedures established by this part and guidelines from the ASD(HA) on staffing and personnel standards.

(4) Provide related services, as defined in § 57.3 to DoDDS students who are on IEPs using the procedures established by this part and guidelines from the ASD(HA) on staffing and personnel standards.

(5) To DoDDS students, provide transportation to and from the site where related services are provided by

the Military Medical Department, if not provided at the school.

(6) Provide transportation to and from the site where EIS is provided, if it is not provided in the home or some other natural environment.

(d) The *Surgeons General of the Military Departments* shall:

(1) Ensure the development of policies and procedures for providing, documenting, and evaluating EIS and related services assigned to the Military Medical Departments, as defined in §57.3 (mmm).

(2) Ensure that EDIS participates in the existing military treatment facility (MTF) quality assurance program, which monitors and evaluates the medical services for children receiving such services as described by this part. Standards used by the Joint Commission on Accreditation of Health Organizations or equivalent standards shall be used, where applicable, to ensure accessibility, acceptability, and adequacy of the medical portion of the program provided by EDIS.

(3) Ensure that each program providing EIS is monitored for compliance with this part at least once every 3 years in accordance with appendix H of this part.

(4) Ensure that resources are allocated in accordance with the healthcare provider workload standards and performance levels developed under the direction of the ASD(HA).

(5) Ensure the cooperation and coordination between their respective offices, the offices of other Surgeons General, and DoDEA with respect to the implementation of this Part.

(6) Ensure that training is available for each healthcare professional providing EIS or related services. This training shall include information about the roles and responsibilities of the providers and the development of an Individualized Family Service Plan (IFSP) or an IEP.

(7) Ensure the provision of in-service training on EIS and related services to educational, legal, and other suitable personnel, if requested and feasible.

(8) Provide professional supervision of the EDIS provision of EIS and related services in the overseas areas, as designated in (b)(3) of this section and of EIS in domestic areas of responsibility.

(9) Submit to the DoD-CC a report not later than July 31 of each year certifying that all EDIS are in compliance with this part and other DoD guidance in accordance with appendix H of this part.

(e) The *Director, Department of Defense Education Activity* under the *Deputy Under Secretary of Defense (Military Community and Family Policy)*, and the PDUSD(P&R), shall ensure that the Directors of the DoD school systems shall:

(1) Ensure that eligible children with disabilities, ages 3 through 21 years, inclusive, are provided a FAPE.

(2) Ensure that the educational needs of children with and without disabilities are met comparably, consistent with appendix B of this part.

(3) Ensure that educational facilities and services operated by the DoD school systems for children with and without disabilities are comparable.

(4) Maintain records on special education and related services provided to eligible children with disabilities, ages 3 through 21 years, inclusive, consistent with 21 U.S.C. 812(c).

(5) Provide any or all special education and related services required by a child with a disability, ages 3 through 21 years, inclusive, other than those furnished by the Secretaries of the Military Departments through inter-Agency, intra-Agency, and inter-Service arrangements, or through contracts with private parties when funds are authorized and appropriated.

(6) Provide transportation, which is a related service under this Part, to students with disabilities when transportation is prescribed in the student's IEP. The DoD school systems shall furnish transportation between the student's home (or another location specified in the IEP) and the DoD school.

(7) Provide transportation to and from the site where DDESS provides related services, if not provided at the school.

(8) Participate in the development and implementation of a comprehensive system of personnel development.

(9) Ensure that all programs providing special education and related services, including those provided by

the Military Medical Departments, are monitored for compliance with this part in accordance with appendix H of this part.

(10) Provide physical space for the provision of occupational therapy, physical therapy, and psychological services in those DoDDS facilities where EDIS shall provide related services.

(11) Provide physical space for the provision of occupational therapy, physical therapy, psychological services, and therapists' offices in construction of DoDDS facilities at those locations where EDIS shall provide related services. The DoDDS shall determine the specifics of space design in consultation with the responsible Military Department's medical authorities concerned and the Defense Medical Facilities Office, Office of the ASD(HA).

(12) The DoDDS shall provide repair and maintenance support, custodial support, and utilities to the areas described in paragraphs (e)(10) and (e)(11) of this section.

(13) The DoDDS shall maintain operational control of therapy and office space.

(14) Ensure that all newly constructed or renovated DoD school facilities are fully accessible to persons with mobility impairments including those in wheelchairs.

(15) Report not later than July 31 of each year to the DoD-CC on the following:

(i) Number of children with disabilities participating in regular and alternate system-wide assessment.

(ii) Performance of children with disabilities on the regular system-wide assessment and on the alternate system-wide assessment.

(iii) By district, rate of suspension and expulsion of students with disabilities compared to regular education students.

(f) The *Director, Defense Office of Hearings and Appeals* (DOHA), under the *General Counsel of the Department of Defense*, shall ensure impartial due process hearings are provided consistent with appendix G of this part.

### § 57.6 Procedures.

(a) The procedures for EIS for infants and toddlers with disabilities and their families are prescribed in appendix A of this part.

(b) The procedures for educational programs and services for children with disabilities, ages 3 through 21 years, inclusive, on IEPs are prescribed in appendix B of this part.

(c) The procedures for the provision of related services for DoDDS students with disabilities, ages 3 through 21, inclusive, are prescribed in appendix C of this part

(d) Procedural safeguards and parent and student rights are prescribed in appendix F of this part.

(e) The procedures for conducting mediation and due process hearings are prescribed in appendix G of this part.

(f) The procedures for conducting compliance monitoring are prescribed in appendix H of this part.

## APPENDIX A TO PART 57—PROCEDURES FOR THE PROVISION OF EARLY INTERVENTION SERVICES FOR INFANTS AND TODDLERS WITH DISABILITIES AND THEIR FAMILIES

### A. IDENTIFICATION AND SCREENING

(1) Each Military Department shall develop and implement in its assigned geographic area a comprehensive child-find public awareness program that focuses on the early identification of children who are eligible to receive EIS under this part. The public awareness program must inform the public about:

(i) The EDIS early intervention program;

(ii) The child-find system, including:

(*A*) The purpose and scope of the system;

(*B*) How to make referrals to service providers that includes timelines and provides for participation by primary referral sources; and

(*C*) How to gain access to a comprehensive, multidisciplinary evaluation and other EIS; and

(*D*) A central directory that includes a description of the EIS and other relevant resources available in each military community overseas.

(2) EDIS must prepare and disseminate materials for parents on the availability of EIS to all primary referral sources, especially hospitals, physicians, and child development centers.

(3) Upon receipt of a referral, EDIS shall appoint a service coordinator.

(4) Procedures for Identification and Screening. All children referred to the EDIS for EIS shall be screened to determine the appropriateness of the referral and to guide the assessment process.

(i) Screening does not constitute a full evaluation. At a minimum, screening shall include a review of the medical and developmental history of the referred child through a parent interview and/or a review of medical records.

(ii) If screening was conducted prior to the referral, or if there is a substantial or obvious biological risk, screening may not be necessary.

B. ASSESSMENT AND EVALUATION

(1) The assessment and evaluation of each child must:

(i) Be conducted by a multidisciplinary team.

(ii) Be based on informed clinical opinion; and

(iii) Include the following:

(*A*) A review of pertinent records related to the child's current health status and medical history.

(*B*) An evaluation of the child's level of functioning in each of the following developmental areas:

(*i*) Cognitive development.

(*ii*) Physical development, including vision and hearing.

(*iii*) Communication development.

(*iv*) Social or emotional development.

(*v*) Adaptive development.

(iv) An assessment of the unique needs of the child in terms of each of the developmental areas in paragraph B.(1)(iii)(*B*) of this appendix, including the identification of services appropriate to meet those needs.

(2) *Family Assessment.* (i) Family assessments must be family-directed and designed to determine the resources, priorities, and concerns of the family and the identification of the supports and services necessary to enhance the family's capacity to meet the developmental needs of the child.

(ii) Any assessment that is conducted must be voluntary on the part of the family.

(iii) If an assessment of the family is carried out, the assessment must:

(*A*) Be conducted by personnel trained to utilize appropriate methods and procedures.

(*B*) Be based on information provided by the family through a personal interview; and

(*C*) Incorporate the family's description of its resources, priorities, and concerns related to enhancing the child's development.

(3) *Standards for Assessment Selection and Procedures.* EDIS shall ensure, at a minimum, that:

(i) Tests and other evaluation materials and procedures are administered in the native language of the parents or other mode of communication, unless it is clearly not feasible to do so.

(ii) Any assessment and evaluation procedures and materials that are used are selected and administered so as not to be racially or culturally discriminatory.

(iii) No single procedure is used as the sole criterion for determining a child's eligibility under this part; and

(iv) Evaluations and assessments are conducted by qualified personnel.

(4) With the parent's consent, EIS may begin before the completion of the assessment and evaluation when it has been determined by a multidisciplinary team that the child and/or the child's family needs the service immediately. Although all assessments have not been completed, an IFSP must be developed before the start of services. The remaining assessments must then be completed in a timely manner.

C. ELIGIBILITY

(1) Eligibility shall be determined at an EIS team meeting that includes parents.

(i) The EIS team shall document the basis for eligibility on an eligibility report.

(ii) A copy of the eligibility report shall be provided to the parent at the eligibility meeting.

(2) Children with disabilities from birth through age 2 are eligible for EIS if they meet one of the following criteria:

(i) The child is experiencing a developmental delay as defined in § 57.3(r).

(ii) The child has a diagnosed physical or mental condition that has a high probability of resulting in developmental delay, as defined in § 57.3(s).

D. TIMELINES

(1) The initial evaluation and assessment of each child (including the family assessment) must be completed within a timely manner.

(2) The Military Department responsible for providing EIS shall develop procedures to ensure that in the event of exceptional circumstances that make it impossible to complete the evaluation and assessment within a timely manner (*e.g.*, if a child is ill), EDIS shall:

(i) Document those circumstances; and

(ii) Develop and implement an interim IFSP, to the extent appropriate and consistent with this part.

E. IFSP

(1) Each Military Department shall ensure that the EDIS develop and implement an IFSP for each child, birth through 2 years of age, who meets the eligibility criteria for EIS in section B of this appendix.

(2) *The IFSP Meeting.* The EDIS shall establish and convene a meeting to develop the IFSP of a child with a disability. That meeting shall be scheduled as soon as possible following a determination by the EDIS that the child is eligible for EIS, but not later than 45 days from the date of the referral for services.

(3) Meetings to develop and review the IFSP must include the following participants:

(i) The parent or parents of the child.

(ii) Other family members, as requested by the parent, if feasible.

(iii) An advocate or person outside of the family, if the parent requests that person's participation.

(iv) The services coordinator who has worked with the family since the initial referral of the child or who has been designated as responsible for the implementation of the IFSP.

(v) The person(s) directly involved in conducting the evaluations and assessments.

(vi) As appropriate, persons who shall provide services to the child or family.

(4) If a person listed in paragraph E.(3) of this appendix is unable to attend a meeting, arrangements must be made for the person's involvement through other means, including the following:

(i) Participating in a telephone conference call.

(ii) Having a knowledgeable, authorized representative attend the meeting.

(iii) Making pertinent records available at the meeting.

(5) The IFSP shall be written in a reasonable time after assessment and shall contain the following:

(i) A statement of the child's current developmental levels including physical, cognitive, communication, social or emotional, and adaptive behaviors based on professionally acceptable objective criteria.

(ii) With the concurrence of the family, a statement of the family's resources, priorities, and concerns about enhancing the child's development.

(iii) A statement of the major outcomes expected to be achieved for the child and the family. Additionally, the statement shall contain the criteria, procedures, and timelines used to determine the degree to which progress toward achieving the outcomes is being made and whether modification or revision of the outcomes and services are necessary.

(iv) A statement of the specific EIS necessary to meet the unique needs of the child and the family including the frequency, intensity, and method of delivering services.

(v) The projected number of sessions necessary to achieve the outcomes listed in the IFSP.

(vi) A statement of the natural environments in which EIS shall be provided, and a justification of the extent, if any, to which the services shall not be provided in a natural environment.

(vii) The projected dates for initiation of services and the anticipated duration of those services.

(viii) The name of the service coordinator who shall be responsible for the implementation of the IFSP and coordination with other agencies and persons. In meeting these requirements, EDIS may:

(*A*) Assign the same service coordinator who was appointed at the time that the child was initially referred for evaluation to be responsible for implementing a child's and family's IFSP; or

(*B*) Appoint a new service coordinator.

(*C*) Appoint a service coordinator requested by the parents.

(ix) The steps to be taken supporting the transition of the toddler with a disability to preschool or other services. These steps must include:

(*A*) Discussions with, and training of, parents regarding future placements and other matters related to the child's transition;

(*B*) Procedures to prepare the child for changes in service delivery, including steps to help the child adjust to, and function in, a new setting; and

(*C*) The transmission of information about the child to the DoD school system, to ensure continuity of services, including evaluation and assessment information, and copies of IFSPs that have been developed and implemented in accordance with this Part.

(6) The contents of the IFSP shall be explained to the parents and an informed, written consent from the parents shall be obtained before providing EIS described in that plan.

(7) If a parent does not provide consent for participation in all EIS, the services shall still be provided for those interventions to which a parent does give consent.

(8) The IFSP shall be evaluated at least once a year and the family shall be provided an opportunity to review the plan at 6-month intervals (or more frequently, based on the child and family needs). The purpose of the periodic review is to determine the following:

(i) The degree to which progress toward achieving the outcomes is being made; and

(ii) Whether modification or revision of the outcomes or services is necessary.

(9) The review may be carried out by a meeting or by another means that is acceptable to the parents and other participants.

F. MAINTENANCE OF RECORDS

(1) The EDIS officials shall maintain all EIS records, in accordance with DoD Directive 5400.11.

(2) The IFSP and the documentation of services delivered in accordance with the IFSP are educational records and shall be maintained accordingly.

## APPENDIX B TO PART 57—PROCEDURES FOR THE PROVISION OF EDUCATIONAL PROGRAMS AND SERVICES FOR CHILDREN WITH DISABILITIES, AGES 3 THROUGH 21 YEARS, INCLUSIVE

### A. IDENTIFICATION

(1) It is the responsibility of the DoD school system officials to engage in child-find activities to locate, identify, and with informed parental consent, evaluate all children who are eligible to enroll in the DDESS under DoD Directive 1342.26 or in the DoDDS under DoD Directive 1342.13 who may require special education and related services.

(2) *Referral of a Child for Special Education or Related Services.* The DoD school system officials, related service providers, parents, or others who suspect that a child has a possible disabling condition shall refer that child to the CSC.

(3) *Procedures for Identification and Screening.* The DoD school system officials shall conduct the following activities to determine if a child needs special education and related services:

(i) Screen educational records.

(ii) Screen students using system-wide or other basic skill tests in the areas of reading, math, and language arts.

(iii) Screen school health data such as reports of hearing, vision, speech, or language tests and reports from healthcare personnel about the health status of a child.

(iv) Analyze school records to obtain pertinent information about the basis for suspensions, exclusions, withdrawals, and disciplinary actions.

(v) Coordinate the transition of children from early intervention to preschool.

(4) In cooperation with the Military Departments, conduct on-going child-find activities and publish, periodically, any information, guidelines, and direction on child-find activities for eligible children with disabilities, ages 3 through 21 years, inclusive.

### B. ASSESSMENT AND EVALUATION

(1) Every child eligible to attend a DoD school who is referred to a CSC shall receive a full and comprehensive diagnostic evaluation of educational needs. An evaluation shall be conducted before an IEP is developed or placement is made in a special education program.

(2) *Procedures for Assessment and Evaluation.* A CSC shall ensure that the following elements are included in a comprehensive assessment and evaluation of a child:

(i) Assessment of visual and auditory acuity.

(ii) A plan to assess the type and extent of the disability. A child shall be assessed in all areas related to the suspected disability. When necessary, the assessment plan shall include the following:

(*A*) Assessment of the level of functioning academically, intellectually, emotionally, socially, and in the family.

(*B*) Observation in an educational environment.

(*C*) Assessment of physical status including perceptual and motor abilities.

(*D*) Assessment of the need for transition services for students 14 years and older, the acquisition of daily living skills, and functional vocational assessment.

(iii) The involvement of parents.

(3) The CSC shall use all locally available community, medical, and school resources to accomplish the assessment. At least one specialist with knowledge in the area of the suspected disability shall be a member of the multidisciplinary assessment team.

(4) Each assessor shall prepare an individual assessment report that includes:

(i) Demographic information about the student and the assessor.

(ii) The problem areas constituting the bases for a referral.

(iii) A behavioral observation of the child during testing.

(iv) The instruments and techniques used for the assessment.

(v) A description of the child's strengths and limitations.

(vi) The results of the assessment; and

(vii) The instructional implications of the findings for educational functioning.

(5) *Standards for Assessment Selection and Procedures.* All DoD elements, including the CSC and related services providers, shall ensure that assessment materials and evaluation procedures are in compliance with the following criteria:

(i) Selected and administered so as not to be racially or culturally discriminatory.

(ii) Administered in the native language or mode of communication of the child, unless it clearly is not possible to do so.

(iii) Materials and procedures used to assess a child with limited English proficiency are selected and administered to ensure that they measure the extent to which the child has a disability and needs special education, rather than measuring the child's English language skills.

(iv) Validated for the specific purpose for which they are used or intended to be used.

(v) Administered by trained personnel in compliance with the instructions of the testing instrument.

(vi) Administered such that no single procedure is the sole criterion for determining eligibility or an appropriate educational program for a child with a disability.

(vii) Selected to assess specific areas of educational needs and strengths and not merely to provide a single general intelligence quotient.

(viii) Administered to a child with impaired sensory, motor, or communication skills so that the results reflect accurately a

child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (unless those skills are the factors that the test purports to measure).

(6) *Review of Existing Evaluation Data.* As part of an initial evaluation (if appropriate) and as part of any reevaluation, the CSC shall review existing evaluation data on the child, including:

(i) Evaluations and information provided by the parents of the child;

(ii) Current classroom-based assessments and observations;

(iii) Observations by teachers and related services providers; and

(iv) On the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine:

(*A*) Whether the child has a particular category of disability, or in the case of a reevaluation of a child, whether the child continues to have such a disability.

(*B*) The present levels of performance and educational needs of the child.

(*C*) Whether the child needs special education and related services, or in the case of a reevaluation of a child, whether the child continues to need special education and related services; and

(*D*) Whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general curriculum.

(v) The CSC may conduct its review without a meeting.

(vi) The CSC shall administer tests and other evaluation materials as may be needed to produce the data identified under paragraph B.(2) of this appendix.

C. ELIGIBILITY

(1) The CSC shall:

(i) Ensure that the full comprehensive evaluation of a child is accomplished by a multidisciplinary team. The team shall be comprised of teachers or other specialists with knowledge in the area of the suspected disability.

(ii) Convene a meeting to determine the eligibility of a child for special education and related services.

(iii) Meet as soon as possible after a child has been assessed to determine the eligibility of the child for services.

(iv) Afford the child's parents the opportunity to participate in the CSC eligibility meeting.

(v) Issue a written eligibility report that contains the following:

(*A*) Identification of the child's disabling condition.

(*B*) A synthesis of the formal and informal findings of the multidisciplinary assessment team.

(*C*) A summary of information from the parents, the child, or other persons having significant contact with the child.

(*D*) A determination of eligibility statement.

(*E*) A list of the educational areas affected by the child's disability, a description of the child's educational needs, and a statement of the child's present level of performance.

(2) *Reevaluation for Eligibility.* School officials shall reevaluate the eligibility of a child with a disability every 3 years, or more frequently, if conditions warrant.

(i) The scope and type of the reevaluation shall be determined individually based on a child's performance, behavior, and needs during the reevaluation and the review of existing data in accordance with paragraph B.(6) of this appendix.

(ii) The CSC is not required to conduct assessments unless requested to do so by the child's parents.

(iii) If the CSC determines that no additional data are needed to determine whether the child continues to be a child with a disability, the CSC shall notify the parents of:

(*A*) The determination that no additional assessment data are needed and the reasons for their determination; and

(*B*) The right of the parents to request an assessment to determine whether the child continues to be a child with a disability.

D. IEP

(1) The DoD school system officials shall ensure that the CSC develop and implement an IEP for each child with a disability who:

(i) Is enrolled in the DoD school system;

(ii) In DoDDS, is home-schooled, eligible to enroll in DoDDS on a space-required, tuition-free basis and whose sponsors have completed a registration form and complied with other registry procedures and requirements of the school;

(iii) In DDESS, is home-schooled and eligible to enroll on a tuition-free basis and whose sponsors have completed a registration form and complied with other registry procedures and requirements of the school; or

(iv) Is placed in another institution by the DoD school system.

(2) The CSC shall convene a meeting to develop, review, or revise the IEP of a child with a disability. That meeting shall:

(i) Be scheduled as soon as possible following a determination by the CSC that the child is eligible for special education and related services.

(ii) Include minimally as participants the following:

(*A*) An administrator or school representative other than the child's teacher who is

qualified to provide or supervise the provision of special education and is knowledgeable about the general curriculum and available resources.

(*B*) The child's teacher (if the child is, or may be, participating in the regular education environment);

(*C*) A special education teacher or provider.

(*D*) One or both of the child's parents.

(*E*) The child, if appropriate.

(*F*) For a child with a disability who has been evaluated for the first time, a representative of the evaluation team who is knowledgeable about the evaluation procedures used and is familiar with the results of the evaluation.

(*G*) Other individuals invited at the discretion of the parent or school who have knowledge or special expertise regarding the child, including related services personnel, as appropriate.

(3) *Development of the IEP*. The CSC shall prepare the IEP with the following:

(i) A statement of the child's present levels of educational performance including a description of:

(*A*) How the child's disability affects involvement and progress in the general curriculum or for preschoolers, how the disability affects participation in appropriate activities.

(*B*) A description of the child's participation in the regular classroom (if the child participates in the regular education environment), extracurricular and other non-academic activities; and

(*C*) If necessary, an explanation of the extent to which the child shall not participate with children who are not disabled in these activities.

(ii) A statement of measurable annual goals including benchmarks or short-term instructional objectives related to meeting:

(*A*) The child's needs that result from the disability to enable the child to be involved in and progress in the general curriculum;

(*B*) Each of the child's other needs resulting from his or her disability.

(iii) A statement of the special education and related services and supplementary aids and services to be provided to the child, or on behalf of the child and a statement of the program modifications or supports for school personnel that shall be provided for the child to:

(*A*) Advance appropriately toward attaining the annual goals.

(*B*) Be involved in and progress in the general curriculum in accordance with this part and to participate in extracurricular and other non-academic activities; and

(*C*) Be educated and participate with other children with or without disabilities.

(iv) A statement of any individual modifications in the administration of system-wide or district-wide assessment of student achievement that are needed for the child to participate in the assessment.

(v) If the CSC determines that the child shall not participate in a particular system-wide or district-wide assessment of student achievement (or part of an assessment), a statement of:

(*A*) Why that assessment is not appropriate for the child; and

(*B*) How the child shall be assessed using alternate assessments to measure student progress.

(vi) A statement explaining how the child's progress towards annual goals shall be measured.

(vii) A statement explaining how parents shall be informed, at least as often as parents are informed of progress of children who are not disabled, of:

(*A*) Their child's progress toward annual goals; and

(*B*) The extent to which that progress is sufficient to enable the child to achieve the goals by the end of the year.

(viii) A statement of special education, related services, and modifications necessary for the child to advance appropriately toward the annual goals.

(ix) A statement of the amount of time that each service shall be provided to the child, to include the projected date for beginning of services and location and duration of those services (including adjusted school day or an extended school year) and modifications.

(x) A statement of the physical education program provided in one of the following settings:

(*A*) In the regular education program.

(*B*) In the regular education program with adaptations, modifications, or the use of assistive technology.

(*C*) Through specially designed instruction based on the goals and objectives included in the IEP.

(xi) Beginning at age 14, and updated annually:

(*A*) A statement of transition service needs under applicable components of the child's IEP that focuses on his or her course of study and augments the standard transition requirements.

(*B*) A statement of needed transition services, including inter-Agency responsibilities.

(xii) Beginning at least one year before the child reaches the age of majority, a statement that the child has been informed of those rights that transfer to him or her under this Part.

(xiii) A statement of special transportation requirement, if any.

(xiv) A statement of the vocational education program for secondary students. If a specially designed instructional program is required, the necessary goals and objectives in the IEP shall be included.

(4) *Consideration of Special Factors*. The CSC shall consider:

(i) Assistive technology needs for all children.

(ii) Language needs for the limited English proficient child.

(iii) Providing Braille instruction, unless the CSC determines that the use of Braille is not appropriate, for a child who is blind or visually impaired.

(iv) Interventions, strategies, and supports including behavior management plans to address behavior for a child whose behavior impedes learning.

(v) Language and communication needs, opportunities for communication in the child's language and communication mode, including direct instruction in that mode, for the child who is deaf or hard of hearing.

(5) The CSC shall ensure that at least one parent understands the special education procedures including the due process procedures described in appendix G of this part and the importance of the parent's participation in those processes. School officials shall use devices or hire interpreters or other intermediaries who might be necessary to foster effective communications between the school and the parent about the child.

(6) The CSC shall ensure that all provisions developed for any child entitled to an education by the DoD school system are fully implemented in DoD schools or in non-DoD schools or facilities including those requiring special facilities, other adaptations, or assistive devices.

(7) The CSC shall afford the child's parents the opportunity to participate in every CSC meeting to determine their child's initial or continuing eligibility for special education and related services, or to prepare or change the child's IEP or to determine or change the child's placement.

(8) In developing each child's IEP, the CSC shall consider the strengths of the child and the concerns of the parents for enhancing the education of their child.

E. IMPLEMENTATION OF THE IEP

The CSC shall:

(1) Obtain parental agreement and signature before implementation of the IEP.

(2) Provide a copy of the child's IEP to the parents.

(3) Ensure that the IEP is in effect before a child receives special education and related services.

(4) Ensure that the IEP is implemented as soon as possible following the meetings described under paragraph D.(2) of this appendix.

(5) Provide special education and related services, in accordance with the IEP. The Department of Defense, the DoD school systems, and DoD personnel are not accountable if a child does not achieve the growth projected in the annual goals of the IEP, as long as services have been provided in accordance with the IEP.

(6) Ensure that the child's IEP is accessible to each regular education teacher, special education teacher, related service provider, and other service provider who is responsible for its implementation, and that each teacher and provider is informed of:

(i) His or her specific responsibilities related to implementing the child's IEP; and

(ii) The specific accommodations, modifications, and supports that must be provided for the child in accordance with the IEP.

(7) Review the IEP for each child at least annually in a CSC meeting to determine whether the annual goals for the child are being achieved.

(8) Revise the IEP, as appropriate, to address:

(i) Any lack of progress toward the annual goals and in the general curriculum, where appropriate.

(ii) The results of any reevaluation.

(iii) Information about the child provided by the parents.

(iv) The child's anticipated needs.

F. TRANSFERRING STUDENTS

(1) When a student transfers to a DoD school with a current IEP from a non-DoD school, the CSC shall convene promptly an IEP meeting to address eligibility and special education services as described in sections C and D of this appendix. The CSC may:

(i) Accept the child's current IEP by notifying and obtaining consent of the parents to use the current IEP and all elements contained in it.

(ii) Initiate a CSC meeting to revise the current IEP, if necessary.

(iii) Initiate an evaluation of the child, if necessary.

(2) When a student with a current IEP transfers from one DoD school to another, the CSC shall accept the child's eligibility and current IEP by notifying and obtaining consent of the parents to use the current IEP and all elements contained in it.

G. LEAST RESTRICTIVE ENVIRONMENT

(1) To the maximum extent, a child with a disability should be placed with children who are not disabled. Special classes, separate schooling, or other removal of a child with a disability from the regular education environment shall occur only when the type or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

(2) A child shall not be placed by the DoD school system in any special education program unless the CSC has developed an IEP. If

a child with a disability is applying for initial admission to a school, the child shall enter on the same basis as a child without a disability. A child with an IEP, and with the consent of a parent and school officials, may receive an initial placement in a special education program under procedures listed in section F of this appendix.

(3) A placement decision requires the following:

(i) Parent participation in the decision and parent consent to the placement before actual placement of the child, except as otherwise provided in paragraph H.(2) of this appendix.

(ii) Delivery of educational instruction and related services in the least restrictive environment.

(iii) The CSC to base placements on the IEP and to review the IEP at least annually.

(iv) The child to participate, to the maximum extent appropriate to the needs and abilities of the child, in school activities including meals, assemblies, recess periods, and field trips with children who are not disabled.

(v) Consideration of factors affecting the child's well-being, including the effects of separation from parents.

(vi) A child to attend a DoD school that is located as close as possible to the residence of the parent who is sponsoring the child's attendance. Unless otherwise required by the IEP, the school should be the same school that the child would have attended had he or she not been disabled.

H. DISCIPLINE

(1) All regular disciplinary rules and procedures applicable to children attending a DoD school shall apply to children with disabilities who violate school rules and regulations or disrupt regular classroom activities, subject to the following provisions. School personnel may remove a child with a disability from the child's current placement (to the extent removal would be applied to children who are not disabled):

(i) On an emergency basis for the duration of the emergency when it reasonably appears that the child's behavior may endanger the health, welfare, or safety of self or any other child, teacher, or school personnel.

(ii) For not more than 10-cumulative school days in a school year for any violation of school rules.

(2) *Change of Placement*. If a child is removed from his or her current placement for more than 10-cumulative school days in a school year, it is considered a change of placement.

(i) Not later than the date on which the decision to make a change in placement is made, the school must notify parents of the decision and of all procedural safeguards, as described in section B of appendix F of this part.

(ii) Not later than 10 days following the change of placement, the CSC must:

(*A*) Convene a meeting of the IEP team and other qualified personnel to conduct a manifestation determination as described in paragraph H.(5) of this appendix and

(*B*) Convene an IEP meeting to review the IEP to develop appropriate behavioral interventions to address the child's behavior and implement those interventions. This review may be conducted at the same meeting that is convened under paragraph H.(2)(ii)(*A*) of this appendix.

(*i*) If the child has a behavioral intervention plan, the CSC must review the plan and its implementation, and modify the plan and its implementation as necessary, to address the behavior.

(*ii*) If the child does not have a behavioral intervention plan, the CSC must develop an assessment plan to include a functional behavioral assessment.

(*iii*) As soon as practicable after developing the assessment plan and completing the assessments required by the plan, the CSC must convene an IEP meeting to develop a behavioral intervention plan to address that behavior, and shall implement the plan.

(3) After a child with a disability has been removed from his or her current placement for more than 10-cumulative school days in a school year, during any subsequent days of removal the DoD school system must provide services to the extent necessary to enable the child to appropriately progress in the general curriculum and appropriately advance toward achieving the goals set out in the child's IEP.

(4) *Alternative Education Setting (AES)*. School personnel may order a change in placement of a child with a disability in accordance with the requirements of paragraph H.(2) of this appendix to an appropriate interim AES for the same amount of time that a non-disabled child would be subject to discipline, but for not more than 45 days, if:

(i) The child carries a weapon to school or to a school function under the jurisdiction of the DoD school system; or

(ii) The child knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance while at school or at a school function under the jurisdiction of a DoD school system.

(5) *Manifestation Determination*. The CSC shall determine whether the child's behavior is the result of the child's disability by considering all relevant information including evaluation results, observation of the child, information provided by the parents of the child, and the child's IEP and placement.

(i) Unless all of the following are evident, the CSC must consider the child's behavior to be a manifestation of the disability:

(*A*) IEP and placement were appropriate and the special education services, supplementary aides and services, and behavior

intervention strategies were provided consistent with the child's IEP and placement;

(*B*) The child's disability did not impair his or her ability to understand the impact and consequences of the behavior subject to the disciplinary action; and

(*C*) The child's disability did not impair his or her ability to control the behavior subject to disciplinary action.

(ii) If the CSC determines that the child's behavior was a manifestation of the disability, the child is not subject to removal from current educational placement as a disciplinary action, except as provided for in paragraph H.(1)(i) of this appendix.

(*A*) The child's parents shall be notified of the right to have an IEP meeting before any changes in the child's placement.

(*B*) The CSC shall address the behavior that was the subject of the disciplinary action, by:

(*i*) Reviewing the child's educational placement to ensure that it is appropriate in consideration of the child's behavior.

(*ii*) Revising the IEP to include goals, services, and modifications that address the behavior subject to disciplinary action, as necessary.

(iii) If the CSC determines that the child's behavior was not the result in whole or part of the disability, relevant disciplinary procedures may be applied to the child in the same manner in which it would be applied to a child without a disability, except as provided in FAPE.

I. PARENT APPEAL

(1) If the parent disagrees with the manifestation determination or with any decision regarding placement, the parent may request a hearing.

(2) The school system shall arrange for an expedited hearing in accordance with appendix G of this part.

(3) *Placement During Appeal.* When a parent requests a hearing challenging placement in an interim AES, the child shall remain in the interim AES pending the decision of the hearing officer or until the expiration of the time period provided for in paragraph H.(3) of this appendix whichever comes first, unless the parent and the school system agree otherwise.

(i) After expiration of the interim AES, during the pendency of any proceedings to challenge the proposed change in placement, the child shall return and remain in the child's placement prior to the interim AES.

(ii) If the school personnel maintain that it is dangerous for the child to return to his or her placement prior to the interim AES, the DoD school system may request an expedited hearing.

J. ORDER BY A HEARING OFFICER

A hearing officer may order a change in the placement of a child with a disability to an interim AES for not more than 45 days, if the hearing officer:

(1) Determines that the DoD school system has demonstrated by substantial evidence that maintaining the current placement of such child is substantially likely to result in injury to the child or to others.

(2) Considers the appropriateness of the child's current placement.

(3) Considers whether the school system has made reasonable efforts to minimize the risk of harm in the child's current placement, including the use of supplementary aids and services; and

(4) Determines that the interim AES meets the requirements of section A of this appendix.

K. CHILDREN NOT YET DETERMINED ELIGIBLE FOR SPECIAL EDUCATION

Children who have not yet been determined eligible for special education and who have violated the disciplinary rules and procedures may assert the protections of the IDEA if the DoD school system had knowledge that the child had a disability before the behavior occurred.

(1) The DoD school system is considered to have had knowledge if:

(i) The parents expressed concern in writing to the school system personnel that the child needed special education or related services.

(ii) The child's behavior or performance indicated a need for services.

(iii) The child's parents requested an evaluation; or

(iv) The child's teacher or other DoD school system personnel expressed concern about the behavior or performance to the CSC, the school principal, assistant principal, or district special education coordinator.

(2) If the DoD school system does not have knowledge of a disability prior to disciplinary action, the child shall be subject to the regular disciplinary rules and procedures.

(3) If an evaluation were requested during the time the child is subjected to disciplinary action, the evaluation shall be expedited. The child shall remain in his or her current placement until determined eligible for special education or related services.

(4) The DoD school system is not constrained from reporting crime to the appropriate law enforcement authorities and shall ensure that special education and disciplinary records are transmitted to the appropriate law enforcement and judicial authorities.

L. CHILDREN WITH DISABILITIES WHO ARE PLACED IN A NON-DoD SCHOOL OR FACILITY

(1) Children with disabilities who are eligible to receive a DoD school system education, but are placed in a non-DoD school or facility by a DoD school system, shall have all the rights of children with disabilities who are enrolled in a DoD school.

(2) A child with a disability may be placed in a non-DoD school or facility only if required by the IEP.

(3) Placement by DoDDS in a host-nation non-DoD school or facility shall be made under the host-nation requirements.

(4) Placement by DoDDS in a host-nation non-DoD school or facility is subject to all treaties, executive agreements, and status of forces agreements between the United States and the host nations, and all DoD and DoD school system regulations.

(5) If a DoD school system places a child with a disability in a non-DoD school or facility as a means of providing special education and related services, the program of that institution, including non-medical care and room and board, as prescribed in the child's IEP, must be provided at no cost to the child or the child's parents. The DoD school system or the responsible DoD Component shall pay the costs in accordance with this part.

(6) DoD school officials shall initiate and conduct a meeting to develop an IEP for the child before placement. A representative of the non-DoD school or facility should attend the meeting. If the representative cannot attend, the DoD school system officials shall communicate in other ways to ensure participation including individual or conference telephone calls. The IEP must meet the following standards:

(i) Be signed by an authorized DoD school system official before it becomes valid.

(ii) Include a determination that the DoD school system does not currently have or cannot reasonably create an educational program appropriate to meet the needs of the child with a disability.

(iii) Include a determination that the non-DoD school or facility and its educational program and related services conform to the requirements of this part.

(7) *Cost of Tuition for Non-DoD School or Facility*. The Department of Defense is not authorized to reimburse the costs of special education if a parent unilaterally places the student in a non-DoD school without approval of the cognizant CSC and the Superintendent, in coordination with the Director of the DoD school system. A valid IEP must document the necessity of the placement in a non-DoD school or facility.

(i) Reimbursement may be required if a hearing officer determines that the DoD school system had not made FAPE available in a timely manner prior to enrollment in the non-DoD school and that the private placement is appropriate.

(ii) Reimbursement may be reduced or denied if the parents did not inform the CSC that the placement determined by the CSC was rejected, including a statement of their concerns, and that they intended to place a child in a non-DoD school; or if 10 business days (Monday through Friday, except for Federal holidays) prior to the parents' removal of the child from the school, the parents failed to provide written notice to the DoD school system of their rejection of the placement decision concerning the child, the reasons for their rejection, and their intent to remove the child; or if the CSC informed parents of its intent to evaluate the child, but parents did not make the child available.

(iii) Reimbursement may not be reduced or denied for failure to provide the required notice if the parents cannot read and write in English; compliance would result in physical or emotional harm to the child; the DoD school prevented the parent from providing notice; or the parents had not received notice of a requirement to provide required notice.

M. CONFIDENTIALITY OF THE RECORDS

The DoD school system and EDIS officials shall maintain all student records in accordance with DoD Directive 5400.11.

N. DISPUTE RESOLUTION

A parent, teacher, or other person covered by this part may file a written complaint about any aspect of this part that is not a proper subject for adjudication by a due process hearing officer, in accordance with DSR 2500.11.

## APPENDIX C TO PART 57—PROCEDURES FOR THE PROVISION OF RELATED SERVICES BY THE MILITARY MEDICAL DEPARTMENTS TO DoDDS STUDENTS ON IEPs

A. EVALUATION PROCEDURES

(1) Upon request by a DoDDS CSC, the responsible EDIS shall ensure that a qualified medical authority conducts or verifies a medical evaluation for use by the CSC in determining the medically related disability that results in a child's need for special education and related services, and oversees an EDIS evaluation used in determining a child's need for related services.

(i) This medical or related services evaluation, including necessary consultation with other medical personnel, shall be supervised by a physician or other qualified healthcare provider.

(ii) This medical evaluation shall include a review of general health history, current health assessment, systems evaluation to include growth and developmental assessment,

and, if pertinent, detailed evaluation of gross motor and fine motor adaptive skills, psychological status, and visual and audiological capabilities, including details of present level of performance in each of these areas affecting the student's performance in school.

(iii) The EDIS-related services evaluation shall be specific to the areas addressed in the referral by the CSC.

(2) EDIS shall provide a summary evaluation report to the CSC that responds to the questions posed in the original referral. The written report shall include:

(i) Demographic information about the child.

(ii) Behavioral observation of the child during testing.

(iii) Instruments and techniques used.

(iv) Evaluation results.

(v) Descriptions of the child's strengths and limitations.

(vi) Instructional implications of the findings; and

(vii) The impact of the child's medical condition(s), if applicable, on his or her educational performance.

(3) If EDIS determines that in order to respond to the CSC referral the scope of its assessment and evaluation must be expanded beyond the areas specified in the initial parental permission, EDIS must:

(i) Obtain parental permission for the additional activities.

(ii) Complete their initial evaluation by the original due date; and

(iii) Notify the CSC of the additional evaluation activities.

(4) When additional evaluation information is submitted by EDIS, the CSC shall review all data and determine the need for program changes and/or the reconsideration of eligibility.

(5) An EDIS provider shall serve on the CSC when eligibility, placement, or requirements for related services that EDIS provides are to be determined.

(6) Related services provided by EDIS, pursuant to an IEP, are educational and not medical services.

B. IEP

(1) EDIS shall be provided the opportunity to participate in the IEP meeting.

(2) EDIS shall provide related services assigned to EDIS that are listed on the IEP.

C. LIAISON WITH DODDS

Each EDIS shall designate an EDIS Liaison Officer to:

(1) Provide liaison between the EDIS and DoDDS schools.

(2) Offer, on a consultative basis, training for DoDDS personnel on medical aspects of specific disabilities.

(3) Offer consultation and advice as needed regarding the health services provided at school (for example, tracheostomy care, tube feeding, occupational therapy).

(4) Participate with DoDDS and legal personnel in developing and delivering in-service training programs that include familiarization with various conditions that impair a child's educational endeavors, the relationship of medical findings to educational functioning, related services, and this part.

## APPENDIX D TO PART 57—THE DOD-AP

A. MEMBERSHIP

(1) The DoD Advisory Panel on Early Intervention and Special Education shall meet as needed in publicly announced, accessible meetings open to the general public and shall comply with DoD Directive 5105.4. The DoD-AP members, appointed by the Secretary of Defense, or designee, shall include at least one representative from each of the following groups:

(i) Persons with disabilities.

(ii) Representatives of the Surgeons General of the Military Departments.

(iii) Representatives of the family support programs of the Military Departments.

(iv) Special education teachers from the DoD school system.

(v) Regular education teachers from the DoD school system.

(vi) Parents of children, ages 3 through 21 years, inclusive, who are receiving special education from the DoD school system.

(vii) Parents of children, ages birth through 2 years, inclusive, who are receiving EIS from EDIS.

(viii) Institutions of higher education that prepare early intervention, special education, and related services personnel.

(ix) Special education program managers from the DoD school systems.

(x) Representatives of the Military Departments and overseas commands, including providers of early intervention and related services.

(xi) Representatives of vocational community, or business organizations concerned with transition services.

(xii) Other appropriate persons.

(2) A majority of panel members shall be individuals with disabilities or parents of children, ages birth through 2 years, inclusive, who are receiving EIS from EDIS and children, ages 3 through 21 years, inclusive who are receiving special education from the DoD school system.

(3) The DoD-AP members shall serve under appointments that shall be for a term not to exceed 3 years.

B. RESPONSIBILITIES

(1) Advise the USD(P&R) of unmet needs within the Department of Defense in the provision of special services to infants, toddlers, and children with disabilities.

(2) Advise and assist the Military Departments in the performance of their responsibilities, particularly the identification of appropriate resources and agencies for providing EIS and promoting inter-Component agreements.

(3) Advise and assist the DoD schools systems on the provision of special education and related services, and on transition of toddlers with disabilities to preschool services.

C. ACTIVITIES

The DoD-AP shall perform the following activities:

(1) Review information about improvements in service provided to children with disabilities, ages birth through 21, inclusive, in the Department of Defense.

(2) Receive and consider comments from parents, students, professional groups, and individuals with disabilities.

(3) Review policy memoranda on effective inter-Department and inter-Component collaboration.

(4) Review the findings of fact and decisions of each impartial due process hearing conducted under appendix G of this part.

(5) Review reports of technical assistance and monitoring activities.

(6) Make recommendations based on program and operational information for changes in policy and procedures and in the budget, organization, and general management of the programs providing special services.

(i) Identify strategies to address areas of conflict, overlap, duplication, or omission of services.

(ii) When necessary, establish committees for short-term purposes comprised of representatives from parent, student, professional groups, and individuals with disabilities.

(iii) Assist in developing and reporting such information and evaluations as may assist the Department of Defense.

(iv) Comment publicly on rules or standards about EIS for infants and toddlers, ages birth through 2 years, and special education of children with disabilities, ages 3 through 21 years, inclusive.

(v) Perform such other tasks as may be requested by the USD(P&R).

D. REPORTING REQUIREMENTS

(1) Submit an annual report of the DoD-AP's activities and suggestions to the DoD Coordinating Committee, by July 31 of each year.

(2) That report is exempt from formal review and licensing under section 5 of DoD Instruction 7750.7

## APPENDIX E TO PART 57—DOD-CC ON EARLY INTERVENTION, SPECIAL EDUCATION, AND RELATED SERVICES

A. COMMITTEE MEMBERSHIP

The DoD-CC shall meet at least yearly to facilitate collaboration in early intervention, special education, and related services in the Department of Defense. The DoD-CC shall consist of the following members, appointed by the Secretary of Defense or designee:

(1) A representative of the USD(P&R) or designee, who shall serve as the Chair.

(2) Representatives of the Secretaries of the Military Departments.

(3) A representative of the TRICARE Management Activity.

(4) Representatives from the DoD school systems.

(5) A representative from the GC, DoD.

B. RESPONSIBILITIES

(1) Advise and assist the USD(P&R) in the performance of his or her responsibilities.

(2) At the direction of the USD(P&R), advise and assist the Military Departments, and the DoD school systems in the coordination of services among providers of early intervention, special education, and related services.

(3) Ensure compliance in the provision of EIS for infants and toddlers and special education and related services for children ages 3 through 21 years, inclusive.

(4) Review the recommendations of the DoD-AP to identify common concerns, ensure coordination of effort, and forward issues requiring resolution to the USD(P&R).

(5) Assist in the coordination of assignments of sponsors who have children with disabilities who are or who may be eligible for special education and related services in the DoDDS or EIS through the Military Departments.

(6) Perform other duties as assigned by the USD(P&R), including monitoring the delivery of services under this part.

## APPENDIX F TO PART 57—PARENT AND STUDENT RIGHTS

A. PARENTAL CONSENT

(1) The consent of a parent of a child with a disability or suspected of having a disability shall be obtained before any of the following:

(i) Initiation of formal evaluation procedures or re-evaluation.

(ii) Provision of EIS or initial educational placement.

(iii) Change in EIS or educational placement.

(2) If a parent of an infant or toddler (birth through 2 years of age) does not provide consent for participation in all EIS, the services shall still be provided for those interventions to which a parent does give consent.

(3) If the parent of a child 3 through 21 years, inclusive, refuses consent to initial evaluation, reevaluation, or initial placement in a special education program, the DoD school system or the parent may do the following:

(i) Request a conference between the school and parents.

(ii) Request mediation.

(iii) Initiate an impartial due process hearing under appendix G of this part to show cause as to why an evaluation or placement in a special education program should or should not occur without such consent. If the hearing officer sustains the DoD school system's position in the impartial due process hearing, the DoD school system may evaluate or provide special education and related services to the child without the consent of a parent, subject to the further exercise of due process rights.

(4) The Department of Defense shall protect the child's rights, by assigning an individual to act as a surrogate for the parents, when after reasonable effort the Department of Defense cannot locate the parents.

B. PROCEDURAL SAFEGUARDS

Parents of children with disabilities are afforded the following procedural safeguards, consistent with appendix G of this part to ensure that their children receive appropriate special services:

(1) The timely administrative resolution of parental complaints, including hearing procedures with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of EIS for an infant or toddler, age birth through 2 years, or a free appropriate public education for the child, age 3 through 21 years, inclusive.

(2) The right to confidentiality of personally identifiable information under DoD Directive 5400.11.

(3) The right to provision of written notice and to have furnished consent prior to the release of relevant information outside the Department of Defense.

(4) The right to determine whether they, their child, or other family members shall accept or decline any portion of EIS, without jeopardizing the provision of other EIS.

(5) The opportunity to examine records on assessment, screening, eligibility determinations, and the development and implementation of the IFSP and IEP.

(6) *Written Notice.* The right to prior written notice when the EDIS or school proposes, or refuses, to initiate or change the identification, evaluation, placement or provision of special services to the child with a disability.

(i) The notice must be in sufficient detail to inform the parents about:

(A) The action that is being proposed or refused;

(B) The reasons for taking the action;

(C) All procedural safeguards that are available under this part as described in paragraph B.(7) of this appendix; and

(D) Conflict resolution procedures, including a description of mediation and due process hearings procedures and applicable timelines, as defined in appendix G of this part.

(ii) The notice must be provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so.

(7) *Procedural Safeguards Notice.* Parents must be given a Procedural Safeguards Notice, at a minimum, upon initial referral for evaluation, upon each notification of an IFSP or IEP meeting, upon reevaluation of the child, and upon receipt of a request for due process.

(i) The procedural safeguards notice must include a full explanation of all of the procedural safeguards available with regard to the matters in paragraph B.(7) of this appendix including the right to:

(*A*) Independent educational evaluation for school-aged children.

(*B*) Prior written notice.

(*C*) Parental consent.

(*D*) Access to educational or early intervention records.

(*E*) Opportunity to present complaints.

(*F*) The child's placement during pendency of due process proceedings.

(*G*) Procedures for children (3 through 21 years, inclusive) who are subject to placement in an interim alternative educational setting.

(*H*) Requirements for unilateral placement by parents of children in private schools at public expense.

(*I*) Mediation.

(*J*) Due process hearings, including requirements for disclosure of evaluation results and recommendations.

(*K*) Civil actions.

(*L*) The DoD complaint system, including a description of how to file a complaint and the timelines under those procedures.

(ii) The procedural safeguards notice must be:

(*A*) Written in language understandable to the general public.

(*B*) Provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so. If the native language or other mode of communication of the parent is not a written language, the school system shall take steps to ensure that:

(*i*) The notice is translated orally or by other means to the parent in his or her native language or other mode of communication.

(*ii*) The parent understands the content of the notice; and

(*iii*) There is written evidence that the requirements in paragraph B.(7)(ii)(*A*) and paragraph B.(7)(ii)(*B*) of this appendix have been met.

(8) *Independent Educational Evaluation*. A parent of a child (3 through 21 years, inclusive) may be entitled to an independent educational evaluation of the child at the expense of the DoD school system if the parent disagrees with the DoD school system's evaluation of the child.

(i) If a parent requests an independent educational evaluation at the school system's expense, the DoD school system must, without unnecessary delay, either:

(*A*) Initiate an impartial due process hearing to show that its evaluation is appropriate; or

(*B*) Ensure an independent evaluation is provided at the DoD school system's expense. Unless the DoD school system demonstrates in an impartial due process hearing that an independent evaluation obtained by the parent did not meet DoD school system criteria. In such cases, the parents must bear the cost of the evaluation.

(ii) If the DoD school system initiates a hearing and the decision is that the DoD school system's evaluation is appropriate, the parents still have the right to an independent evaluation, but not at the school system's expense.

(iii) An independent educational evaluation provided at the DoD school system's expense must do the following:

(*A*) Conform to the requirements of this part.

(*B*) Be conducted, when possible, in the area where the child resides.

(*C*) Meet DoD standards governing persons qualified to conduct an educational evaluation, including an evaluation for related services.

(9) The DoD school system, the CSC, and a hearing officer appointed under this part shall consider any evaluation report presented by a parent.

(10) *Access to Records*. The parents of a child with a disability shall be afforded an opportunity to inspect and review educational records about the identification, evaluation, and educational placement of the child, and the provision of a free public education for the child.

(11) *Due Process Rights*. (i) The parent of a child with a disability, the Military Department, or the DoD school system has the opportunity to file a written petition for an impartial due process hearing under appendix G of this part. The petition may concern issues affecting a particular child's identification, evaluation, or placement, or the provision of EIS or a free and appropriate public education.

(ii) While an impartial due process hearing or judicial proceeding is pending, unless the EDIS or the DoD school system and the parent of the child agree otherwise, the child shall remain in his or her present educational setting, subject to the disciplinary procedures prescribed in section H of appendix B of this part.

(12) *Transfer of Parental Rights at Age of Majority*. (i) In the DoD school systems, a child reaches the age of majority at age 18.

(ii) When a child with a disability reaches the age of majority (except for a child with a disability who has been determined to be incompetent under State law) the rights accorded to parents under this Part transfer to the child.

(iii) When a child reaches the age of majority, the DoD school system shall notify the individual and the parents of the transfer of rights.

(iv) When a child with a disability who has reached the age of majority, who has not been determined to be incompetent, but who does not have the ability to provide informed consent with respect to his or her educational program, the Department of Defense shall establish procedures for appointing the parent of the child to represent the educational interests of the child throughout the period of eligibility for special education services.

## APPENDIX G TO PART 57—MEDIATION AND HEARING PROCEDURES

### A. PURPOSE

This appendix establishes requirements for the resolution of conflicts through mediation and impartial due process hearings. Parents of infants, toddlers, and children who are covered by this Part and, as the case may be, the cognizant Military Medical Department or the DoD school system are afforded impartial mediation and/or impartial due process hearings and administrative appeals about the provision of EIS, or the identification, evaluation, educational placement of, and the FAPE provided to, such children by the Department of Defense, in accordance with sections 927 and 1400 of 20 U.S.C. and section 2164 of 10 U.S.C.

### B. MEDIATION

(1) Mediation may be initiated by either a parent or the Military Medical Department concerned or the DoD school system to resolve informally a disagreement on any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to such child.

(i) The DoD school system shall participate in mediation involving special education and related services.

(ii) The cognizant Military Medical Department shall participate in mediation involving EIS.

(2) The party initiating mediation must notify the other party to the mediation of its request to mediate. The initiating party's request must be written, include a written description of the dispute and bear the signature of the requesting party. Formal acknowledgement of the request for mediation shall occur in a timely manner. The parties may jointly request mediation.

(3) Upon agreement of the parties to mediate a dispute, the Military Medical Department or DoD school shall forward a request for a mediator to higher headquarters, or request a mediator through the Director, Defense Office of Hearings and Appeals (DOHA).

(i) The cognizant DoDDS Area Special Education Coordinator or the DDESS District Superintendent shall promptly appoint a mediator. The Director, DOHA, through the DoHA Office of Alternate Dispute Resolution (ADR), shall maintain a roster of mediators trained in ADR methods, knowledgeable in laws and regulations related to special education, and available to mediate disputes upon request. When requested, the Director, DOHA, through the Office of ADR, shall appoint a mediator within 15 business days of receiving the request for a due process hearing, unless a party provides written notice to the Director, DOHA that the party refuses to participate in mediation.

(ii) The mediator assigned to a dispute shall not be employed by the Military Medical Department or the DoD school system involved, unless the parties agree otherwise.

(4) Unless both parties agree otherwise, mediation shall commence in a timely manner after both parties agree to mediation.

(5) The parents of the infant, toddler or child and 2 representatives of the EDIS or DoD school may participate in mediation. With the consent of both parties, other persons may participate in mediation. Either party may recess a mediation session to consult advisors, whether or not present, or to consult privately with the mediator.

(6) If the parties resolve the dispute or a portion of the dispute, or agree to use another procedure to resolve the dispute, the mediator shall ensure that the resolution or agreement is reduced to writing and that it is signed and dated by the parties and that a copy is given to each party. The resolution or agreement is legally binding upon the parties.

(7) Discussions that occur during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding. Unless the parties and the mediator agree, no person may record a mediation session, nor should any written notes be taken from the room by either party. The mediator may require the parties to sign a confidentiality pledge before the commencement of mediation.

(8) Parents must be provided an opportunity to meet with appropriate EDIS or DoD school system staff in at least one mediation session, if they request a due process hearing in accordance with sections A through H of this appendix. The parents and the Military Medical Department or DoD school system must participate in mediation, unless a party objects to mediation.

(9) Mediation shall not delay hearings or appeals related to the dispute. All mediation sessions shall be held in a location that is convenient to the parties. The Military Medical Department in mediations concerning EIS or the DoD school system in mediations concerning special education and related services shall bear the cost of the mediation process.

(10) Any hearing officer or adjudicative body may draw no negative inference from the fact that a mediator or a party withdrew from mediation or that mediation did not result in settlement of a dispute.

C. HEARING ADMINISTRATION

(1) The Defense Office of Hearings and Appeals (DOHA) shall have administrative responsibility for the proceedings authorized by sections D through H of this appendix.

(2) This appendix shall be administered to ensure that the findings, judgments, and determinations made are prompt, fair, and impartial.

(3) Impartial hearing officers, who shall be DOHA Administrative Judges, shall be appointed by the Director, DOHA, and shall be attorneys in good standing of the bar of any State, the District of Columbia, or a commonwealth, territory or possession of the United States, who are also independent of the DoD school system or the Military Medical Department concerned in proceedings conducted under this appendix. A parent shall have the right to be represented in such proceedings by counsel or by persons with special knowledge or training with respect to the challenges of individuals with disabilities. The DOHA Department Counsel normally shall appear and represent the DoD school system in proceedings conducted under this appendix, when such proceedings involve a child age 3 to 21, inclusive. When an infant or toddler is involved, the Military Medical Department responsible under this part for delivering EIS shall either provide its own counsel or request counsel from the DOHA.

D. HEARING PRACTICE AND PROCEDURE

(1) *Hearing*. (i) Should mediation be refused or otherwise fail to resolve the issues on the

provision of EIS to an infant or toddler or the identification or evaluation of such an individual, the parent may request and shall receive a hearing before a hearing officer to resolve the matter. The parents of an infant or toddler and the Military Medical Department concerned shall be the only parties to a hearing conducted under this appendix.

(ii) Should mediation be refused or otherwise fail to resolve the issues on the provision of a FAPE to a child with a disability, age 3 to 21, inclusive, or the identification, evaluation, or educational placement of such an individual, the parent or the school principal, for the DoD school system, may request and shall receive a hearing before a hearing officer to resolve the matter. The parents of a child age 3 to 21, inclusive, and the DoD school system shall be the only parties to a hearing conducted under this appendix.

(2) The parents and the Military Medical Department or DoD school system must have an opportunity to obtain an impartial due process hearing, if the parents object to:

(i) A proposed formal educational assessment or proposed denial of a formal educational assessment of their child.

(ii) The proposed placement of their child in, or transfer of their child to a special education program.

(iii) The proposed denial of placement of their child in a special education program or the transfer of their child from a special education program.

(iv) The proposed provision or addition of special education services for their child; or

(v) The proposed denial or removal of special education services for their child.

(3) The parent or the attorney representing the child shall include in the petition, the name of the child, the address of the residence of the child, the name of the school the child is attending, a description of the nature of the problem of the child relating to the proposed or refused initiation or change, including the facts relating to the problem, and a proposed resolution of the problem to the extent known and available to the parents at the time.

(4) The DoD school system may file a written petition for a hearing to override a parent's refusal to grant consent for an initial evaluation, a reevaluation or an initial educational placement of the child. The DoD school system may also file a written petition for a hearing to override a parent's refusal to accept an IEP.

(5) The party seeking the hearing shall submit the petition to the Director, DOHA, at P.O. Box 3656, Arlington, Virginia 22203. The petitioner shall deliver a copy of the petition to the opposing party (*i.e.*, the parent or the school principal, for the DoD school system, or the military MTF commander, for the Military Medical Department), either in person or by first-class mail, postage prepaid. Delivery is complete on mailing. When the DoD school system or the Military Medical Department petitions for a hearing, it shall inform the other parties of the deadline for filing an answer under paragraph D.(6) of this appendix and shall provide the other parties with a copy of this part.

(6) An opposing party shall submit an answer to the petition to the Director, DOHA, with a copy to the petitioner, at the latest by the 15th business day after receipt of the petition. The answer shall be as full and complete as possible, addressing the issues, facts, and proposed relief. The submission of the answer is complete upon mailing.

(7) By 10 business days after receipt of the petition, the Director, DOHA, shall assign a hearing officer, who then shall have jurisdiction over the resulting proceedings. The Director, DOHA, shall forward all pleadings to the hearing officer.

(8) The party requesting the hearing shall plead with specificity as to what issues are in dispute and all issues not specifically pleaded with specificity is deemed waived. Parties must limit evidence to the issues specifically pleaded. A party may amend a pleading if the amendment is filed with the hearing officer and is received by the other parties at least 10 business days before the hearing.

(9) The Director, DOHA, shall arrange for the time and place of the hearing, and shall provide administrative support. The hearing shall be held in the DoD school district attended by the child or at the military base location of the EDIS clinic, unless the parties agree otherwise or upon a showing of good cause.

(10) The purpose of a hearing is to establish the relevant facts necessary for the hearing officer to reach a fair and impartial determination of the case. Oral and documentary evidence that is relevant and material may be received. The technical rules of evidence shall be relaxed to permit the development of a full evidentiary record with the Federal Rules of Evidence, title 28, United States Code serving as guide.

(11) The hearing officer shall be the presiding officer, with judicial powers to manage the proceeding and conduct the hearing. Those powers shall include the authority to order an independent evaluation of the child at the expense of the DoD school system or the Military Medical Department concerned and to call and question witnesses.

(12) Those normally authorized to attend a hearing shall be the parents of the individual with disabilities, the counsel or personal representative of the parents, the counsel and professional employees of the DoDDS or the Military Medical Department concerned, the hearing officer, and a person qualified to transcribe or record the proceedings. The hearing officer may permit other persons to

attend the hearing, consistent with the privacy interests of the parents and the individual with disabilities. The parents have the right to an open hearing on waiving in writing their privacy rights and those of the individual with disabilities who is the subject of the hearing.

(13) A verbatim transcription of the hearing shall be made in written or electronic form and shall become a permanent part of the record. A copy of the written transcript or electronic record of the hearing shall be made available to a parent on request and without cost. The hearing officer may allow corrections to the written transcript or electronic recording for conforming it to actual testimony after adequate notice of such changes is given to all parties.

(14) The hearing officer's decision of the case shall be based on the record, which shall include the petition, the answer, the written transcript or the electronic recording of the hearing, exhibits admitted into evidence, pleadings or correspondence properly filed and served on all parties, and such other matters as the hearing officer may include in the record, if such matter is made available to all parties before the record is closed under paragraph D.(16) of this appendix.

(15) The hearing officer shall make a full and complete record of a case presented for adjudication.

(16) The hearing officer shall decide when the record in a case is closed.

(17) The hearing officer shall issue findings of fact and conclusions of law in a case not later than 50 business days after being assigned to the case, unless a request for discovery is made by either party, as provided for in paragraph D.(5) of this appendix in which case the time required for such discovery does not count toward the 50 business days. The hearing officer may grant a specific extension of time for good cause either on his or her own motion or at the request of either party. Good cause includes the time required for mediation under section B of this appendix. If the hearing officer grants an extension of time, he or she shall identify the length of the extension and the reason for the extension in the record of the proceeding.

E. DISCOVERY

(1) Full discovery shall be available to parties to the proceeding, with the Federal Rules of Civil Procedure, Rules 26–37, codified at 28 U.S.C. serving as a guide.

(2) If voluntary discovery cannot be accomplished, a party seeking discovery may file a motion with the hearing officer to accomplish discovery. The hearing officer shall grant an order to accomplish discovery upon a showing that the requested evidence is relevant and necessary. Relevant evidence is necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue. A matter is not in issue when it is admitted or stipulated as a fact. An order granting discovery shall be enforceable as is an order compelling testimony or the production of evidence.

(3) Records compiled or created in the regular course of business, which have been provided to a party prior to hearing in accordance with paragraph E.(2) of this appendix may be received and considered by the officer without authenticating witnesses.

F. WITNESSES; PRODUCTION OF EVIDENCE

(1) All witnesses testifying at the hearing shall be advised that it is a criminal offense knowingly and willfully to make a false statement or representation to a Department or Agency of the U.S. Government as to any matter in the jurisdiction of that Department or Agency. All witnesses shall be subject to cross-examination by the parties.

(2) A party calling a witness shall bear the witness' travel and incidental expenses associated with testifying at the hearing. The DoD school system or the Military Medical Department concerned shall pay such expenses when a witness is called by the hearing officer.

(3) The hearing officer may issue an order compelling the attendance of witnesses or the production of evidence on the hearing officer's own motion or, if good cause can be shown, on motion of either party.

(4) When the hearing officer determines that a person has failed to obey an order to testify or to produce evidence, and such failure is in knowing and willful disregard of the order, the hearing officer shall so certify.

(5) The party or the hearing officer seeking to compel testimony or the production of evidence may, based on the certification provided for in paragraph F.(4) of this appendix file an appropriate action in a court of competent jurisdiction to compel compliance with the hearing officer's order.

(6) At least 5 business days prior to a hearing, the parties shall exchange lists of all documents and materials that each party intends to use at the hearing, including all evaluations and reports. Each party also shall disclose the names of all witnesses it intends to call at hearing along with a proffer of the anticipated testimony of each witness.

(7) At least 10 business days in advance of hearing, each party must provide the name, title, curriculum vitae, and summary of proposed testimony of any expert witness it intends to call at hearing.

(8) Failure to disclose documents, materials, or witnesses pursuant to paragraphs F.(6) and F.(7) of this appendix may result in the hearing officer barring their introduction at the hearing.

G. HEARING OFFICER'S FINDINGS OF FACT AND DECISION

(1) The hearing officer shall make written findings of fact and shall issue a decision setting forth the questions presented, the resolution of those questions, and the rationale for the resolution. The hearing officer shall file the findings of fact and decision with the Director, DOHA, with a copy to the parties.

(2) The Director, DOHA, shall forward to the Director, of the DoD school system, or to the Military Medical Department concerned, copies with all personally identifiable information deleted, of the hearing officer's findings of fact and decision or, in cases that are administratively appealed, of the final decision of the DOHA Appeal Board.

(3) The findings of fact and decision of the hearing officer shall become final unless a notice of appeal is filed under section I of this appendix. The DoD school system or the Military Medical Department concerned shall implement the decision as soon as practicable after it becomes final.

H. DETERMINATION WITHOUT HEARING

(1) At the request of a parent of an infant, toddler, or child age 3 to 21, inclusive, when early intervention or special educational (including related) services are at issue, the requirement for a hearing may be waived, and the case may be submitted to the hearing officer on written documents filed by the parties. The hearing officer shall make findings of fact and conclusions of law in the period fixed by paragraph D.(17) of this appendix.

(2) The DoD school system or the Military Medical Department concerned may oppose a request to waive a hearing. In that event, the hearing officer shall rule on that request.

(3) Documents submitted to the hearing officer in a case determined without a hearing shall comply with paragraph F.(6) of this appendix. A party submitting such documents shall provide copies to all other parties.

I. APPEAL

(1) A party may appeal the hearing officer's findings of fact and decision by filing a written notice of appeal with the Director, DOHA, at P.O. Box 3656, Arlington, Virginia 22203, within 15 business days of receipt of the findings of fact and conclusions of law. The notice of appeal must contain the appellant's certification that a copy of the notice of appeal has been provided to all other parties. Filing is complete on mailing.

(2) Within 30 business days of receipt of the notice of appeal, the appellant shall submit a written statement of issues and arguments to the Director, DOHA, with a copy to the other parties. The other parties shall submit a reply or replies to the Director, DOHA, within 20 business days of receiving the statement, and shall deliver a copy of each reply to the appellant. Submission is complete on mailing.

(3) The Director, DOHA, shall refer the matter on appeal to the DOHA Appeal Board. It shall determine the matter, including the making of interlocutory rulings, within 45 business days of receiving timely submitted replies under paragraph I.(2) of this appendix.

(4) The determination of the DOHA Appeal Board shall be a final administrative decision and shall be in written form. It shall address the issues presented and set forth a rationale for the decision reached. A determination denying the appeal of a parent in whole or in part shall state that the parent has the right under sections 921–932 and chapter 33 of title 20, United States Code to bring a civil action on the matters in dispute in a district court of the United States of competent jurisdiction without regard to the amount in controversy.

(5) No provision of this part or other DoD guidance may be construed as conferring a further right of administrative review. A party must exhaust all administrative remedies afforded by this appendix before seeking judicial review of a determination made under this appendix.

J. PUBLICATION AND INDEXING OF FINAL DECISIONS

The Director, DOHA, shall ensure that final decisions in cases arising under this appendix are published and indexed to protect the privacy rights of the parents who are parties in those cases and the children of such parents, in accordance with DoD Directive 5400.11.

## APPENDIX H TO PART 57—MONITORING

A. MONITORING

(1) The DoDEA and the Military Medical Departments shall establish procedures for monitoring special services requiring:

(i) Periodic on-site monitoring at each administrative level.

(ii) The DoD school systems to report annually that the provision of special education and related services is in compliance with this part.

(iii) The Military Medical Departments to report annually that the provision of EIS is in compliance with this part.

(2) The Director, DoDEA, and the Surgeons General of the Military Medical Departments shall submit reports to the DoD-CC not later than July 31 each year that summarize the status of compliance. The reports shall:

(i) Identify procedures conducted at Headquarters and at each subordinate level, including on-site visits, to evaluate compliance with this part.

(ii) Summarize the findings.

(iii) Describe corrective actions required of the programs that were not in compliance and the technical assistance that shall be provided to ensure they reach compliance.

B. USD(P&R) OVERSIGHT

(1) On behalf of the USD(P&R), the DoD-CC or designees, shall make periodic unannounced visits to selected programs to ensure the monitoring process is in place and to validate the compliance data and reporting. The DoD-CC may use other means in addition to the procedures in this section to ensure compliance with the requirements established in this part.

(2) For DoD-CC monitoring visits, the Secretaries of the Military Departments, or designees, shall:

(i) Provide necessary travel funding and support for their respective team members.

(ii) Provide necessary technical assistance and logistical support to monitoring teams during monitoring visits to facilities for which they are responsible.

(iii) Cooperate with monitoring teams, including making all pertinent records available to the teams.

(iv) Address monitoring teams' recommendations concerning early intervention and related services for which the Secretary concerned has responsibility, including those to be furnished through an inter-Service agreement, are promptly implemented.

(3) For DoD-CC monitoring visits, the Director, DoDEA shall:

(i) Provide necessary travel funding and support for team members from the Office of the Under Secretary (P&R); the Office of GC, DoD; and DoD school systems.

(ii) Provide necessary technical assistance and logistical support to monitoring teams during monitoring visits to facilities for which he/she is responsible.

(iii) Cooperate with monitoring teams, including making all pertinent records available to the teams.

(iv) Address the monitoring teams' recommendations concerning special education and related services for which the DoD school system concerned has responsibility.

(4) The ASD(HA), or designee, shall provide technical assistance to the DoD monitoring teams when requested.

(5) The GC, DoD, or designee, shall:

(i) Provide legal counsel regarding monitoring activities conducted pursuant to this part to the USD(P&R), the ASD(HA), and, where appropriate, to DoDEA, monitored Agencies, and monitoring teams.

(ii) Provide advice about the legal requirements of this part and Federal law to the DoD school systems, military medical commanders, and military installation commanders, and to other DoD personnel as appropriate, in connection with monitoring activities conducted pursuant to this part.

# PART 64—MANAGEMENT AND MOBILIZATION OF REGULAR AND RESERVE RETIRED MILITARY MEMBERS

Sec.
64.1 Purpose.
64.2 Applicability and scope.
64.3 Definitions.
64.4 Policy.
64.5 Responsibilities.

AUTHORITY: 10 U.S.C. 688, 973, and 12301(a).

SOURCE: 71 FR 19828, Apr. 18, 2006, unless otherwise noted.

## § 64.1 Purpose.

This part implements 10 U.S.C. 688, 973, 12301(a), and 12307 by prescribing uniform policy and guidance governing the peacetime management of retired Regular and Reserve military personnel preparing for their use during a mobilization.

## § 64.2 Applicability and scope.

This part:

(a) Applies to the Office of the Secretary of Defense, the Military Departments (including the Coast Guard when it is not operating as part of the Navy by agreement with the Department of Homeland Security), the Chairman of the Joint Chiefs of 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 in the Department of Defense (hereafter referred to as the ''DoD Components''). The term ''Military Services,'' as used herein, refers to the Army, the Navy, the Air Force, the Marine Corps, and the Coast Guard. The term ''Secretary concerned,'' refers to the respective Secretaries of the Military Departments and the Secretary of Homeland Security for the Coast Guard when it is not operating as part of the Navy. (b) This part also applies to non-DoD organizations that have DoD-related missions, such as the Department of Homeland Security and the Selective Service System, and non-DoD organizations that have North Atlantic Treaty Organization-related missions, under agreements with those non-DoD organizations.

### § 64.3 Definitions.

(a) *Key employee*. Any Reservist or any military retiree (Regular or Reserve) identified by his or her employer, private or public, as filling a key position.

(b) *Key position*. A civilian position, public or private (designated by an employer and approved by the Secretary concerned), that cannot be vacated during war, a national emergency, or mobilization without seriously impairing the capability of the parent agency or office to function effectively, while meeting the criteria for designating key positions as outlined in Department of Defense Directive 1200.7.[1]

(c) *Military retiree categories*—(1) *Category I*. Non-disability military retirees under age 60 who have been retired fewer than 5 years.

(2) *Category II*. Non-disability military retirees under age 60 who have been retired 5 years or more.

(3) *Category III*. Military retirees, including those retired for disability, other than categories I or II retirees (includes warrant officers and healthcare professionals who retire from active duty after age 60).

(d) *Military retirees or retired military members*. (1) Regular and Reserve officers and enlisted members who retire from the Military Services under 10 U.S.C. Chapters 61, 63, 65, 1223, 367, 571, or 573, and 14 U.S.C. Chapters 11 and 21.

(2) Reserve officers and enlisted members eligible for retirement under one of the provisions of law in § 64.3(d) who have not reached age 60 and who have not elected discharge or are not members of the Ready Reserve or Standby Reserve (including members of the Inactive Standby Reserve).

(3) Members of the Fleet Reserve and Fleet Marine Corps Reserve under 10 U.S.C. 6330.

### § 64.4 Policy.

(a) It is DoD policy that military retirees be ordered to active duty as needed to perform such duties as the Secretary concerned considers necessary in the interests of national defense as described in 10 U.S.C. 12301 and 688.

(b) The DoD Components and the Commandant of the U.S. Coast Guard shall plan to use as many retirees as necessary to meet national security needs.

(c) The military retirees ordered to active duty may be used according to guidance prescribed by the Secretary concerned as follows:

(1) To fill shortages or to augment deployed or deploying units and activities or units in the Continental United States, Alaska, and Hawaii supporting deployed units.

(2) To release other military members for deployment overseas.

(3) Subject to the limitations of 10 U.S.C. 973, Federal civilian workforce shortages in the Department of Defense, the U.S. Coast Guard, or other Government entities.

(4) To meet national security needs in organizations outside the Department of Defense with Defense-related missions, if the detail outside the Department of Defense is approved according to DoD Directive 1000.17.[2]

(5) To perform other duties that the Secretary concerned considers necessary in the interests of national defense.

(d) Military retirees shall be ordered to active duty with full pay and allowances. They may not be used to fill mobilization billets in a non-pay status.

(e) Military retirees serving on active duty may be reassigned to meet the needs of the Military Service.

### § 64.5 Responsibilities.

(a) The Assistant Secretary of Defense for Reserve Affairs and the Deputy Under Secretary of Defense (Military Personnel Policy) (DUSD(MMP)), under the Under Secretary of Defense for Personnel and Readiness, shall provide policy guidance for the management and mobilization of DoD military retirees.

(b) The Secretaries of the Military Departments and the Commandant of the U.S. Coast Guard shall ensure plans for the management and mobilization of military retirees are consistent with this rule.

(c) The Directors of the Defense Agencies, the Secretary of Homeland

[1] Copies may be obtained from *http://www.dtic.mil/whs/directives*.

[2] See § 64.3(b).

Security, the Director of the Selective Service System, and Heads of Federal Agencies, shall, by agreement, assist in identifying military and Federal civilian wartime positions that are suitable to be filled by military retirees. They shall also process those requirements according to Departmental policy, including any appropriate coordination under Department of Defense Directive 1000.17,[3] before the positions are filled by the Military Services. The Secretary of the Military Department shall retain the right to disapprove the request if no military retiree is available.

(d) The Secretaries of the Military Departments, or designees, shall:

(1) Prepare plans and establish procedures for mobilization of military retirees according to this rule.

(2) Determine the extent of military retiree mobilization requirements based on existing inventories and inventory projections for mobilization of qualified Reservists in an active status in the Ready Reserve, including Individual Ready Reserve and the Inactive National Guard (when placed in an active status), or the Standby Reserve.

(3) Develop procedures for identifying retiree Categories I and II and conduct screening of retirees according to Department of Defense Directive 1200.7.[4]

(4) Maintain necessary records on military retirees and their military qualifications. Maintain records for military retiree Categories I and II, including retirees who are key employees, and their availability for mobilization, civilian employment, and physical condition. Data shall be

(5) Advise military retirees of their duty to provide the Military Services with accurate mailing addresses and any changes in civilian employment, military qualifications, availability for service, and physical condition.

(6) Pre-assign retired members, when determined appropriate and as necessary.

(7) Determine refresher training requirements.

[3] See § 64.3(b).

[4] See § 64.3(b).

# PART 65—POST–9/11 GI BILL

Sec.
65.1 Purpose.
65.2 Applicability.
65.3 Definitions.
65.4 Policy.
65.5 Responsibilities.
65.6 Procedures.
65.7 Eligibility.
65.8 Reporting requirements.
APPENDIX TO 32 CFR PART 65—ADDITIONAL REPORTING REQUIREMENTS

AUTHORITY: 38 U.S.C., chapter 33

SOURCE: 74 FR 30213, June 25, 2009, unless otherwise noted.

## § 65.1 Purpose.

This part:

(a) Establishes policy, assigns responsibilities, and prescribes procedures under chapter 33 of title 38, United States Code (U.S.C.) for carrying out the Post–9/11 GI Bill.

(b) Establishes policy for the use of supplemental educational assistance (hereafter referred to as ''kickers'') for members with critical skills or specialties, or for members serving additional service under section 3316 of title 38, U.S.C.

(c) Establishes policy for authorizing the transferability of education benefits (TEB) in accordance with section 3319 of title 38, U.S.C.

(d) Assigns responsibility to the Department of Defense Board of Actuaries to review valuations of the Department of Defense Education Benefits Fund in accordance with sections 183 and 2006 of title 10, U.S.C.

## § 65.2 Applicability.

(a) This part applies to the Office of the Secretary of Defense, the Military Departments (including the Coast Guard at all times, including when it is a Service in the Department of Homeland Security (DHS) by agreement with the Department).

(b) The term ''Military Services,'' as used herein, refers to the Army, the Navy, the Air Force, the Marine Corps, and the Coast Guard.

## § 65.3 Definitions.

*Active Duty*. Defined in section 101(21)(A) of title 38, U.S.C. for Members of the regular components of the

Armed Forces. Defined in section 688, 12301(a), 12301(d), 12301(g), 12302, or 12304 of title 10, U.S.C. for Members of the Reserve Components of the Armed Forces.

*EATP*. The Educational Assistance for Persons Enlisting for Active Duty program, chapter 106A (formerly 107) of title 10, U.S.C.

*Entry Level and Skill Training*. (1) In the case of members of the Army, Basic Combat Training and Advanced Individual Training, which includes members attending One Station Unit Training (OSUT).

(2) In the case of members of the Navy, Recruit Training (or Boot Camp) and Skill Training (or so-called 'A' School).

(3) In the case of members of the Air Force, Basic Military Training and Technical Training.

(4) In the case of members of the Marine Corps, Recruit Training and Marine Corps Training (or School of Infantry Training).

(5) In the case of members of the Coast Guard, Basic Training.

*Family Member*. For the purpose of this part, a spouse or child enrolled in the Defense Enrollment Eligibility Reporting System (DEERS).

*Kickers*. Supplemental educational assistance paid to an eligible Service member besides the basic educational assistance, because of the individual's qualifying service, as in section 3316 of title 38, U.S.C.

*Institution of Higher Learning (IHL)*. A training institution as defined in section 3452(f) of title 38, U.S.C., and approved for purposes of chapter 30 of title 38, U.S.C., (including approval by the State approving agency concerned).

*Member of the Armed Forces*. For the purposes of this part, those individuals on active duty or in the Selected Reserve. Does not include other members of the Ready Reserve (such as the Individual Ready Reserve, standby Reserve, or retired members of the Armed Forces.)

*MGIB*. The All–Volunteer Force Education Assistance Program, Chapter 30 of title 38, U.S.C.

*MGIB–SR*. The Educational Assistance for Members of the Selected Reserve program, Chapter 1606 of title 10, U.S.C.

*Post-9/11 GI Bill*. The Post–9/11 Educational Assistance Program, Chapter 33 of title 38, U.S.C.

*REAP*. The Reserve Educational Assistance Program, Chapter 1607 of title 10, U.S.C.

*Secretary of the Military Department concerned*. For a member of the Army, the Navy, the Air Force, the Marine Corps, and the Coast Guard when it is operating as a Service of the Department of the Navy, the term means the Secretary of the Military Department with jurisdiction over that Service member. For a member of the Coast Guard, when the Coast Guard is operating as a Service of the DHS, the term means, ''the Secretary of Homeland Security has jurisdiction over that Service member.''

### § 65.4 Policy.

It is DoD policy:

(a) That ''kickers'' may be authorized to assist in the recruitment and retention of individuals into skills or specialties in which there are critical shortages or for which it is difficult to recruit, or in the case of units, retain personnel.

(b) That transferability of unused educational benefits be used by the Military Services to promote recruitment and retention.

(c) That the Secretary of Defense may limit the months of the entitlement that may be transferred to no less than 18 months, as specified in section 3319 of title 38, U.S.C., if needed to manage force structure and force shaping.

### § 65.5 Responsibilities.

(a) The Deputy Under Secretary of Defense for Military Personnel Policy (DUSD(MPP)), under the authority, direction, and control of the Under Secretary of Defense for Personnel and Readiness, shall:

(1) Develop procedures to implement policy for the Post-9/11 GI Bill authorized by chapter 33 of title 38, U.S.C.

(2) Coordinate administrative procedures with the Department of Veterans Affairs (DVA), as applicable.

(3) Review and approve each Military Department plan to use supplemental assistance under the provisions of section 3316 of title 38, U.S.C.

(4) Establish the standard data elements needed to administer the Post-9/11 GI Bill Program.(see Appendix A to this part).

(b) The Under Secretary of Defense (Comptroller)/Chief Financial Officer (USD(C/CFO)) shall:

(1) Provide guidance on budgeting, accounting, and funding for the educational benefits program in support of policies established in § 65.6(b) of this part, and for investing the available DoD Education Benefits Fund balance.

(2) In coordination with the DUSD (MPP), review and approve the Military Department budget estimates for the supplemental payments under the provisions of section 3316 of title 38, U.S.C.

(c) The Secretaries of the Military Departments shall:

(1) Provide regulations, policy implementation guidance, and instructions governing the administration of the GI Bill program established under chapter 33 of title 38, U.S.C. consistent with this DTM and other guidance issued by the DUSD(MPP) and USD(C)/CFO consistent with the needs of the Military Services. Regulations must include Service implementation of kickers and the transfer of unused educational benefits as established in section 3319 of title 38, U.S.C., as outlined in § 65.6 of this part.

(2) Ensure that all eligible active duty members and members of the Reserve Components are aware that they are eligible for educational assistance under the Post-9/11 GI Bill program upon serving the required active duty time as established in Chapter 33 of title 38, U.S.C.

(3) Advise all officers without earlier established eligibility, following commissioning through Service Academies, with the exception the U.S. Coast Guard Academy, or Reserve Officer Training Corps (ROTC) Scholarship Programs, that their eligibility for benefits does not begin until they have completed their statutory obligated active duty service. Any active duty service after that obligated period of service may qualify and entitle the Service member to accrue active duty service for the Post–9/11 GI Bill eligibility.

(4) Ensure that Service members participating in the student loan repayment program under chapter 109 of title 10, U.S.C., receive counseling on qualification for the Post–9/11 GI Bill program and understand that their service commitment due to such participation does not count as qualifying active duty service. Any service after that obligated period of service may qualify and entitle the Service member to accrue active duty service for Post-9/11 GI Bill eligibility.

(5) Determine the need for Supplemental Educational Assistance (Kickers) for recruitment and retention of individuals with special skills under section 3316 of title 38, U.S.C., and submit plans to the DUSD(MPP) for approval. That submission shall include justification for providing benefits to those skills, identification of skills for which benefits shall be offered, other special incentives offered in those skills, estimated number of participants, costs, and eligibility requirements.

(6) Budget for and transfer funds to support the Supplemental Educational Assistance (Kickers), in accordance with § 65.6 of this part and guidance issued by the USD(C)/CFO.

(7) Provide active duty participants and members of the Reserve Components with qualifying active duty service individual pre-separation or release from active duty counseling on the benefits under the Post-9/11 GI Bill and document accordingly.

(8) Maintain records for individuals who participate in supplemental educational assistance programs under section 3316 of title 38, U.S.C. Ensure that records on that participation are provided to the Defense Manpower Data Center (DMDC) and the DVA.

(9) Use DoD standard data elements and codes established by DoD Instruction 1336.5 (available at *http://www.dtic.mil/whs/directives/corres/pdf/133605p.pdf*) and DoD Instruction 7730.54 (available at *http://www.dtic.mil/whs/directives/corres/pdf/773054p.pdf*) and listed in table 1 of appendix A to this part, when specified. A Military Service failing to comply either with the coding instructions or with codes registered in the DoD Data Element Program shall be responsible for the conversion costs in accomplishing data interchange.

**§ 65.6 Procedures.**

(a) *General*—(1) *Eligibility*. The Department of Veterans Affairs is responsible for determining eligibility for education benefits under the GI Bill. Generally, to be eligible for the GI Bill, individuals must serve on active duty on or after September 11, 2001, for at least 30 continuous days with a discharge due to a service-connected disability; or an aggregate period ranging from 90 days to 36 months or more. See § 65.7 of this part for specific requirements.

(2) *Educational assistance benefits*. (i) Benefits under the GI Bill are based on a percentage, as determined by a Service Member's aggregate length of active duty service.

(A) Amount of tuition and fees charged, not to exceed the most expensive in-State undergraduate tuition and fees at a public institution of higher learning (tuition and fees paid directly to the school);

(B) Monthly stipend equal to the basic allowance for housing (BAH) amount payable to a military E–5 with dependents, in the same ZIP code as the school that the student is attending (paid to the individual);

(C) Yearly books and supplies stipend of up to $1000 per year (paid to the individual on a quarter, semester, or term basis, as appropriate); and

(D) A one-time payment of $500 may be payable to certain individuals relocating from highly rural areas (paid to the individual).

(ii) ''Kickers'', for those who are eligible, will be paid to the individual in conjunction with, and only when receiving, the monthly stipend.

(iii) The monthly stipend and the books and supplies stipend are not payable to individuals on active duty.

(iv) The monthly stipend allowance is not payable for those pursuing education and/or training at half time or less or to some individuals taking distance learning. Individuals enrolled at half time or less are eligible for an appropriately reduced stipend for books and supplies. The DVA will determine under what, if any, circumstances an individual will be eligible for the monthly stipend while undertaking distance learning.

(v) Post-9/11 GI Bill benefits are subject to change based on legislative changes. The benefits are different for educational programs pursued on a full-time basis or at an applicable reduced rate determined by the Secretary of Veterans Affairs for less than full-time enrollment.

(vi) Post-9/11 GI Bill benefits may be used for an approved program of education offered by an Institution of Higher Learning (IHL) This includes graduate and undergraduate training, and some vocational/technical training programs. DVA is the final authority on program eligibility.

(vii) Individuals may receive tutorial assistance (up to $100 per month, not to exceed a total of $1,200) and reimbursement of one licensing and certification test (not to exceed a total of $2,000).

(viii) Additionally, individuals who were eligible for MGIB, MGIB–SR, or REAP, and elect to use benefits under the GI Bill will be eligible to receive benefits for programs approved under those provisions but not offered by IHLs, such as on-the-job training, apprenticeship training, correspondence courses, flight training, preparatory courses, and national exams at the benefit rate for MGIB, MGIB–SR, or REAP, as appropriate.

(3) *Benefits for individuals pursuing education on active duty*. Educational assistance is payable under the Post-9/11 GI Bill Program for pursuit of an approved program of education while on active duty.

(i) The amount of educational assistance payable shall be the lesser of the amount of assistance authorized in the manner specified under section 3014(b)(1) of title 38, U.S.C., or the established institutional charges for tuition and fees required in similar circumstances of non-veterans enrolled in the same program.

(ii) Concurrent Use of Post-9/11 GI Bill and Tuition Assistance (commonly called ''Top Up''). In accordance with section 3313(e) of title 38, U.S.C., a Service member entitled to basic educational assistance who is pursuing education or training described in subsection (a) or (c) of section 2007 of title 10, U.S.C., may use, at their discretion, Post-9/11 GI Bill benefits to meet all or

a portion of the charges of the educational institution for the education or training that are not paid by the Secretary of the Military Department concerned under such subsection. DVA shall administer fully that portion of the Post-9/11 GI Bill Program.

(4) *Time limitation*. As a general rule, eligible individual entitlements expire at the end of a 15-year period beginning on the Service member's last date of discharge or release from active duty of at least 90 consecutive days (30 days if released or discharged for service-connected disability). The Secretary of the Military Department concerned shall determine the last date of discharge or release, if such date cannot be determined clearly from the Service member's records.

(5) *Issues for Members with Entitlement to Existing Education Programs*—(i) *Members Eligible for Existing Programs*. An individual may elect to receive educational assistance under chapter 33 of title 38, U.S.C., if such individual, as of August 1, 2009,

(A) Is entitled to basic educational assistance under MGIB, and has used, but retains unused, entitlement under chapter 30 of title 38, U.S.C.;

(B) Is entitled to educational assistance under EATP, MGIB–SR, or REAP, and has used, but retains unused, entitlement under the applicable program;

(C) Is entitled to basic educational assistance under MGIB, but has not used any entitlement under chapter 30 of title 38, U.S.C.;

(D) Is entitled to educational assistance under EATP, MGIB–SR, or REAP, but has not used any entitlement under such program;

(E) Is a member of the Armed Forces who is eligible for receipt of basic educational assistance under MGIB, and is making contributions toward such assistance under sections 3011(b) or 3012(c) of title 38, U.S.C.; or

(F) Is a member of the Armed Forces who is not entitled to basic educational assistance under MGIB, by reason of an election under sections 3011(c)(1) or 3012(d)(1) of title 38, U.S.C.; and

(*G*) As of the date of the individual's election under paragraph (a)(5)(i)), meets the requirements for entitlement to educational assistance under chapter 33 of title 38, U.S.C.

(*ii*) *Election Process*. The method and process of making such election will be determined by DVA.

(*iii*) *Irrevocability of Election*. An election made under paragraph (a)(5(i)) of this section is irrevocable.

(*iv*) An individual entitled to educational assistance under the Post-9/11 GI Bill who is also eligible for educational assistance under the MGIB (chapters 30, 31, 32, or 35 of title 38, U.S.C.), EATP (chapter 106A of title 10, U.S.C.), MGIB–SR (chapter 1606 of title 10, U.S.C.), REAP (chapter 1607 of title 10, U.S.C.), or the provisions of the Hostage Relief Act of 1980 (section 5561 note of title 5, U.S.C.) may not receive assistance under two or more such programs concurrently, but shall elect (in such form and manner as the Secretary of Veterans Affairs may prescribe) under which chapter or provisions to receive educational assistance.

(v) *Cessation of pay reduction under Montgomery GI Bill*. Effective as of the first month beginning on or after the date of an election under paragraph (a)(5(i)) of this section, an individual having their pay reduced under the provisions of sections 3011(b) or 3012(c) of title 38, U.S.C., as applicable, shall have that pay reduction ceased, and the requirements of such section shall be deemed no longer applicable to the individual.

(vi) *Refund of pay reduction under Montgomery GI Bill*. An individual who is described in paragraph (a)(5(i)) of this section, whose pay was reduced under the provisions of sections 3011(b) or 3012(c) of title 38, U.S.C., will receive a refund of that pay reduction subject to the following:

(A) A full refund for an individual who used no months of benefit under the MGIB.

(B) A refund reduced by a proportion calculated by the number of months of MGIB benefits remaining at the time of election divided by 36.

(C) The refund will be added to the monthly stipend allowance paid in the last month of eligibility under the Post-9/11 GI Bill. Individuals who do not exhaust entitlement under the Post-9/11 GI Bill will not receive a refund of the pay reduction.

(vii) *Treatment of certain contributions under MGIB and REAP (commonly called*

*''Buy-Up'')*. (A) There is no provision to allow for increasing the amount allowed for Post-9/11 GI Bill benefits based on any contributions made by an individual under the provisions of section 3015(g) of title 38, U.S.C.

(B) There is no provision to allow for increasing the amount allowed for Post-9/11 GI Bill benefits based on any contributions made by an individual under the provisions of section 16162(f) of title 10, U.S.C.

(viii) *Limitation on entitlement for certain individuals*. In the case of an individual eligible for MGIB who has used but retains unused entitlement, making an election to receive benefits under the Post-9/11 GI Bill, the number of months of entitlement of the individual to educational assistance under the Post-9/11 GI Bill shall be the number of months equal to the number of months of unused entitlement of the individual under MGIB as of the date of the election.

(ix) *Additional educational and training availability*. In addition to the educational benefits as described in paragraph (a)(2)(vi) of this section, individuals who were eligible for benefits under MGIB, MGIB–SR, or REAP, and elect to use benefits under the GI Bill, will be eligible to receive benefits for on-the-job training, apprenticeship training, correspondence courses, flight training, preparatory courses, and national exams at the benefit rate for MGIB, MGIB–S, or REAP, as approriate.

(x) *Treatment of existing supplemental educational benefits (Kickers)*. Individuals eligible for kickers under either MGIB or MGIB–SR will remain eligible for such increased educational assistance. The payments shall be based upon the applicable monthly rate for the kickers. Payments shall be lump sum and made on a quarter, semester, or term basis as determined by the Secretary of Veterans Affairs.

(b) *Supplemental educational assistance (''kickers'')*—(1) *Enlistment kickers*. (i) The Secretaries of the Military Departments may offer an increase to the monthly amount of educational assistance otherwise payable to the individual under paragraph (1)(B) of section 3313(c) of title 38, U.S.C., or under paragraphs (2) through (7) of such section 3313(c) of title 38, U.S.C. (as applicable), for members who initially enlist in a regular component in a skill or specialty in which there is a critical shortage of personnel or for which it is difficult to recruit. These increases in the monthly amount are known as enlistment kickers.

(ii) The use of enlistment kickers should be based on the criticality of the skill and/or the length of enlistment commitment and may be offered in amounts from $150 per month to $950 per month in increments of $100. Reporting codes for enlistment kickers are listed in Appendix A to this part.

(2) *Affiliation kickers*. (i) The Secretaries of the Military Departments may offer an increase to the monthly amount of educational assistance otherwise payable to the individual under paragraph (1)(B) of section 3313(c) of title 38, U.S.C., or under paragraphs (2) through (7) of such section 3313(c) of title 38, U.S.C. (as applicable), to a member who is separating honorably from a regular component and who agrees to serve in the Selected Reserve in a skill, specialty, or unit in which there is a critical shortage of personnel or for which it is difficult to recruit and/or retain.

(ii) The use of affiliation kickers should be based on the criticality of the skill and/or unit and the length of Selected Reserve commitment, and may be offered in amounts from $150 per month to $950 per month in increments of $100. If an individual is already eligible for an enlistment kicker, the amount of the Affiliation Kicker is limited to the amount that would take the total to $950. For those individuals who are offered an Affiliation Kicker on top of an Enlistment Kicker, the increases will be in $100 increments. Reporting codes for Affiliation Kickers are the same as the codes for Enlistment Kickers listed in Appendix A to this part.

(3) *Reenlistment kickers*. (i) The Secretaries of the Military Departments may offer an increase to the monthly amount of educational assistance otherwise payable to the individual under paragraph (1)(B) of section 3313(c) of title 38, U.S.C., or under paragraphs (2) through (7) of such section 3313.(c) of title 38, U.S.C. (as applicable), to a

member who, after completing the initial term of service, elects to remain on active duty for a period of at least 2 years.

(ii) The use of reenlistment kickers should be based on the criticality of the skill and may be offered in amounts from $100 per month to $300 per month in increments of $100, based on length of additional service. Reporting codes for reenlistment kickers are listed in appendix A to this part.

(4) *Limitations*. Since kickers are paid in conjunction with the monthly stipend paid under section (1)(B)(i) of section 3313(c) of title 38, U.S.C., members eligible for kickers should be aware of the limitations on payment.

(i) No payment will be provided for education pursued on half-time basis or less.

(ii) No payment will be provided for education/training pursued solely through distance learning.

(iii) No payment will be provided for use while serving on active duty.

(c) *Transferability of unused education benefits to family members*. Subject to the provisions of this section, the Secretaries of the Military Departments, to promote recruitment and retention of members of the Armed Forces, may permit an individual described in paragraph (c)(1) of this section, who is entitled to educational assistance under this Post-9/11 GI Bill to elect to transfer to one or more of the family members specified, all or a portion of such individual's entitlement to such assistance.

(1) *Eligible individuals*. Any member of the Armed Forces on or after August 1, 2009 who, at the time of the approval of the individual's request to transfer entitlement to educational assistance under this section, is eligible for the Post-9/11 GI Bill, and

(i) Has at least 6 years of service in the Armed Forces (active duty and/or Selected Reserve) on the date of election and agrees to serve 4 additional years in the Armed Forces from the date of election, or

(ii) Has at least 10 years of service in the Armed Forces (active duty and/or Selected Reserve) on the date of election and either standard policy (Service or DoD) or statute preclude the Service member from committing to 4 additional years and agrees to serve for the maximum amount of time allowed by such policy or statute, or

(iii) Is or becomes retirement eligible during the period from August 1, 2009, through August 1, 2013, and agrees to serve the additional period, if any, specified in paragraphs (c)(1)(iii)(A) through (c)(1)(iii)(E) of this section. A Service Member is considered to be retirement eligible if he or she has completed 20 years of active Federal service or 20 qualifying years as computed under section 12732 of title 10, U.S.C.

(A) For those individuals eligible for retirement on August 1, 2009, no additional service is required.

(B) For those individuals who have an approved retirement date after August 1, 2009, and before July 1, 2010, no additional service is required.

(C) For those individuals eligible for retirement after August 1, 2009, and before August 1, 2010, 1 year of additional service is required.

(D) For those individuals eligible for retirement on or after August 1, 2010 and before August 1, 2011, 2 years of additional service is required.

(E) For those individuals eligible for retirement on or after August 1, 2011, and before August 1, 2012, 3 years of additional service is required.

(2) *Eligible family members*. (i) An individual approved to transfer an entitlement to educational assistance under this section may transfer the individual's entitlement to:

(A) The individual's spouse.

(B) One or more of the individual's children.

(C) A combination of the individuals referred to in paragraphs (c)(2)(i)(A) and (c)(2)(i)(B) of this section.

(ii) A family member must be enrolled in the Defense Eligibility Enrollment Reporting System (DEERS) and be eligible for benefits, at the time of transfer to receive transferred educational benefits.

(iii) A child's subsequent marriage will not affect his or her eligibility to receive the educational benefit; however, after an individual has designated a child as a transferee under this section, the individual retains the right to revoke or modify the transfer at any time.

(iv) A subsequent divorce will not affect the transferee's eligibility to receive educational benefits; however, after an individual has designated a spouse as a transferee under this section, the eligible individual retains the right to revoke or modify the transfer at any time.

(3) *Months of transfer*. Months transferred must be in whole months. The Secretary of Defense may limit the months of entitlement that may be transferred to no less than 18 months. The number of months of benefits transferred by an individual under this section may not exceed the lesser of:

(i) The months of unused benefits available under the Post-9/11 GI Bill,

(ii) 36 months, or

(iii) the number of months specified by the Secretary of Defense.

(4) *Transferee usage*. Dependent use of transferred educational benefits is subject to the following:

(i) A spouse:

(A) May start to use the benefit only after the individual making the transfer has completed at least 6 years of service in the Armed Forces.

(B) May use the benefit while the member remains in the Armed Forces or after separation from active duty after completing the additional service required to transfer the educational assistance under the Post-9/11 GI Bill referred to in paragraph (c)(1) of this section.

(C) Is subject to the same 15-year limitation as the member as stipulated in paragraph (a)(4) of this section.

(ii) A child:

(A) May start to use the benefit only after the individual making the transfer has completed at least 10 years of service in the Armed Forces.

(B) May use the benefit while the member remains in the Armed Forces or after separation from active duty after completing the additional service required to transfer the educational assistance under the Post-9/11 GI Bill referred to in paragraph (c)(1) of this section.

(C) May not use the benefit until they have met the requirements of a secondary school diploma (or equivalency certificate), or reached 18 years of age.

(D) Is not subject to the time limitation in paragraph (a)(4) of this section, but may not use the benefit after reaching 26 years of age.

(5) *Nature of transferred entitlement*. The entitlement transferred will be available as follows:

(i) An eligible spouse:

(A) Is entitled to educational assistance under chapter 33 of title 38, U.S.C. in the same manner as the individual from whom the entitlement was transferred.

(B) Is not eligible for the monthly stipend or books and supplies stipend while the sponsor is serving on active duty.

(ii) An eligible child:

(A) Is entitled to educational assistance under chapter 33 of title 38, U.S.C, in the same manner as the individual from whom the entitlement was transferred as if the individual were not on active duty.

(B) Is entitled to the monthly stipend and books and supplies stipend even if the eligible individual is on active duty.

(6) *Designation of transferee*. An individual transferring an entitlement to educational assistance under this section shall, through notification to the Secretary of the Military Department concerned as specified in paragraph (c)(9) of this section:

(i) Designate the dependent or dependents to whom such entitlement is being transferred;

(ii) Designate the number of months of such entitlement to be transferred to each dependent; and

(iii) Specify the period for which the transfer shall be effective for each dependent.

(7) *Time for transfer, revocation, and modification*—(i) *Time for transfer*. An individual approved to transfer entitlement to educational assistance under this section may transfer such entitlement to the individual's dependent only while serving as a member of the Armed Forces.

(ii) *Modification or revocation*. (A) An individual transferring entitlement under this section may modify or revoke at any time the transfer of any unused portion of the entitlement so transferred.

(*1*) An individual may add new dependents, modify the number of months of the transferred entitlement for existing dependents, or revoke transfer of the entitlement while serving in the Armed Forces.

(*2*) An individual may not add dependents after retirement or separation from the Armed Forces, but may modify the number of months of the transferred entitlement for existing dependents or revoke transferred benefits after retirement or separation for those family members who had received transferred benefits prior to separation or retirement.

(B) The modification or revocation of the transfer of entitlement under this section shall be made by submitting notice of the action to both the Secretary of the Military Department concerned and the Secretary of Veterans Affairs. Additions, modifications or revocations made while in the Armed Forces will be made through the Transferability of Educational Benefits (TEB) Web site as described in paragraph (c)(9) of this section. Modifications or revocations after separation from the Armed Forces will be accomplished with the Department of Veterans Affairs.

(8) *Additional administrative matters*—(i) *Use*. The use of any entitlement to educational assistance transferred under this section shall be charged against the entitlement of the individual making the transfer at the rate of 1 month for each month of transferred entitlement that is used.

(ii) *Death of transferor*. The death of an individual transferring an entitlement under this section shall not affect the use of the entitlement by the dependent to whom the entitlement is transferred.

(iii) *Scope of use by transferees*. The purposes for which a dependent to whom entitlement is transferred under this section may use such entitlement shall include the pursuit and completion of the requirements of a secondary school diploma (or equivalency certificate).

(iv) *Joint and several liability*. In the event of an overpayment of educational assistance with respect to a dependent to whom entitlement is transferred under this section, the dependent and the individual making the transfer shall be jointly and severally liable to the United States for the amount of the overpayment for purposes of section 3685 of title 38, U.S.C.

(v) *Failure to complete service agreement*. (A) Except as provided in paragraph (c)(8)(v)(B) of this section, if an individual transferring entitlement under this section fails to complete the service agreed to by the individual under paragraph (c)(1) of this section in accordance with the terms of the agreement of the individual under that section, the amount of any transferred entitlement under this section that is used by a dependent of the individual as of the date of such failure shall be treated as an overpayment of educational assistance (see paragraph (c)(8)(iv) of this section) and will be subject to collection by DVA.

(B) Paragraph (c)(8)(v)(A) of this section shall not apply in the case of an individual who fails to complete service agreed to by the individual due to:

(*1*) The death of the individual,

(*2*) Discharge or release from active duty for a medical condition which preexisted the service of the individual and was not service connected,

(*3*) Discharge or release from active duty for hardship as determined by the Secretary of the Military Department concerned,

(*4*) Discharge or release from active duty for a physical or mental condition not a disability and that did not result from the individual's own willful misconduct, but did interfere with the performance of duty.

(9) *Procedures*. All requests and transactions for individuals who remain in the Armed Forces will be completed through the Transferability of Educational Benefits (TEB) Web application at *https://www.dmdc.osd.mil/TEB/*. The TEB Users Manual will provide instruction for enrollment; verification; and additions, changes, and revocations. Modifications or revocations after separation from the Armed Forces will be accomplished with the Department of Veterans Affairs.

(10) *Regulations*. The Secretaries of the Military Departments concerned

shall prescribe regulations for the purposes of administering the transferability of unused education entitlements to family members in accordance with this part. Such regulations shall specify:

(i) The manner of verifying and documenting the additional service commitment, if any, under paragraph (c)(1) of this section, to be authorized to transfer education benefits.

(ii) The manner of determining eligibility to be authorized to transfer entitlements as allowed in paragraph (c)(1)(i), (c)(1)(ii) or (c)(1)(iii) of this section.

### § 65.7 Eligibility.

The DVA is responsible for determining eligibility for education benefits under the GI Bill. Generally, to be eligible for the GI Bill, individuals must serve on active duty after September 10, 2001, for at least 30 continuous days with a discharge due to a service-connected disability; or an aggregate period ranging from 90 days to 36 months or more. Benefits under the GI Bill are based on a percentage, as determined by a Service Member's length of active duty service, as shown in the following table:

TABLE TO § 65.7—MAXIMUM BENEFITS PAYABLE

| Member serves | Percentage of maximum benefit payable |
|---|---|
| At least 36 months | 100 |
| At least 30 continuous days on active duty and discharged due to service-connected disability | 100 |
| At least 30 months, but less than 36 months | 90 |
| At least 24 months, but less than 30 months | 80 |
| At least 18 months, but less than 24 months* | 70 |
| At least 12 months, but less than 18 months* | 60 |
| At least 6 months, but less than 12 months* | 50 |
| At least 90 days, but less than 6 months* | 40 |

If aggregate service is less than 24 months, initial entry training does not count as qualifying active duty.

### § 65.8 Reporting requirements.

The reporting requirements in this part have been assigned Report Control Symbols DD–P&R(AR)1221, DD–P&R(Q)2077, DD–RA(M)1147, DD–RA(D)1148, DD–RA(D)2170, DD–RA(M)2171, DD–RA(D)2302, and DD–RA(M)2303 in accordance with the requirements of DoD 8910.1–M (Available at *http://www.dtic.mil/whs/directives/corres/pdf/891001m.pdf*).

## APPENDIX A TO 32 CFR PART 65—ADDITIONAL REPORTING REQUIREMENTS

TABLE 1—DATA ELEMENTS FROM DOD INSTRUCTION 1336.5 AND DOD INSTRUCTION 7730.54 RELEVANT TO THIS PART

| Field | Data element name | Description | References |
|---|---|---|---|
| *947–954* | *d. Initial Entry Training End Calendar Date.* | The date a member completed initial entry training, including skill training. Format: YYYYMMDD. If not applicable or unknown, report all zeros. | |
| *293* | *b. Commissioned Officer Accession Program Source Code.* | The code that represents the accession program by which a member first obtained commissioned officer, other than commissioned warrant officer, status (also known as Source of Initial Commission.) Applicable only to commissioned officers, other than commissioned warrant officers. If not applicable or unknown, report Z.<br>G ROTC scholarship program under section 2107(b) of title 10, U.S.C<br>R ROTC scholarship program under section 2107a of title 10, U.S.C ... | See DoD Instruction 1336.5 for additional data elements. |
| *955–971* | Active Duty Loan Repayment Incentive Program. | | |
| *955–962* | a. Active Duty Loan Repayment Incentive Program Eligibility Effective Date. | The beginning date of a Service member's commitment based on eligibility for an educational incentive under the Active Duty Loan Repayment Incentive Program.<br>Format: YYYYMMDD. If not applicable or unknown, report all zeroes. | |
| *963* | b. Active Duty Loan Repayment Incentive Program Educational Type Code. | The type of active duty educational incentive for a Service member, who is appointed, enlists, reenlists, affiliates, or extends in an Active Duty Loan Repayment Incentive Program. If not applicable or unknown, report Z.<br>A = Educational loan repayment assistance. | Chapter 109 of title 10, U.S.C. |
| *964–971* | c. Active Duty Loan Repayment Incentive Program Eligibility Completion Date. | The completion date of a Service member's commitment based on eligibility for an educational incentive under the Active Duty Loan Repayment Incentive Program. Format: YYYYMMDD. If not applicable or unknown, report all zeroes. | |

TABLE 1—DATA ELEMENTS FROM DOD INSTRUCTION 1336.5 AND DOD INSTRUCTION 7730.54 RELEVANT TO THIS PART—Continued

| Field | Data element name | Description | References |
|---|---|---|---|
| *972–975* ..... | GI Bill Incentive Program.. | | |
| *972–973* ..... | a. GI Bill Incentive Kicker Rate Code. | The code that represents the monetary level of a GI Bill kicker incentive for which a member is entitled upon enlistment or affiliation. If not applicable or unknown, report ZZ. | See Table 4 for a list of values. |
| *974–975* ..... | b. GI Bill Reenlistment Incentive Kicker Rate Code. | The code that represents the monetary level of a GI Bill reenlistment kicker incentive for which a member is entitled. If not applicable or unknown, report ZZ. | See Table 5 for a list of values. |

TABLE 2—ENLISTMENT AND AFFILIATION KICKER CODES*

| Code | Rate | Other Information |
|---|---|---|
| D2 ..... | $150 | Effective 1 August 2009. Requires a 2-year active duty service agreement. |
| D3 ..... | 150 | Effective 1 August 2009. Requires a 3-year active duty service agreement. |
| D4 ..... | 150 | Effective 1 August 2009. Requires a 4-year active duty service agreement. |
| D5 ..... | 150 | Effective 1 August 2009. Requires a 5-year active duty service agreement. |
| D6 ..... | 150 | Effective 1 August 2009. Requires a 6-year active duty service agreement. |
| D9 ..... | 150 | Effective 1 August 2009. Requires a 4-year service agreement: 2 years on active duty plus 2 years in the Selected Reserve. |
| E2 ..... | 250 | Effective 1 August 2009. Requires a 2-year active duty service agreement. |
| E3 ..... | 250 | Effective 1 August 2009. Requires a 3-year active duty service agreement. |
| E4 ..... | 250 | Effective 1 August 2009. Requires a 4-year active duty service agreement. |
| E5 ..... | 250 | Effective 1 August 2009. Requires a 5-year active duty service agreement. |
| E6 ..... | 250 | Effective 1 August 2009. Requires a 6-year active duty service agreement. |
| E9 ..... | 250 | Effective 1 August 2009. Requires a 4-year service agreement: 2 years on active duty plus 2 years in the Selected Reserve. |
| F2 ..... | 350 | Effective 1 August 2009. Requires a 2-year active duty service agreement. |
| F3 ..... | 350 | Effective 1 August 2009. Requires a 3-year active duty service agreement. |
| F4 ..... | 350 | Effective 1 August 2009. Requires a 4-year active duty service agreement. |
| F5 ..... | 350 | Effective 1 August 2009. Requires a 5-year active duty service agreement. |
| F6 ..... | 350 | Effective 1 August 2009. Requires a 6-year active duty service agreement. |
| F9 ..... | 350 | Effective 1 August 2009. Requires a 4-year service agreement: 2 years on active duty plus 2 years in the Selected Reserve. |
| G2 ..... | 450 | Effective 1 August 2009. Requires a 2-year active duty service agreement. |
| G3 ..... | 450 | Effective 1 August 2009. Requires a 3-year active duty service agreement. |
| G4 ..... | 450 | Effective 1 August 2009. Requires a 4-year active duty service agreement. |
| G5 ..... | 450 | Effective 1 August 2009. Requires a 5-year active duty service agreement. |
| G6 ..... | 450 | Effective 1 August 2009. Requires a 6-year active duty service agreement. |
| G9 ..... | 450 | Effective 1 August 2009. Requires a 4-year service agreement: 2 years on active duty plus 2 years in the Selected Reserve. |
| H2 ..... | 550 | Effective 1 August 2009. Requires a 2-year active duty service agreement. |
| H3 ..... | 550 | Effective 1 August 2009. Requires a 3-year active duty service agreement. |
| H4 ..... | 550 | Effective 1 August 2009. Requires a 4-year active duty service agreement. |
| H5 ..... | 550 | Effective 1 August 2009. Requires a 5-year active duty service agreement. |
| H6 ..... | 550 | Effective 1 August 2009. Requires a 6-year active duty service agreement. |
| H9 ..... | 550 | Effective 1 August 2009. Requires a 4-year service agreement: 2 years on active duty plus 2 years in the Selected Reserve. |
| J2 ..... | 650 | Effective 1 August 2009. Requires a 2-year active duty service agreement. |
| J3 ..... | 650 | Effective 1 August 2009. Requires a 3-year active duty service agreement. |
| J4 ..... | 650 | Effective 1 August 2009. Requires a 4-year active duty service agreement. |
| J5 ..... | 650 | Effective 1 August 2009. Requires a 5-year active duty service agreement. |
| J6 ..... | 650 | Effective 1 August 2009. Requires a 6-year active duty service agreement. |
| J9 ..... | 650 | Effective 1 August 2009. Requires a 4-year service agreement: 2 years on active duty plus 2 years in the Selected Reserve. |
| K2 ..... | 750 | Effective 1 August 2009. Requires a 2-year active duty service agreement. |
| K3 ..... | 750 | Effective 1 August 2009. Requires a 3-year active duty service agreement. |
| K4 ..... | 750 | Effective 1 August 2009. Requires a 4-year active duty service agreement. |
| K5 ..... | 750 | Effective 1 August 2009. Requires a 5-year active duty service agreement. |
| K6 ..... | 750 | Effective 1 August 2009. Requires a 6-year active duty service agreement. |
| K9 ..... | 750 | Effective 1 August 2009. Requires a 4-year service agreement: 2 years on active duty plus 2 years in the Selected Reserve. |
| L2 ..... | 850 | Effective 1 August 2009. Requires a 2-year active duty service agreement. |
| L3 ..... | 850 | Effective 1 August 2009. Requires a 3-year active duty service agreement. |
| L4 ..... | 850 | Effective 1 August 2009. Requires a 4-year active duty service agreement. |
| L5 ..... | 850 | Effective 1 August 2009. Requires a 5-year active duty service agreement. |
| L6 ..... | 850 | Effective 1 August 2009. Requires a 6-year active duty service agreement. |
| L9 ..... | 850 | Effective 1 August 2009. Requires a 4-year service agreement: 2 years on active duty plus 2 years in the Selected Reserve. |
| M2 ..... | 950 | Effective 1 August 2009. Requires a 2-year active duty service agreement. |

TABLE 2—ENLISTMENT AND AFFILIATION KICKER CODES*—Continued

| Code | Rate | Other Information |
|---|---|---|
| M3 | 950 | Effective 1 August 2009. Requires a 3-year active duty service agreement. |
| M4 | 950 | Effective 1 August 2009. Requires a 4-year active duty service agreement. |
| M5 | 950 | Effective 1 August 2009. Requires a 5-year active duty service agreement. |
| M6 | 950 | Effective 1 August 2009. Requires a 6-year active duty service agreement. |
| M9 | 950 | Effective 1 August 2009. Requires a 4-year service agreement: 2 years on active duty plus 2 years in the Selected Reserve. |

*This will be the same coding structure for DoD Instruction 7730.54, ''Reserve Components Common Personnel Data System (RCCPDS).''

TABLE 3—REENLISTMENT KICKER CODES*

| Code | Rate | Other Information |
|---|---|---|
| N2 | $100 | Effective 1 August 2009. Requires a 2-year active duty service agreement. |
| N3 | 200 | Effective 1 August 2009. Requires a 3-year active duty service agreement. |
| N4 | 300 | Effective 1 August 2009. Requires a 4-year active duty service agreement. |

*This will be the same coding structure for DoD Instruction 7730.54, ''Reserve Components Common Personnel Data System (RCCPDS).''

# PART 67—EDUCATIONAL REQUIREMENTS FOR APPOINTMENT OF RESERVE COMPONENT OFFICERS TO A GRADE ABOVE FIRST LIEUTENANT OR LIEUTENANT (JUNIOR GRADE)

Sec.

67.1 Purpose.
67.2 Applicability.
67.3 Definitions.
67.4 Policy.
67.5 Responsibilities.
67.6 Procedures.

AUTHORITY: 10 U.S.C. 12205.

SOURCE: 62 FR 55517, Oct. 27, 1997, unless otherwise noted.

## §67.1 Purpose.

This part provides guidance for implementing policy, assigns responsibilities, and prescribes under 10 U.S.C. 12205 for identifying criteria for determining educational institutions that award baccalaureate degrees which satisfy the educational requirement for appointment of officers to a grade above First Lieutenant in the Army Reserve, Air Force Reserve, and Marine Corps Reserve, or Lieutenant (Junior Grade) in the Naval Reserve, or for officers to be federally recognized in a grade level above First Lieutenant as a member of the Army National Guard or Air National Guard.

## §67.2 Applicability.

This part applies to the Office of the Secretary of Defense, and the Military Departments; the Chairman of the Joint Chiefs or Staff; and the Defense Agencies referred to collectively in this part as the ''DoD Components''). The term ''Military Departments,'' as used in this part, refers to the Departments of the Army, the Navy, and the Air Force. The term ''Secretary concerned'' refers to the Secretaries of the Military Departments. The term ''Military Services'' refers to the Army, the Navy, the Air Force, the Marine Corps. The term ''Reserve components'' refers to the Army Reserve, Army National Guard of the United States, Air Force Reserve, Air National Guard of the United States, Naval Reserve, Marine Corps Reserve.

## §67.3 Definitions.

*Accredited educational institution.* An educational institution accredited by an agency recognized by the Secretary of Education.

*Qualifying educational institution.* An educational institution that is accredited, or an unaccredited educational institution that the Secretary of Defense designates pursuant to §67.6(a) and §67.6(b).

*Unaccredited educational institution.* An educational institution not accredited by an agency recognized by the Secretary of Education.

### § 67.4 Policy

(a) It is DoD policy under 10 U.S.C. 12205 to require Reserve component officers to have at least a baccalaureate degree from a qualifying educational institution before appointment to a grade above First Lieutenant in the Army Reserve, Air Force Reserve or Marine Corps Reserve, or Lieutenant (Junior Grade) in the Naval Reserve, or for officers to be federally recognized in a grade above First Lieutenant as a member of the Army National Guard or Air National Guard.

(b) Exempt from this policy is any officer who was:

(1) Appointed to or recognized in a higher grade for service in a health profession for which a baccalaureate degree is not a condition of original appointment or assignment.

(2) Appointed in the Naval Reserve or Marine Corps Reserve as a limited duty officer.

(3) Appointed in the Naval Reserve for service under the Naval Aviation Cadet (NAVCAD) program or the Seaman to Admiral program.

(4) Appointed to or recognized in a higher grade if appointed to, or federally recognized in, the grade of captain or, in the case of the Navy, lieutenant before October 1, 1995.

(5) Recognized in the grade of captain or major in the Alaska Army National Guard, who resides permanently at a location in Alaska that is more than 50 miles from each of the cities of Anchorage, Fairbanks, and Juneau, Alaska, by paved road, and who is serving in a Scout unit or a Scout support unit.

(c) The Department of Defense will designate an unaccredited educational institution as a qualifying educational institution for the purpose of meeting this educational requirement if that institution meets the criteria established in this part.

### § 67.5 Responsibilities.

(a) The Assistant Secretary of Defense for Reserve Affairs, under the Under Secretary of Defense for Personnel and Readiness, shall:

(1) Establish procedures by which an unaccredited educational institution can apply for DoD designation as a qualifying educational institution.

(2) Publish in the FEDERAL REGISTER DoD requirements and procedures for an unaccredited educational institution to apply for designation as a qualifying education institution.

(3) Annually, provide to the Secretaries of the Military Departments a list of those unaccredited educational institutions that have been approved by the Department of Defense as a qualifying educational institution. This list shall include the year or years for which unaccredited educational institutions are designed as qualifying educational institutions.

(b) The Secretaries of the Military Departments shall establish procedures to ensure that after September 30, 1995, those Reserve component officers selected for appointment to a grade above First Lieutenant in the Army Reserve, Air Force Reserve, or Marine Corps Reserve, or Lieutenant (Junior Grade) in the Naval Reserve, or for officers to be federally recognized in a grade above First Lieutenant as a member of the Army National Guard or Air National Guard, who are required to hold a baccalaureate degree, were awarded a baccalaureate degree from a qualifying educational institution before appointment to the next higher grade. For a degree from an unaccredited educational institution that has been recognized as qualifying educational institution by the Department of Defense to satisfy the educational requirements of 10 U.S.C. 12205, the degree must not have been awarded more than 8 years before the date the officer is to be appointed, or federally recognized, in the grade of Captain in the Army Reserve, Army National Guard, Air Force Reserve, Air National Guard, or Marine Corps Reserve, or in the grade of Lieutenant in the Naval Reserve.

### § 67.6 Procedures.

(a) An unaccredited educational institution may obtain designation as a qualifying educational institution for a specific Reserve component officer who graduated from that educational institution by providing certification from registrars at three accredited educational institutions that maintain ROTC programs that their educational institutions would accept at least 90

percent of the credit hours earned by that officer at the unaccredited educational institution, as of the year of graduation.

(b) For an unaccredited educational institution to be designated as a qualifying educational institution for a specific year, that educational institution must provide the Office of the Assistant Secretary of Defense for Reserve Affairs certification from the registrars at three different accredited educational institutions that maintain ROTC programs listing the major field(s) of study in which that educational institution would accept at least 90 percent of the credit hours earned by a student who was awarded a baccalaureate degree in that major field of study at the unaccredited educational institution.

(c) For an unaccredited educational institution to be considered for designation as a qualifying educational institution, the unaccredited educational institution must submit the required documentation no later than January 1 of the year for which the unaccredited educational institution seeks to be designated a qualifying educational institution.

(d) The required documentation must be sent to the following address: Office of the Assistant Secretary of Defense for Reserve Affairs, Attn: DASD (M&P), 1500 Defense Pentagon, Washington, DC 20301–1500.

(e) Applications containing the required documentation may also be submitted at any time from unaccredited educational institutions requesting designation as a qualifying educational institution for prior school years.

# PART 69—SCHOOL BOARDS FOR DEPARTMENT OF DEFENSE DOMESTIC DEPENDENT ELEMENTARY AND SECONDARY SCHOOLS

Sec.
69.1 Purpose.
69.2 Applicability and scope.
69.3 Definitions.
69.4 Policy.
69.5 Responsibilities.
69.6 Procedures.

AUTHORITY: 10 U.S.C. 2164.

SOURCE: 61 FR 60563, Nov. 29, 1996, unless otherwise noted.

## §69.1 Purpose.

This part prescribes policies and procedures for the establishment and operation of elected School Boards for schools operated by the Department of Defense (DoD) under 10 U.S.C. 2164, 32 CFR part 345, and Public Law 92–463.

## §69.2 Applicability and scope.

This part applies to:

(a) The Office of the Secretary of Defense (OSD), the Military Departments, the Coast Guard when operating as a service of the Department of the Navy or by agreement between DoD and the Department of Transportation, the Chairman of the Joint Chiefs of Staff, the Unified and Specified Combatant Commands, the Inspector General of the Department of Defense, the Uniformed Services University of the Health Sciences, the Defense Agencies, and the DoD Field Activities.

(b) The schools (prekindergarten through grade 12) operated by the DoD under 10 U.S.C. 2164 and 32 CFR part 345 within the continental United States, Alaska, Hawaii, Puerto Rico, Wake Island, Guam, American Samoa, the Northern Mariana Islands, and the Virgin Islands, known as DoD DDESS Arrangements.

(c) This part does not apply to elected school boards established under state or local law for DoD DDESS special arrangements.

## §69.3 Definitions.

(a) *Arrangements*. Actions taken by the Secretary of Defense to provide a free public education to dependent children under 10 U.S.C. 2164 through DoD DDESS arrangements or DoD DDESS special arrangements:

(1) *DDESS arrangement*. A school operated by the Department of Defense under 10 U.S.C. 2164 and 32 CFR 345 to provide a free public education for eligible children.

(2) *DDESS special arrangement*. An agreement, under 10 U.S.C. 2164, between the Secretary of Defense, or designee, and a local public education agency whereby a school or a school system operated by the local public education agency provides educational services to eligible dependent children

of U.S. military personnel and federally employed civilian personnel. Arrangements result in partial or total Federal funding to the local public education agency for the educational services provided.

(b) *Parent*. The biological father or mother of a child when parental rights have not been legally terminated; a person who, by order of a court of competent jurisdiction, has been declared the father or mother of a child by adoption; the legal guardian of a child; or a person in whose household a child resides, provided that such person stands in *loco parentis* to that child and contributes at least one-half of the child's support.

**§ 69.4 Policy.**

(a) Each DoD DDESS arrangement shall have an elected school board, established and operated in accordance with this part and other pertinent guidance.

(b) Because members of DoD DDESS elected school boards are not officers or employees of the United States appointed under the Appointments Clause of the United States Constitution (Art. II, Sec. 2, Cl. 2), they may not exercise discretionary governmental authority, such as the taking of personnel actions or the establishment of governmental policies. This part clarifies the role of school boards in the development and oversight of fiscal, personnel, and educational policies, procedures, and programs for DoD DDESS arrangements, subject to these constitutional limitations.

(c) The DoD DDESS chain of command for matters relating to school arrangements operated under 10 U.S.C. 2164 and 32 CFR part 345 shall be from the Director, DoD DDESS, to the Superintendent of each school arrangement. The Superintendent will inform the school board of all matters affecting the operation of the local school arrangement. Direct liaison among the school board, the Director, and the Superintendent is authorized for all matters pertaining to the local school arrangement.

**§ 69.5 Responsibilities.**

The Assistant Secretary of Defense for Force Management Policy (ASD (FMP)), under the Under Secretary of Defense for Personnel and Readiness, shall:

(a) Make the final decision on all formal appeals to directives and other guidance submitted by the school board or Superintendent.

(b) Ensure the Director, DoD DDESS shall:

(1) Ensure the establishment of elected school boards in DoD DDESS arrangements.

(2) Monitor compliance by the Superintendent and school boards with applicable statutory and regulatory requirements, and this part. In the event of suspected noncompliance, the Director, DoD DDESS, shall take appropriate action, which will include notification of the Superintendent and the school board president of the affected DoD DDESS arrangement.

(3) Determine when the actions of a school board conflict with an applicable statute, regulation, or other guidance or when there is a conflict in the views of the school board and the Superintendent. When such conflicts occur, the Director, DoD DDESS, shall assist the Superintendent and the school board in resolving them or direct that such actions be discontinued. Such disapprovals must be in writing to the school board and the Superintendent concerned and shall state the specific supporting reason or reasons.

(c) Ensure the school board for DoD DDESS arrangements shall:

(1) Participate in the development and oversight of fiscal, personnel, and educational policies, procedures, and programs for the DoD DDESS arrangement concerned, consistent with this part.

(2) Approve agendas and prepare minutes for school board meetings. A copy of the approved minutes of school board meetings shall be forwarded to the Director, DoD DDESS, within 10 working days after the date the minutes are approved.

(3) Provide to the Director, DoD DDESS, names of applicants for a vacancy in the Superintendent's position after a recruitment has been accomplished. The school board shall submit to the Director, DoD DDESS, a list of all applicants based on its review of the applications and interviews (either in

person or telephonically) of the applicants. The list of applicants will be accompanied by the recommended choice of the school board. The Director will select the Superintendent and will submit written notice with justification to the school board if the recommendation of the school board is not followed.

(4) Prepare an annual written on-site review of the Superintendent's performance for consideration by the Director, DoD DDESS. The written review shall be based on critical elements recommended by the school board and Superintendent and approved by the Director, DoD DDESS. The school board's review will be an official attachment to the Superintendent's appraisal.

(5) Participate in the development of the school system's budget for submission to the Director, DoD DDESS, for his or her approval as endorsed by the school board; and participate in the oversight of the approved budget, in conjunction with the Superintendent, as appropriate for operation of the school arrangement.

(6) Invite the Superintendent or designee to attend all school board meetings.

(7) Provide counsel to the Superintendent on the operation of the school and the implementation of the approved budget.

(8) Channel communications with school employees to the DoD DDESS Superintendent. Refer all applications, complaints, and other communications, oral or written, to the DoD DDESS Arrangement Superintendents.

(9) Participate in the development of school policies, rules, and regulations, in conjunction with the Superintendent, and recommend which policies shall be reflected in the School Policy Manual. At a minimum, the Policy Manual, which shall be issued by the Superintendent, shall include following:

(i) A statement of the school philosophy.

(ii) The role and responsibilities of school administrative and educational personnel.

(iii) Provisions for promulgation of an annual school calendar.

(iv) Provisions on instructional services, including policies for development and adoption of curriculum and textbooks.

(v) Regulations affecting students, including attendance, grading, promotion, retention, and graduation criteria, and the student code of rights, responsibilities, and conduct.

(vi) School policy on community relations and noninstructional services, including maintenance and custodial services, food services, and student transportation.

(vii) School policy and legal limits on financial operations, including accounting, disbursing, contracting, and procurement; personnel operations, including conditions of employment, and labor management regulations; and the processing of, and response to, complaints.

(viii) Procedures providing for new school board member orientation.

(ix) Any other matters determined by the school board and the superintendent to be necessary.

(10) Under 10 U.S.C. 2164(b)(4)(B), prepare and submit formal appeals to directives and other guidance that in the view of the school board adversely impact the operation of the school system either through the operation and management of DoD DDESS or a specific DoD DDESS arrangement. Written formal appeals with justification and supporting documentation shall be submitted by the school board or Superintendent to ASD(FMP). The ASD(FMP) shall make the final decision on all formal appeals. The Director, Dod DDESS, will provide the appealing body written review of the findings relating to the merits of the appeal. Formal appeals will be handled expeditiously by all parties to minimize any adverse impact on the operation of the DoD DDESS system.

(d) Ensure school board operating procedures are as follows:

(1) The school board shall operate from a written agenda at all meetings. Matters not placed on the agenda before the start of the meeting, but approved by a majority of the school board present, may be considered at the ongoing meeting and added to the agenda at that time.

(2) A majority of the total number of school board members authorized shall constitute a quorum.

(3) School board meetings shall be conducted a minimum of 9 times a year. The school board President or designee will provide school board members timely notice of all meetings. All regularly scheduled school board meetings will be open to the public. Executive session meetings may be closed under 10 U.S.C. 2164(d)(6).

(4) The school board shall not be bound in any way by any action or statement of an individual member or group of members of the board except when such action or statement is approved by a majority of the school board members during a school board meeting.

(5) School board members are eligible for reimbursement for official travel in accordance with the DoD Joint Travel Regulations and guidance issued by the Director, DoD DDESS.

(6) School board members may be removed by the ASD (FMP) for dereliction of duty, malfeasance, or other grounds for cause shown. The school board concerned may recommend such removal with a two-thirds majority vote. Before a member may be removed, the member shall be afforded due process, to include written notification of the basis for the action, review of the evidence or documentation considered by the school board, and an opportunity to respond to the allegations.

**§ 69.6 Procedures.**

(a) *Composition of school board.* (1) The school board shall recommend to the Director, DoD DDESS, the number of elected school board voting members, which shall be not fewer than 3 and no more than 9, depending upon local needs. The members of the school board shall select by majority vote of the total number of school board members authorized at the beginning of each official school board term, one member to act as President and another to act as Vice President. The President and Vice President shall each serve for 1 year. The President shall preside over school board meetings and provide leadership for related activities and functions. The Vice President shall serve in the absence of the President. If the position of President is vacated for any reason, the Vice President shall be the President until the next regularly scheduled school board election. The resulting vacancy in the position of the Vice President shall be filled by the majority vote of all members of the incumbent board.

(2) The DoD DDESS Arrangement Superintendent, or designee, shall serve as a non-voting observer to all school board meetings. The Installation Commander, or designee, shall convey command concerns to the school board and the Superintendent and keep the school board and the Superintendent informed of changes and other matters within the host installation that affect school expenditures or operations.

(3) School board members may not receive compensation for their service on the school board.

(4) Members of the school board may not have any financial interest in any company or organization doing business with the school system. Waivers to this restriction may be granted on a case-by-case basis by the Director, DoD DDESS, in coordination with the Office of General Counsel of the Department of Defense.

(b) *Electorate of the school board.* The electorate for each school board seat shall be composed of parents of the students attending the school. Each member of the electorate shall have one vote.

(c) *Election of school board members.* (1) To be elected as a member of the school board, an individual must be a resident of the military installation in which the DoD DDESS arrangement is located, or in the case of candidates for the Antilles Consolidated School System School Board, be the parent of an eligible child currently enrolled in the school system. Personnel employed by a DoD DDESS arrangement may not serve as school board members.

(2) The board shall determine the term of office for elected members, not to exceed 3 years, and the limit on the number of terms, if any. If the board fails to set these terms by the first day of the first full month of the school year, the terms will be set at 3 years, with a maximum of 2 consecutive terms.

(3) When there is a sufficient number of school board vacancies that result in not having a quorum, which is defined

as a majority of seats authorized, a special election shall be called by the DoD DDESS Arrangement Superintendent or designee. A special election is an election that is held between the regularly scheduled annual school board election. The nomination and election procedures for a special election shall be the same as those of regularly scheduled school board elections. Individuals elected by special election shall serve until the next regularly scheduled school board election. Vacancies may occur due to the resignation, death, removal for cause, transfer, or disenrollment of a school board member's child(ren) from the DoD DDESS arrangement.

(4) The board shall determine a schedule for regular elections. Parents shall have adequate notice of the time and place of the election. The election shall be by secret ballot. All votes must be cast in person at the time and place of the election. The candidate(s) receiving the greatest number of votes shall be elected as school board member(s).

(5) Each candidate for school board membership must be nominated in writing by at least one member of the electorate to be represented by the candidate. Votes may be cast at the time of election for write-in candidates who have not filed a nomination petition if the write-in candidates otherwise are qualified to serve in the positions sought.

(6) The election process shall provide staggered terms for board members; e.g., on the last day of the last month of each year, the term for some board members will expire.

(7) The DoD DDESS Superintendent, in consultation with the school board, shall be responsible for developing the plans for nominating school board members and conducting the school board election and the special election process. The DoD DDESS Superintendent shall announce election results within 7 working days of the election.

# PART 70—DISCHARGE REVIEW BOARD (DRB) PROCEDURES AND STANDARDS

Sec.

70.1 Reissuance and purpose.
70.2 Applicability.
70.3 Definitions.
70.4 Responsibilities.
70.5 Procedures.
70.6 Information requirements.
70.7 Effective date and implementation.
70.8 Discharge review procedures.
70.9 Discharge review standards.
70.10 Complaints concerning decisional documents and index entries.
70.11 DoD semiannual report.

AUTHORITY: 10 U.S.C. 1553 and 38 U.S.C. 101 and 3103, as amended.

SOURCE: 47 FR 37785, Aug. 26, 1982, unless otherwise noted.

## § 70.1 Reissuance and purpose.

This part is reissued and:

(a) Establishes uniform policies, procedures, and standards for the review of discharges or dismissals under 10 U.S.C. 1553.

(b) Provides guidelines for discharge review by application or on motion of a DRB, and the conduct of discharge reviews and standards to be applied in such reviews which are designed to ensure historically consistent uniformity in execution of this function, as required under Pub. L. 95–126.

(c) Assigns responsibility for administering the program.

(d) Makes provisions for public inspection, copying, and distribution of DRB documents through the Armed Forces Discharge Review/Correction Board Reading Room.

(e) Establishes procedures for the preparation of decisional documents and index entries.

(f) Provides guidance for processing complaints concerning decisional documents and index entries.

## § 70.2 Applicability.

The provisions of this part 70 apply to the Office of the Secretary of Defense (OSD) and the Military Departments. The terms, ''Military Services,'' and ''Armed Forces,'' as used herein, refer to the Army, Navy, Air Force and Marine Corps.

**§ 70.3 Definitions.**

(a) *Applicant*. A former member of the Armed Forces who has been discharged or dismissed administratively in accordance with Military Department regulations or by sentence of a court-martial (other than a general court-martial) and under statutory regulatory provisions whose application is accepted by the DRB concerned or whose case is heard on the DRB's own motion. If the former member is deceased or incompetent, the term ''applicant'' includes the surviving spouse, next-of-kin, or legal representative who is acting on behalf of the former member. When the term ''applicant'' is used in §§ 70.8 through 70.10, it includes the applicant's counsel or representative, except that the counsel or representative may not submit an application for review, waive the applicant's right to be present at a hearing, or terminate a review without providing the DRB an appropriate power of attorney or other written consent of the applicant.

(b) *Complainant*. A former member of the Armed Forces (or the former member's counsel) who submits a complaint under § 70.10 with respect to the decisional document issued in the former member's own case; or a former member of the Armed Forces (or the former member's counsel) who submits a complaint under § 70.10 stating that correction of the decisional document will assist the former member in preparing for an administrative or judicial proceeding in which the former member's own discharge will be at issue.

(c) *Counsel or Representative*. An individual or agency designated by the applicant who agrees to represent the applicant in a case before the DRB. It includes, but is not limited to: a lawyer who is a member of the bar of a Federal court or of the highest court of a State; an accredited representative designated by an organization recognized by the Administrator of Veterans Affairs; a representative from a State agency concerned with veterans affairs; and representatives from private organizations or local government agencies.

(d) *Discharge*. A general term used in this Directive that includes dismissal and separation or release from active or inactive military status, and actions that accomplish a complete severance of all military status. This term also includes the assignment of a reason for such discharge and characterization of service (32 CFR part 41).

(e) *Discharge Review*. The process by which the reason for separation, the procedures followed in accomplishing separation, and the characterization of service are evaluated. This includes determinations made under the provisions of 38 U.S.C. 3103(e)(2).

(f) *Discharge Review Board (DRB)*. An administrative board constituted by the Secretary of the Military Department concerned and vested with discretionary authority to review discharges and dismissals under the provisions of 10 U.S.C. 1553. It may be configured as one main element or two or more elements as designated by the Secretary concerned.

(g) *DRB Panel*. An element of a DRB, consisting of five members, authorized by the Secretary concerned to review discharges and dismissals.

(h) *DRB Traveling or Regional Panel*. A DRB panel that conducts discharge reviews in a location outside the National Capital Region (NCR).

(i) *Hearing*. A review involving an appearance before the DRB by the applicant or on the applicant's behalf by a counsel or representative.

(j) *Hearing Examination*. The process by which a designated officer of a DRB prepares a presentation for consideration by a DRB in accordance with regulations prescribed by the Secretary concerned.

(k) *National Capital Region (NCR)*. The District of Columbia; Prince Georges and Montgomery Counties in Maryland; Arlington, Fairfax, Loudoun, and Prince William Counties in Virginia; and all cities and towns included within the outer boundaries of the foregoing counties.

(l) *President, DRB*. A person designated by the Secretary concerned and responsible for the supervision of the discharge review function and other duties as assigned.

**§ 70.4 Responsibilities.**

(a) The *Secretaries of the Military Departments* have the authority for final decision and the responsibility for the

operation for their respective discharge review programs under 10 U.S.C. 1553.

(b) The *Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics)* (ASD(MRA&L)) shall:

(1) Resolve all issues concerning DRBs that cannot be resolved among the Military Departments.

(2) Ensure uniformity among the Military Departments in the rights afforded applicants in discharge reviews.

(3) Modify or supplement the enclosures to this part.

(4) Maintain the index of decisions and provide for timely modification of index categories to reflect changes in discharge review policies, procedures, and standards issued by the OSD and the Military Departments.

(c) The *Secretary of the Army*, as the designated administrative focal point for DRB matters, shall:

(1) Effect necessary coordination with other governmental agencies regarding continuing applicability of this part and resolve administrative procedures relating thereto.

(2) Review suggested modifications to this part, including implementing documents; monitor the implementing documents of the Military Departments; resolve differences, when practicable; recommend specific changes; provide supporting rationale to the ASD(MRA&L) for decision; and include appropriate documentation through the Office of the ASD(MRA&L) and the OSD Federal Register liaison officer to effect publication in the FEDERAL REGISTER.

(3) Maintain the DD Form 293, ''Application for Review of Discharge or Separation from the Armed Forces of the United States,'' and republish as necessary with appropriate coordination of the other Military Departments and the Office of Management and Budget.

(4) Respond to all inquiries from private individuals, organizations, or public officials with regard to DRB matters. When the specific Military Service can be identified, refer such correspondence to the appropriate DRB for response or designate an appropriate activity to perform this task.

(5) Provide overall guidance and supervision to the Armed Forces Discharge Review/Correction Board Reading Room with staff augmentation, as required, by the Departments of the Navy and Air Force.

(6) Ensure that notice of the location, hours of operation, and similar types of information regarding the Reading Room is published in the FEDERAL REGISTER.

### § 70.5 Procedures.

(a) Discharge review procedures are prescribed in § 70.8.

(b) Discharge Review Standards are prescribed in § 70.9 and constitute the basic guidelines for the determination whether to grant or deny relief in a discharge review.

(c) Complaint Procedures about decisional documents are prescribed in § 70.10.

### § 70.6 Information requirements.

(a) *Reporting requirements.* (1) The reporting requirement prescribed in § 70.8(n) is assigned Report Control Symbol DD-M(SA)1489.

(2) All reports must be consistent with DoD Directive 5000.11, ''Data Elements and Data Codes Standardization Program,'' December 7, 1964.

(b) *Use of standard data elements.* The data requirements prescribed by this part shall be consistent with DoD 5000.12–M, ''DoD Manual for Standard Data Elements,'' December 1981. Any reference to a date should appear as (YYMMDD), while any name entry should appear as (Last name, first name, middle initial).

### § 70.7 Effective date and implementation.

This part is effective immediately for the purpose of preparing implementing documents. DoD Directive 1332.28, March 29, 1978, is officially canceled, effective November 27, 1982. This part applies to all discharge review proceedings conducted on or after November 27, 1982. § 70.10 applies to all complaint proceedings conducted on or after September 28, 1982. Final action on complaints shall not be taken until September 28, 1982, unless earlier corrective action is requested expressly by the applicant (or the applicant's counsel) whose case is the subject of the

decisional document. If earlier corrective action is requested, it shall be taken in accordance with § 70.10.

**§ 70.8 Discharge review procedures.**

(a) *Application for review*—(1) *General.* Applications shall be submitted to the appropriate DRB on DD Form 293, ''Application for Review of Discharge or Separation from the Armed Forces of the United States,'' with such other statements, affidavits, or documentation as desired. It is to the applicant's advantage to submit such documents with the application or within 60 days thereafter in order to permit a thorough screening of the case. The DD Form 293 is available at most DoD installations and regional offices of the Veterans Administration, or by writing to: DA Military Review Boards Agency, Attention: SFBA (Reading Room), Room 1E520, The Pentagon, Washington, DC 20310.

(2) *Timing.* A motion or request for review must be made within 15 years after the date of discharge or dismissal.

(3) *Applicant's responsibilities.* An applicant may request a change in the character of or reason for discharge (or both).

(i) *Character of discharge.* Block 7 of DD Form 293 provides an applicant an opportunity to request a specific change in character of discharge (for example, General Discharge to Honorable Discharge; Other than Honorable Discharge to General or Honorable Discharge). Only a person separated on or after 1 October 1982 while in an entry level status may request a change from Other than Honorable Discharge to Entry Level Separation. A request for review from an applicant who does not have an Honorable Discharge shall be treated as a request for a change to an Honorable Discharge unless the applicant requests a specific change to another character of discharge.

(ii) *Reason for discharge.* Block 7 of DD Form 293 provides an applicant an opportunity to request a specific change in the reason for discharge. If an applicant does not request a specific change in the reason for discharge, the DRB shall presume that the request for review does not involve a request for change in the reason for discharge. Under its responsibility to examine the propriety and equity of an applicant's discharge, the DRB shall change the reason for discharge if such a change is warranted.

(iii) The applicant must ensure that issues submitted to the DRB are consistent with the request for change in discharge set forth in block 7 of the DD Form 293. If an ambiguity is created by a difference between an applicant's issue and the request in block 7, the DRB shall respond to the issue in the context of the action requested in block 7. In the case of a hearing, the DRB shall attempt to resolve the ambiguity under paragraph (a)(5) of this section.

(4) *Request for consideration of specific issues.* An applicant may request the DRB to consider specific issues which, in the opinion of the applicant, form a basis for changing the character of or reason for discharge, or both. In addition to the guidance set forth in this section, applicants should consult the other sections in this part (particularly paragraphs (c), (d), and (e) of this section and §§ 70.9 and 70.10 before submitting issues for consideration by the DRB.

(i) *Submission of issues on DD Form 293.* Issues must be provided to the DRB on DD Form 293 before the DRB closes the review process for deliberation.

(A) *Issues must be clear and specific.* An issue must be stated clearly and specifically in order to enable the DRB to understand the nature of the issue and its relationship to the applicant's discharge.

(B) *Separate listing of issues.* Each issue submitted by an applicant should be listed separately. Submission of a separate statement for each issue provides the best means of ensuring that the full import of the issue is conveyed to the DRB.

(C) *Use of DD Form 293.* DD Form 293 provides applicants with a standard format for submitting issues to the DRB, and its use:

(*1*) Provides a means for an applicant to set forth clearly and specifically those matters that, in the opinion of the applicant, provide a basis for changing the discharge;

(*2*) Assists the DRB in focusing on those matters considered to be important by an applicant;

(*3*) Assists the DRB in distinguishing between a matter submitted by an applicant in the expectation that it will be treated as a decisional issue under paragraph (e) of this section, and those matters submitted simply as background or supporting materials;

(*4*) Provides the applicant with greater rights in the event that the applicant later submits a complaint under § 70.10(d)(1)(iii) concerning the decisional document;

(*5*) Reduces the potential for disagreement as to the content of an applicant's issue.

(D) *Incorporation by reference*. If the applicant makes an additional written submission, such as a brief, in support of the application, the applicant may incorporate by reference specific issues set forth in the written submission in accordance with the guidance on DD Form 293. The reference shall be specific enough for the DRB to identify clearly the matter being submitted as an issue. At a minimum, it shall identify the page, paragraph, and sentence incorporated. Because it is to the applicant's benefit to bring such issues to the DRB's attention as early as possible in the review, applicants who submit a brief are strongly urged to set forth all such issues as a separate item at the beginning of the brief. If it reasonably appears that the applicant inadvertently has failed expressly to incorporate an issue which the applicant clearly identifies as an issue to be addressed by the DRB, the DRB shall respond to such an issue under paragraphs (d) and (e) of this section.

(E) *Effective date of the new Form DD 293*. With respect to applications received before November 27, 1982, the DRB shall consider issues clearly and specifically stated in accordance with the rules in effect at the time of submission. With respect to applications received on or after November 27, 1982, if the applicant submits an obsolete DD Form 293, the DRB shall accept the application, but shall provide the applicant with a copy of the new form and advise the applicant that it will only respond to issues submitted on the new form in accordance with this part.

(ii) *Relationship of issues to character of or reason for discharge*. If the application applies to both character of and reason for discharge, the applicant is encouraged, but not required, to identify the issue as applying to the character of or reason for discharge (or both). Unless the issue is directed at the reason for discharge expressly or by necessary implication, the DRB will presume that it applies solely to the character of discharge.

(iii) *Relationship of issues to the standards for discharge review*. The DRB reviews discharges on the basis of issues of propriety and equity. The standards used by the DRB are set forth in § 70.9. The applicant is encouraged to review those standards before submitting any issue upon which the applicant believes a change in discharge should be based.

(A) *Issues concerning the equity of the discharge*. An issue of equity is a matter that involves a determination whether a discharge should by changed under the equity standards of § 70.9. This includes any issue, submitted by the applicant in accordance with paragraph (a)(4)(i) of this section, that is addressed to the discretionary authority of the DRB.

(B) *Issues concerning the propriety of a discharge*. An issue of propriety is a matter that involves a determination whether a discharge should be changed under the propriety standards of § 70.9. This includes an applicant's issue, submitted in accordance with paragraph (a)(4)(i) of this section, in which the applicant's position is that the discharge must be changed because of an error in the discharge pertaining to a regulation, statute, constitutional provision, or other source of law (including a matter that requires a determination whether, under the circumstances of the case, action by military authorities was arbitrary, capricious, or an abuse of discretion). Although a numerical reference to the regulation or other sources of law alleged to have been violated is not necessarily required, the context of the regulation or a description of the procedures alleged to have been violated normally must be set forth in order to inform the DRB adequately of the basis for the applicant's position.

(C) *The applicant's identification of an issue*. The applicant is encouraged, but not required, to identify an issue as

pertaining to the propriety or the equity to the discharge. This will assist the DRB in assessing the relationship of the issue to propriety or equity under paragraph (e)(1)(iii) of this section.

(iv) *Citation of matter from decisions.* The primary function of the DRB involves the exercise of dicretion on a case-by-case basis. See §70.9(b)(3). Applicants are not required to cite prior decisions as the basis for a change in discharge. If the applicant wishes to bring the DRB's attention to a prior decision as background or illustrative material, the citation should be placed in a brief or other supporting documents. If, however, it is the applicant's intention to submit an issue that sets forth specific principles and facts from a specific cited decision, the following requirements apply with respect to applications received on or after November 27, 1982.

(A) The issue must be set forth or expressly incorporated in the ''Applicant's Issue'' portion of DD Form 293.

(B) If an applicant's issue cites a prior decision (of the DRB, another Board, an agency, or a court), the applicant shall describe the specific principles and facts that are contained in the prior decision and explain the relevance of cited matter to the applicant's case.

(C) To ensure timely consideration of principles cited from unpublished opinions (including decisions maintained by the Armed Forces Discharge Review Board/Corrective Board Reading Room), applicants must provide the DRB with copies of such decisions or of the relevant portion of the treatise, manual, or similar source in which the principles were discussed. At the applicant's request, such materials will be returned.

(D) If the applicant fails to comply with the requirements in paragraphs (a)(4)(iv) (A), (B), and (C), the decisional document shall note the defect, and shall respond to the issue without regard to the citation.

(5) *Identification by the DRB of issues submitted by an applicant.* The applicant's issues shall be identified in accordance with this section after a review of the materials noted under paragraph (c)(4), is made.

(i) *Issues on DD Form 293.* The DRB shall consider all items submitted as issues by an applicant on DD Form 293 (or incorporated therein) in accordance with paragraph (a)(4)(i). With respect to applications submitted before November 27, 1982, the DRB shall consider all issues clearly and specifically stated in accordance with the rules in effect at the time of the submission.

(ii) *Amendment of issues.* The DRB shall not request or instruct an applicant to amend or withdraw any matter submitted by the applicant. Any amendment or withdrawal of an issue by an applicant shall be confirmed in writing by the applicant. Nothing in this provision:

(A) Limits the DRB's authority to question an applicant as to the meaning of such matter;

(B) Precludes the DRB from developing decisional issues based upon such questions;

(C) Prevents the applicant from amending or withdrawing such matter any time before the DRB closes the review process for deliberation; or

(D) Prevents the DRB from presenting an applicant with a list of proposed decisional issues and written information concerning the right of the applicant to add to, amend, or withdraw the applicant's submission. The written information will state that the applicant's decision to take such action (or decline to do so) will not be used against the applicant in the consideration of the case.

(iii) *Additional issues identified during a hearing.* The following additional procedure shall be used during a hearing in order to promote the DRB's understanding of an applicant's presentation. If, before closing the case for deliberation, the DRB believes that an applicant has presented an issue not listed on DD Form 293, the DRB may so inform the applicant, and the applicant may submit the issue in writing or add additional written issues at that time. This does not preclude the DRB from developing its own decisional issues.

(6) *Notification of possible bar to benefits.* Written notification shall be made to each applicant whose record indicates a reason for discharge that bars receipt of benefits under 38 U.S.C. 3103(a). This notification will advise

the applicant that separate action by the Board for Correction of Military or Naval Records or the Veterans Administration may confer eligibility for VA benefits. Regarding the bar to benefits based upon the 180 days consecutive unauthorized absence, the following applies:

(i) Such absence must have been included as part of the basis for the applicant's discharge under other than honorable conditions.

(ii) Such absence is computed without regard to the applicant's normal or adjusted expiration of term of service.

(b) *Conduct of reviews*—(1) *Members*. As designated by the Secretary concerned, the DRB and its panels, if any, shall consist of five members. One member of the DRB shall be designated as the president and may serve as a presiding officer. Other officers may be designated to serve as presiding officers for DRB panels under regulations prescribed by the Secretary concerned.

(2) *Locations*. Reviews by a DRB will be conducted in the NCR and such other locations as designated by the Secretary concerned.

(3) *Types of review*. An applicant, upon request, is entitled to:

(i) *Record review*. A review of the application, available service records, and additional documents (if any) submitted by the applicant.

(ii) *Hearing*. A review involving an appearance before the DRB by the applicant or counsel or representative (or both).

(4) *Applicant's expenses*. Unless otherwise specified by law or regulation, expenses incurred by the applicant, witnesses, counsel or representative will not be paid by the Department of Defense.

(5) *Withdrawal of application*. An applicant shall be permitted to withdraw an application without prejudice at any time before the scheduled review.

(6) *Failure to appear at a hearing or respond to a scheduling notice*. (i) Except as otherwise authorized by the Secretary concerned, further opportunity for a hearing shall not be made available in the following circumstances to an applicant who has requested a hearing:

(A) When the applicant has been sent a letter containing the month and location of a proposed hearing and fails to make a timely response; or

(B) When the applicant, after being notified by letter of the time and place of the hearing, fails to appear at the appointed time, either in person or by representative, without having made a prior, timely request for a continuation, postponement, or withdrawal.

(ii) In such cases, the applicant shall be deemed to have waived the right to a hearing, and the DRB shall complete its review of the discharge. Further request for a hearing shall not be granted unless the applicant can demonstrate that the failure to appear or respond was due to circumstances beyond the applicant's control.

(7) *Continuance and postponements*. (i) A continuance of a discharge review hearing may be authorized by the president of the DRB or presiding officer of the panel concerned, provided that such continuance is of reasonable duration and is essential to achieving a full and fair hearing. When a proposal for continuance is indefinite, the pending application shall be returned to the applicant with the option to resubmit when the case is fully ready for review.

(ii) Postponements of scheduled reviews normally shall not be permitted other than for demonstrated good and sufficient reason set forth by the applicant in a timely manner, or for the convenience of the government.

(8) *Reconsideration*. A discharge review shall not be subject to reconsideration except:

(i) When the only previous consideration of the case was on the motion of the DRB;

(ii) When the original discharge review did not involve a hearing and a hearing is now desired, and the provisions of paragraph (b)(6) of this section do not apply;

(iii) When changes in discharge policy are announced after an earlier review of an applicant's discharge, and the new policy is made expressly retroactive;

(iv) When the DRB determines that policies and procedures under which the applicant was discharged differ in material respects from policies and procedures currently applicable on a Service-wide basis to discharges of the type under consideration, provided

that such changes in policies or procedures represent a substantial enhancement of the rights afforded a respondent in such proceedings;

(v) When an individual is to be represented by a counsel or representative, and was not so represented in any previous consideration of the case by the DRB;

(vi) When the case was not previously considered under uniform standards published pursuant to Pub. L. 95–126 and such application is made within 15 years after the date of discharge; or

(vii) On the basis of presentation of new, substantial, relevant evidence not available to the applicant at the time of the original review. The decision whether evidence offered by an applicant in support of a request for reconsideration is in fact new, substantial, relevant, and was not available to the applicant at the time of the original review will be based on a comparison of such evidence with the evidence considered in the previous discharge review. If this comparison shows that the evidence submitted would have had a probable effect on matters concerning the propriety or equity of the discharge, the request for reconsideration shall be granted.

(9) *Availability of records and documents*. (i) Before applying for discharge review, potential applicants or their designated representatives may obtain copies of their military personnel records by submitting a General Services Administration Standard Form 180, ''Request Pertaining to Military Records,'' to the National Personnel Records Center (NPRC), 9700 Page Boulevard, St. Louis, MO 62132. Once the application for discharge review (DD Form 293) is submitted, an applicant's military records are forwarded to the DRBs where they cannot be reproduced. Submission of a request for an applicant's military records, including a request under the Freedom of Information Act (32 CFR part 286) or Privacy Act (32 CFR part 286a) after the DD Form 293 has been submitted, shall result automatically in the temporary suspension of processing of the application for discharge review until the requested records are sent to an appropriate location for copying, are copied, and are returned to the headquarters of the DRB. Processing of the application shall then be resumed at whatever stage of the discharge review process is practicable. Applicants are encouraged to submit any request for their military records before applying for discharge review rather than after submitting DD Form 293, to avoid delays in processing of applications and scheduling of reviews. Applicants and their counsel also may examine their military personnel records at the site of their scheduled review before the hearing. DRBs shall notify applicants of the dates the records are available for examination in their standard scheduling information.

(ii) If the DRB is not authorized to provide copies of documents that are under the cognizance of another government department, office, or activity, applications for such information must be made by the applicant to the cognizant authority. The DRB shall advise the applicant of the mailing address of the government department, office, or activity to which the request should be submitted.

(iii) If the official records relevant to the discharge review are not available at the agency having custody of the records, the applicant shall be so notified and requested to provide such information and documents as may be desired in support of the request for discharge review. A period of not less than 30 days shall be allowed for such documents to be submitted. At the expiration of this period, the review may be conducted with information available to the DRB.

(iv) A DRB may take steps to obtain additional evidence that is relevant to the discharge under consideration beyond that found in the official military records or submitted by the applicant, if a review of available evidence suggests that it would be incomplete without the additional information, or when the applicant presents testimony or documents that require additional information to evaluate properly. Such information shall be made available to the applicant, upon request, with appropriate modifications regarding classified material.

(A) In any case heard on request of an applicant, the DRB shall provide the

applicant and counsel or representative, if any, at a reasonable time before initiating the decision process, a notice of the availability of all regulations and documents to be considered in the discharge review, except for documents in the official personnel or medical records and any documents submitted by the applicant. The DRB shall also notify the applicant or counsel or representative:

(*1*) Of the right to examine such documents or to be provided with copies of the documents upon request;

(*2*) Of the date by which such requests must be received; and

(*3*) Of the opportunity to respond within a reasonable period of time to be set by the DRB.

(B) When necessary to acquaint the applicant with the substance of a classified document, the classifying authority, on the request of the DRB, shall prepare a summary of or an extract from the document, deleting all references to sources of information and other matters, the disclosure of which, in the opinion of the classifying authority, would be detrimental to the national security interests of the United States. Should preparation of such summary be deemed impracticable by the classifying authority, information from the classified sources shall not be considered by the DRB in its review of the case.

(v) Regulations of a Military Department may be obtained at many installations under the jurisdiction of the Military Department concerned or by writing to the following address: DA Military Review Boards Agency, Attention: SFBA (Reading Room), room 1E520, Washington, DC 20310.

(10) *Recorder/Secretary or Assistant*. Such a person shall be designated to assist in the functioning of each DRB in accordance with the procedures prescribed by the Secretary of the Military Department concerned.

(11) *Hearings*. Hearings (including hearing examinations) that are conducted shall recognize the rights of the individual to privacy. Accordingly, presence at hearings of individuals other than those required shall be limited to persons authorized by the Secretary concerned or expressly requested by the applicant, subject to reasonable limitations based upon available space. If, in the opinion of the presiding officer, the presence of other individuals could be prejudicial to the interests of the applicant or the government, hearings may be held in closed session.

(12) *Evidence and testimony*. (i) The DRB may consider any evidence obtained in accordance with this part.

(ii) Formal rules of evidence shall not be applied in DRB proceedings. The presiding officer shall rule on matters of procedure and shall ensure that reasonable bounds of relevancy and materiality are maintained in the taking of evidence and presentation of witnesses.

(iii) Applicants undergoing hearings shall be permitted to make sworn or unsworn statements, if they so desire, or to introduce witnesses, documents, or other information on their behalf, at no expense to the Department of Defense.

(iv) Applicants may also make oral or written arguments personally or through counsel or representatives.

(v) Applicants who present sworn or unsworn statements and witnesses may be questioned by the DRB. All testimony shall be taken under oath or affirmation unless the applicant specifically requests to make an unsworn statement.

(vi) There is a presumption of regularity in the conduct of governmental affairs. This presumption can be applied in any review unless there is substantial credible evidence to rebut the presumption.

(c) *Decision process*. (1) The DRB or the DRB panel, as appropriate, shall meet in plenary session to review discharges and exercise its discretion on a case-by-case basis in applying the standards set forth in § 70.9.

(2) The presiding officer is responsible for the conduct of the discharge review. The presiding officer shall convene, recess, and adjourn the DRB panel as appropriate and shall maintain an atmosphere of dignity and decorum at all times.

(3) Each DRB member shall act under oath or affirmation requiring careful, objective consideration of the application. DRB members are responsible for eliciting all facts necessary for a full and fair hearing. They shall consider

all information presented to them by the applicant. In addition, they shall consider available Military Service and health records, together with other records that may be in the files of the Military Department concerned and relevant to the issues before the DRB, and any other evidence obtained in accordance with this part.

(4) The DRB shall identify and address issues after a review of the following material obtained and presented in accordance with this part and the implementing instructions of the DRB: Available official records, documentary evidence submitted by or on behalf of an applicant, presentation of a hearing examination, testimony by or on behalf of an applicant, oral or written arguments presented by or on behalf of an applicant, and any other relevant evidence.

(5) If an applicant who has requested a hearing does not respond to a notification letter or does not appear for a scheduled hearing, the DRB may complete the review on the basis of material previously submitted.

(6) *Application of standards.* (i) When a DRB determines that an applicant's discharge was improper (§ 70.9(b)), the DRB will determine which reason for discharge should have been assigned based upon the facts and circumstances before the discharge authority, including the Service regulations governing reasons for discharge at the time the applicant was discharged. Unless it is also determined that the discharge was inequitable (§ 70.9(c)), the provisions as to characterization in the regulation under which the applicant should have been discharged will be considered in determining whether further relief is warranted.

(ii) When the DRB determines that an applicant's discharge was inequitable (see § 70.9(c)), any change will be based on the evaluation of the applicant's overall record of service and relevant regulations of the Military Service of which the applicant was a member.

(7) Voting shall be conducted in closed session, a majority of the five members' votes constituting the DRB decision. Voting procedures shall be prescribed by the Secretary of the Military Department concerned.

(8) Details of closed session deliberations of a DRB are privileged information and shall not be divulged.

(9) There is no requirement for a statement of minority views in the event of a split vote. The minority, however, may submit a brief statement of its views under procedures established by the Secretary concerned.

(10) DRBs may request advisory opinions from staff officers of their Military Departments. These opinions are advisory in nature and are not binding on the DRB in its decision-making process.

(11) The preliminary determinations required by 38 U.S.C. 3103(e) shall be made upon majority vote of the DRB concerned on an expedited basis. Such determination shall be based upon the standards set forth in § 70.9 of this part.

(12) *The DRB shall:* (i) Address items submitted as issues by the applicant under paragraph (d) of this section;

(ii) Address decisional issues under paragraph (e) of this section; and

(iii) Prepare a decisional document in accordance with paragraph (h) of this section.

(d) *Response to items submitted as issues by the applicant*—(1) *General guidance.* (i) If an issue submitted by an applicant contains two or more clearly separate issues, the DRB should respond to each issue under the guidance of this paragraph as if it had been set forth separately by the applicant.

(ii) If an applicant uses a ''building block'' approach (that is, setting forth a series of conclusions on issues that lead to a single conclusion purportedly warranting a change in the applicant's discharge), normally there should be a separate response to each issue.

(iii) Nothing in this paragraph precludes the DRB from making a single response to multiple issues when such action would enhance the clarity of the decisional document, but such response must reflect an adequate response to each separate issue.

(2) *Decisional issues.* An item submitted as an issue by an applicant in accordance with this part shall be addressed as a decisional issue under paragraph (e), in the following circumstances:

(i) When the DRB decides that a change in discharge should be granted,

and the DRB bases its decision in whole or in part on the applicant's issue; or

(ii) When the DRB does not provide the applicant with the full change in discharge requested, and the decision is based in whole or in part on the DRB's disagreement on the merits with an issue submitted by the applicant.

(3) *Response to items not addressed as decisional issues.* (i) If the applicant receives the full change in discharge requested (or a more favorable change), that fact shall be noted and the basis shall be addressed as a decisional issue. No further response is required to other issues submitted by the applicant.

(ii) If the applicant does not receive the full change in discharge requested with respect to either the character of or reason for discharge (or both), the DRB shall address the items submitted by the applicant under paragraph (e) of this section (decisional issues) unless one of the following responses is applicable:

(A) *Duplicate issues.* The DRB may state that there is a full response to the issue submitted by the applicant under a specified decisional issue. This response may be used only when one issue clearly duplicates another or the issue clearly requires discussion in conjunction with another issue.

(B) *Citations without principles and facts.* The DRB may state that the applicant's issue, which consists of a citation to a decision without setting forth any principles and facts from the decision that the applicant states are relevant to the applicant's case, does not comply with the requirements of paragraph (a)(4)(iv)(A).

(C) *Unclear issues.* The DRB may state that it cannot respond to an item submitted by the applicant as an issue because the meaning of the item is unclear. An issue is unclear if it cannot be understood by a reasonable person familiar with the discharge review process after a review of the materials considered under paragraph (c)(4) of this section.

(D) *Nonspecific issues.* The DRB may state that it cannot respond to an item submitted by the applicant as an issue because it is not specific. A submission is considered not specific if a reasonable person familiar with the discharge review process after a review of the materials considered under paragraph (c)(4) of this section, cannot determine the relationship between the applicant's submission and the particular circumstances of the case. This response may be used only if the submission is expressed in such general terms that no other response is applicable. For example, if the DRB disagrees with the applicant as to the relevance of matters set forth in the submission, the DRB normally will set forth the nature of the disagreement under the guidance in paragraph (e) of this section, with respect to decisional issues, or it will reject the applicant's position on the basis of paragraphs (d)(3)(ii)(A) or (d)(3)(ii)(B) of this section. If the applicant's submission is so general that none of those provisions is applicable, then the DRB may state that it cannot respond because the item is not specific.

(e) *Decisional issues*—(1) *General.* Under the guidance in this section, the decisional document shall discuss the issues that provide a basis for the decision whether there should be a change in the character of or reason for discharge. In order to enhance clarity, the DRB should not address matters other than issues relied upon in the decision or raised by the applicant.

(i) *Partial change.* When the decision changes a discharge, but does not provide the applicant with the full change in discharge requested, the decisional document shall address both the issues upon which change is granted and the issues upon which the DRB denies the full change requested.

(ii) *Relationship of issue to character of or reason for discharge.* Generally, the decisional document should specify whether a decisional issue applies to the character of or reason for discharge (or both), but it is not required to do so.

(iii) *Relationship of an issue to propriety or equity.* (A) If an applicant identifies an issue as pertaining to both propriety and equity, the DRB will consider it under both standards.

(B) If an applicant identifies an issue as pertaining to the propriety of the discharge (for example, by citing a propriety standard or otherwise claiming

that a change in discharge is required as a matter of law), the DRB shall consider the issue solely as a matter of propriety. Except as provided in paragraph (e)(1)(iii)(D) of this section, the DRB is not required to consider such an issue under the equity standards.

(C) If the applicant's issue contends that the DRB is required as a matter of law to follow a prior decision by setting forth an issue of propriety from the prior decision and describing its relationship to the applicant's case, the issue shall be considered under the propriety standards and addressed under paragraph (e)(2) or (e)(3) of this section.

(D) If the applicant's issue sets forth principles of equity contained in a prior DRB decision, describes the relationship to the applicant's case, and contends that the DRB is required as a matter of law to follow the prior case, the decisional document shall note that the DRB is not bound by its discretionary decisions in prior cases under the standards in § 70.9. However, the principles cited by the applicant, and the description of the relationship of the principles to the applicant's case, shall be considered under the equity standards and addressed under paragraph (e)(5) or (e)(6) of this section.

(E) If the applicant's issue cannot be identified as a matter of propriety or equity, the DRB shall address it as an issue of equity.

(2) *Change of discharge: issues of propriety*. If a change in the discharge is warranted under the propriety standards in § 70.9 the decisional document shall state that conclusion and list the errors of expressly retroactive changes in policy that provide a basis for the conclusion. The decisional document shall cite the facts in the record that demonstrate the relevance of the error or change in policy to the applicant's case. If the change in discharge does not constitute the full change requested by the applicant, the reasons for not granting the full change shall be addressed under the guidance in paragraph (e)((3) or (e)(6) of this section.

(3) *Denial of the full change requested: issues of propriety*. (i) If the decision rejects the applicant's position on an issue of propriety, or if it is otherwise decided on the basis of an issue of propriety that the full change in discharge requested by the applicant is not warranted, the decisional document shall note that conclusion.

(ii) The decisional document shall list reasons for its conclusion on each issue of propriety under the following guidance:

(A) If a reason is based in whole or in part upon a regulation, statute, constitutional provision, judicial determination, or other source of law, the DRB shall cite the pertinent source of law and the facts in the record that demonstrate the relevance of the source of law to the particular circumstances in the case.

(B) If a reason is based in whole or in part on a determination as to the occurrence or nonoccurrence of an event or circumstance, including a factor required by applicable Service regulations to be considered for determination of the character of and reason for the applicant's discharge, the DRB shall make a finding of fact for each such event or circumstance.

(*1*) For each such finding, the decisional document shall list the specific source of the information relied upon. This may include the presumption of regularity in appropriate cases. If the information is listed in the service record section of the decisional document, a citation is not required.

(*2*) If a finding of fact is made after consideration of contradictory evidence in the record (including information cited by the applicant or otherwise identified by members of the DRB), the decisional document shall set forth the conflicting evidence and explain why the information relied upon was more persuasive than the information that was rejected. If the presumption of regularity is cited as the basis for rejecting such information, the decisional document shall set forth the basis for relying on the presumption of regularity and explain why the contradictory evidence was insufficient to overcome the presumption. In an appropriate case, the explanation as to why the contradictory evidence was insufficient to overcome the presumption of regularity may consist of a statement that the applicant failed to provide sufficient corroborating evidence,

or that the DRB did not find the applicant's testimony to be sufficiently credible to overcome the presumption.

(C) If the DRB disagrees with the position of the applicant on an issue of propriety, the following guidance applies in addition to the guidance in paragraphs (e)(3)(ii) (A) and (B) of this section:

(*1*) The DRB may reject the applicant's position by explaining why it disagrees with the principles set forth in the applicant's issue (including principles derived from cases cited by the applicant in accordance with paragraph (e)(4)(iv) of this section).

(*2*) The DRB may reject the applicant's position by explaining why the principles set forth in the applicant's issue (including principles derived from cases cited by the applicant in accordance with paragraph (a)(4)(iv) of this section) are not relevant to the applicant's case.

(*3*) The DRB may reject an applicant's position by stating that the applicant's issue of propriety is not a matter upon which the DRB grants a change in discharge, and by providing an explanation for this position. When the applicant indicates that the issue is to be considered in conjunction with one or more other specified issues, the explanation will address all such specified issues.

(*4*) The DRB may reject the applicant's position on the grounds that other specified factors in the case preclude granting relief, regardless of whether the DRB agreed with the applicant's position.

(*5*) If the applicant takes the position that the discharge must be changed because of an alleged error in a record associated with the discharge, and the record has not been corrected by the organization with primary responsibility for corrective action, the DRB may respond that it will presume the validity of the record in the absence of such corrective action. If the organization empowered to correct the record is within the Department of Defense, the DRB should provide the applicant with a brief description of the procedures for requesting correction of the record. If the DRB on its own motion cites this issue as a decisional issue on the basis of equity, it shall address the issue under paragraph (d)(5) or (d)(6) of this section.

(*6*) When an applicant's issue contains a general allegation that a certain course of action violated his or her constitutional rights, the DRB may respond in appropriate cases by noting that the action was consistent with statutory or regulatory authority, and by citing the presumption of constitutionality that attaches to statutes and regulations. If, on the other hand, the applicant makes a specific challenge to the constitutionality of the action by challenging the application of a statute or regulation in a particular set of circumstances, it is not sufficient to respond solely by citing the presumption of constitutionality of the statute or regulation when the applicant is not challenging the constitutionality of the statute or regulation. Instead, the response must address the specific circumstances of the case.

(4) *Denial of the full change in discharge requested when propriety is not at issue.* If the applicant has not submitted an issue of propriety and the DRB has not otherwise relied upon an issue of propriety to change the discharge, the decisional document shall contain a statement to that effect. The DRB is not required to provide any further discussion as to the propriety of the discharge.

(5) *Change of discharge: issues of equity.* If the DRB concludes that a change in the discharge is warranted under the equity standards in § 70.9 the decisional document shall list each issue of equity upon which this conclusion is based. The DRB shall cite the facts in the record that demonstrate the relevance of the issue to the applicant's case. If the change in discharge does not constitute the full change requested by the applicant, the reasons for not giving the full change requested shall be discussed under the guidance in paragraph (e)(6) of this section.

(6) *Denial of the full change in discharge requested: issues of equity.* (i) If the DRB rejects the applicant's position on an issue of equity, or if the decision otherwise provides less than the full change in discharge requested by the applicant, the decisional document shall note that conclusion.

(ii) The DRB shall list reasons for its conclusion on each issue of equity under the following guidance:

(A) If a reason is based in whole or in part upon a regulation, statute, constitutional provision, judicial determination, or other source of law, the DRB shall cite the pertinent source of law and the facts in the record that demonstrate the relevance of the source of law to the exercise of discretion on the issue of equity in the applicant's case.

(B) If a reason is based in whole or in part on a determination as to the occurrence or nonoccurrence of an event or circumstance, including a factor required by applicable Service regulations to be considered for determination of the character of and reason for the applicant's discharge, the DRB shall make a finding of fact for each such event or circumstance.

(*1*) For each such finding, the decisional document shall list the specific source of the information relied upon. This may include the presumption of regularity in appropriate cases. If the information is listed in the service record section of the decisional document, a citation is not required.

(*2*) If a finding of fact is made after consideration of contradictory evidence in the record (including information cited by the applicant or otherwise identified by members of the DRB), the decisional document shall set forth the conflicting evidence and explain why the information relied upon was more persuasive than the information that was rejected. If the presumption of regularity is cited as the basis for rejecting such information, the decisional document shall set forth the basis for relying on the presumption of regularity and explain why the contradictory evidence was insufficient to overcome the presumption. In an appropriate case, the explanation as to why the contradictory evidence was insufficient to overcome the presumption of regularity may consist of a statement that the applicant failed to provide sufficient corroborating evidence, or that the DRB did not find the applicant's testimony to be sufficiently credible to overcome the presumption.

(C) If the DRB disagrees with the position of the applicant on an issue of equity, the following guidance applies in addition to the guidance in paragraphs (e)(6)(ii) (A) and (B) of this section:

(*1*) The DRB may reject the applicant's position by explaining why it disagrees with the principles set forth in the applicant's issue (including principles derived from cases cited by the applicant in accordance with paragraph (a)(4)(iv) of this section).

(*2*) The DRB may reject the applicant's position by explaining why the principles set forth in the applicant's issue (including principles derived from cases cited by the applicant) are not relevant to the applicant's case.

(*3*) The DRB may reject an applicant's position by explaining why the applicant's issue is not a matter upon which the DRB grants a change in discharge as a matter of equity. When the applicant indicates that the issue is to be considered in conjunction with other specified issues, the explanation will address all such specified issues.

(*4*) The DRB may reject the applicant's position on the grounds that other specified factors in the case preclude granting relief, regardless of whether the DRB agreed with the applicant's position.

(*5*) If the applicant takes the position that the discharge should be changed as a matter of equity because of an alleged error in a record associated with the discharge, and the record has not been corrected by the organization with primary responsibility for corrective action, the DRB may respond that it will presume the validity of the record in the absence of such corrective action. However, the DRB will consider whether it should exercise its equitable powers to change the discharge on the basis of the alleged error. If it declines to do so, it shall explain why the applicant's position did not provide a sufficient basis for the change in the discharge requested by the applicant.

(D) When the DRB concludes that aggravating factors outweigh mitigating factors, the DRB must set forth reasons such as the seriousness of the offense, specific circumstances surrounding the offense, number of offenses, lack of mitigating circumstances, or similar factors. The

DRB is not required, however, to explain why it relied on any such factors unless the applicability or weight of such a factor is expressly raised as an issue by the applicant.

(E) If the applicant has not submitted any issues and the DRB has not otherwise relied upon an issue of equity for a change in discharge, the decisional document shall contain a statement to that effect, and shall note that the major factors upon which the discharge was based are set forth in the service record portion of the decisional document.

(f) *The recommendation of the DRB President*—(1) *General*. The president of the DRB may forward cases for consideration by the Secretarial Reviewing Authority (SRA) under rules established by the Secretary concerned. There is no requirement that the President submit a recommendation when a case is forwarded to the SRA. If the president makes a recommendation with respect to the character of or reason for discharge, however, the recommendation shall be prepared under the guidance in paragraph (f)(2) of this section.

(2) *Format for recommendation*. If a recommendation is provided, it shall contain the president's views whether there should be a change in the character of or reason for discharge (or both). If the president recommends such a change, the particular change to be made shall be specified. The recommendation shall set forth the president's position on decisional issues and issues submitted by the applicant under the following guidance:

(i) *Adoption of the DRB's decisional document*. The recommendation may state that the president has adopted the decisional document prepared by the majority. The president shall ensure that the decisional document meets the requirements of this section.

(ii) *Adoption of the specific statements from the majority*. If the President adopts the views of the majority only in part, the recommendation shall cite the specific matter adopted from the majority. If the president modifies a statement submitted by the majority, the recommendation shall set forth the modification.

(iii) *Response to issues not included in matter adopted from the majority*. The recommendation shall set forth the following if not adopted in whole or in part from the majority:

(A) The issues on which the president's recommendation is based. Each such decisional issue shall be addressed by the president under paragraph (e) of this section,

(B) The president's response to items submitted as issues by the applicant under paragraph (d) of this section.

(C) Reasons for rejecting the conclusions of the majority with respect to decisional issues which, if resolved in the applicant's favor, would have resulted in greater relief for the applicant than that afforded by the president's recommendation. Suh issues shall be addressed under the principles in paragraph (e) of this section.

(g) *Secretarial reviewing authority (SRA)*—(1) *Review by the SRA*. The Secretarial Reviewing Authority (SRA) is the Secretary concerned or the official to whom Secretary's discharge review authority has been delegated.

(i) The SRA may review the following types of cases before issuance of the final notification of a decision:

(A) Any specific case in which the SRA has an interest.

(B) Any specific case that the president of the DRB believes is of significant interest to the SRA.

(ii) Cases reviewed by the SRA shall be considered under the standards set forth in § 70.9.

(2) *Processing the decisional document*. (i) The decisional document shall be transmitted by the DRB president under paragraph (e) of this section.

(ii) The following guidance applies to cases that have been forwarded to the SRA except for cases reviewed on the DRB's own motion without the participation of the applicant or the applicant's counsel:

(A) The applicant and counsel or representative, if any, shall be provided with a copy of the proposed decisional document, including the DRB president's recommendation to the SRA, if any. Classified information shall be summarized.

(B) The applicant shall be provided with a reasonable period of time, but not less than 25 days, to submit to the

SRA a rebuttal. An issue in rebuttal consists of a clear and specific statement by the applicant in support of or in opposition to the statements of the DRB or DRB president on decisional issues and other clear and specific issues that were submitted by the applicant in accordance with paragraph (a)(4)(i) of this section. The rebuttal shall be based solely on matters in the record before when the DRB closed the case for deliberation or in the president's recommendation.

(3) *Review of the decisional document.* If corrections in the decisional document are required, the decisional document shall be returned to the DRB for corrective action. The corrected decisional document shall be sent to the applicant (and counsel, if any), but a further opportunity for rebuttal is not required unless the correction produces a different result or includes a substantial change in the discussion by the DRB (or DRB president) of the issues raised by the majority or the applicant.

(4) *The Addendum of the SRA.* The decision of the SRA shall be in writing and shall be appended as an addendum to the decisional document under the guidance in this subsection.

(i) *The SRA's decision.* The addendum shall set forth the SRA's decision whether there will be a change in the character of or reason for discharge (or both); if the SRA concludes that a change is warranted, the particular change to be made shall be specified. If the SRA adopts the decision recommended by the DRB or the DRB president, the decisional document shall contain a reference to the matter adopted.

(ii) *Discussion of issues.* In support of the SRA's decision, the addendum shall set forth the SRA's position on decisional issues, items submitted as issues by an applicant in accordance with paragraph (a)(4)(i) of this section, and issues raised by the DRB and the DRB president in accordance with the following guidance:

(A) *Adoption of the DRB president's recommendation.* The addendum may state that the SRA has adopted the DRB president's recommendation.

(B) *Adoption of the DRB's proposed decisional document.* The addendum may state that the SRA has adopted the proposed decisional document prepared by the DRB.

(C) *Adoption of specific statements from the majority or the DRB president.* If the SRA adopts the views of the DRB or the DRB president only in part, the addendum shall cite the specific statements adopted. If the SRA modifies a statement submitted by the DRB or the DRB president, the addendum shall set forth the modification.

(D) *Response to issues not included in matter adopted from the DRB or the DRB president.* The addendum shall set forth the following if not adopted in whole or in part from the DRB or the DRB president:

(*1*) A list of the issues on which the SRA's decision is based. Each such decisional issue shall be addressed by the SRA under paragraph (e) of this section. This includes reasons for rejecting the conclusion of the DRB or the DRB president with respect to decisional issues which, if resolved in the applicant's favor, would have resulted in change to the discharge more favorable to the applicant than that afforded by the SRA's decision. Such issues shall be addressed under the principles in paragraph (e) of this section.

(*2*) The SRA's response to items submitted as issues by the applicant under paragraph (d) of this section.

(iii) *Response to the rebuttal.* (A) If the SRA grants the full change in discharge requested by the applicant (or a more favorable change), that fact shall be noted, the decisional issues shall be addressed under paragraph (e) of this section, and no further response to the rebuttal is required.

(B) If the SRA does not grant the full change in discharge requested by the applicant (or a more favorable change), the addendum shall list each issue in rebuttal submitted by an applicant in accordance with this section, and shall set forth the response of the SRA under the following guidance:

(*1*) If the SRA rejects an issue in rebuttal, the SRA may respond in accordance with the principles in paragraph (e) of this section.

(*2*) If the matter adopted by the SRA provides a basis for the SRA's rejection of the rebuttal material, the SRA may

note that fact and cite the specific matter adopted that responds to the issue in rebuttal.

(*3*) If the matter submitted by the applicant does not meet the requirements for rebuttal material in paragraph (b)(2)(ii)(B) of this section.

(iv) *Index entries.* Appropriate index entries shall be prepared for the SRA's actions for matters that are not adopted from the DRB's proposed decisional document.

(h) *The decisional document.* A decisional document shall be prepared for each review. At a minimum, this document shall contain:

(1) The circumstances and character of the applicant's service as extracted from available service records, including health records, and information provided by other Government authorities or the applicant, such as, but not limited to:

(i) Information concerning the discharge at issue in the review, including:

(A) Date (YYMMDD) of discharge.

(B) Character of discharge.

(C) Reason for discharge.

(D) The specific regulatory authority under which the discharge was issued.

(ii) Date (YYMMDD) of enlistment.

(iii) Period of enlistment.

(iv) Age at enlistment.

(v) Length of service.

(vi) Periods of unauthorized absence.

(vii) Conduct and efficiency ratings (numerical or narrative).

(viii) Highest rank received.

(ix) Awards and decorations.

(x) Educational level.

(xi) Aptitude test scores.

(xii) Incidents of punishment pursuant to Article 15, Uniform Code of Military Justice (including nature and date (YYMMDD) of offense or punishment).

(xiii) Convictions by court-martial.

(xiv) Prior military service and type of discharge received.

(2) A list of the type of documents submitted by or on behalf of the applicant (including a written brief, letters of recommendation, affidavits concerning the circumstances of the discharge, or other documentary evidence), if any.

(3) A statement whether the applicant testified, and a list of the type of witnesses, if any, who testified on behalf of the applicant.

(4) A notation whether the application pertained to the character of discharge, the reason for discharge, or both.

(5) The DRB's conclusions on the following:

(i) Whether the character of or reason for discharge should be changed.

(ii) The specific changes to be made, if any.

(6) A list of the items submitted as issues on DD Form 293 or expressly incorporated therein and such other items submitted as issues by the applicant that are identified as inadvertently omitted under paragraph (a)(4)(i)(D) of this section. If the issues are listed verbatim on DD Form 293, a copy of the relevant portion of the Form may be attached. Issues that have been withdrawn or modified with the consent of the applicant need not be listed.

(7) The response to the items submitted as issues by the applicant under the guidance in paragraph (d) of this section.

(8) A list of decisional issues and a discussion of such issues under the guidance in paragraph (e) of this section.

(9) Minority views, if any, when authorized under rules of the Military Department concerned.

(10) The recommendation of the DRB president when required by paragraph (f) of this section.

(11) The addendum of the SRA when required by paragraph (g) of this section.

(12) Advisory opinions, including those containing factual information, when such opinions have been relied upon for final decision or have been accepted as a basis for rejecting any of the applicant's issues. Such advisory opinions or relevant portions thereof that are not fully set forth in the discussion of decisional issues or otherwise in response to items submitted as issues by the application shall be incorporated by reference. A copy of opinions incorporated by reference shall be appended to the decision and included in the record of proceedings.

(13) A record of the voting, including:

(i) The number of votes for the DRB's decision and the number of votes in the minority, if any.

(ii) The DRB member's names (last name, first name, M.I.) and votes. The copy provided to the applicant may substitute a statement that the names and votes will be made available to the applicant at the applicant's request.

(14) Index entries for each decisional issue under appropriate categories listed in the index of decisions.

(15) An authentication of the document by an appropriate official.

(i) *Issuance of decisions following discharge review*. The applicant and counsel or representative, if any, shall be provided with a copy of the decisional document and of any further action in review. The applicant (and counsel, if any) shall be notified of the availability of the complaint process under § 70.10. Final notification of decisions shall be issued to the applicant with a copy to the counsel or representative, if any, and to the Military Service concerned.

(1) Notification to applicants, with copies to counsel or representatives, shall normally be made through the U.S. Postal Service. Such notification shall consist of a notification of decision, together with a copy of the decisional document.

(2) Notification to the Military Services shall be for the purpose of appropriate action and inclusion of review matter in personnel records. Such notification shall bear appropriate certification of completeness and accuracy.

(3) Actions on review by superior authority, when occurring, shall be provided to the applicant and counsel or representative in the same manner as the notification of the review decision.

(j) *Record of DRB proceedings*. (1) When the proceedings in any review have been concluded, a record thereof will be prepared. Records may include written records, electromagnetic records, videotape recordings, or a combination thereof.

(2) At a minimum, the record will include the following:

(i) The application for review;

(ii) A record of the testimony in verbatim, summarized, or recorded form at the option of the DRB concerned;

(iii) Documentary evidence or copies thereof, considered by the DRB other than the Military Service record;

(iv) Briefs and arguments submitted by or on behalf of the applicant;

(v) Advisory opinions considered by the DRB, if any;

(vi) The findings, conclusions, and reasons developed by the DRB;

(vii) Notification of the DRB's decision to the cognizant custodian of the applicant's records, or reference to the notification document;

(viii) Minority reports, if any;

(ix) A copy of the decisional document.

(k) *Final disposition of the Record of Proceedings*. The original record of proceedings and all appendices thereto shall in all cases be incorporated in the Military Service record of the applicant and the Military Service record shall be returned to the custody of the appropriate records holding facility. If a portion of the original record of the proceedings cannot be stored with the Military Service record, the Military Service record shall contain a notation as to the place where the record is stored. Other copies shall be filed and disposed of in accordance with appropriate Military Service regulations.

(l) *Availability of Discharge Review Board documents for inspection and copying*. (1) A copy of the decisional document prepared in accordance with paragraph (d) of this section shall be made available for public inspection and copying promptly after a notice of final decision is sent to the applicant.

(2) To prevent a clearly unwarranted invasion of personal privacy, identifying details of the applicant and other persons will be deleted from documents made available for public inspection and copying.

(i) Names, addresses, social security numbers, and Military Service numbers must be deleted. Written justification shall be made for all other deletions and shall be available for public inspection.

(ii) Each DRB shall ensure that there is a means for relating a decisional document number to the name of the applicant to permit retrieval of the applicant's records when required in processing a complaint under § 70.10.

(3) Any other privileged or classified material contained in or appended to any documents required by this part to be furnished the applicant and counsel or representative or made available for public inspection and copying may be deleted therefrom only if a written statement of the basis for the deletions is provided the applicant and counsel or representative and made available for public inspection. It is not intended that the statement be so detailed as to reveal the nature of the withheld material.

(4) DRB documents made available for public inspection and copying shall be located in the Armed Forces Discharge Review/Correction Board Reading Room. The documents shall be indexed in a usable and concise form so as to enable the public, and those who represent applicants before the DRBs, to isolate from all these decisions that are indexed, those cases that may be similar to an applicant's case and that indicate the circumstances under or reasons for (or both) which the DRB or the Secretary concerned granted or denied relief.

(i) The reading file index shall include, in addition to any other items determined by the DRB, the case number, the date, character of, reason and authority for the discharge. It shall also include the decisions of the DRB and reviewing authority, if any, and the issues addressed in the statement of findings, conclusions, and reasons.

(ii) The index shall be maintained at selected permanent locations throughout the United States. This ensures reasonable availability to applicants at least 30 days before a traveling panel review. A list of these locations shall be published in the FEDERAL REGISTER by the Department of the Army. The index shall also be made available at sites selected for traveling panels or hearing examinations for such periods as the DRB or a hearing examiner is present and in operation. An applicant who has requested a traveling panel review or a hearing examination shall be advised in the notice of such review of the permanent index locations.

(iii) The Armed Forces Discharge Review/Correction Board Reading Room shall publish indexes quarterly for all DRBs. All DRBs shall be responsible for timely submission to the Reading Room of individual case information required for update of the indexes. In addition, all DRBs shall be responsible for submission of new index categories based upon published changes in policy, procedures, or standards. These indexes shall be available for public inspection or purchase (or both) at the Reading Room. When the DRB has accepted an application, information concerning the availability of the index shall be provided in the DRB's response to the application.

(iv) Copies of decisional documents will be provided to individuals or organizations outside the NCR in response to written requests for such documents. Although the Reading Room shall try to make timely responses to such requests, certain factors such as the length of a request, the volume of other pending requests, and the impact of other responsibilities of the staff assigned to such duties may cause some delays. A fee may be charged for such documents under appropriate DoD and Department of the Army directives and regulations. The manual that accompanies the index of decisions shall notify the public that if an applicant indicates that a review is scheduled for a specific date, an effort will be made to provide requested decisional documents before that date. The individual or organization will be advised if that cannot be accomplished.

(v) Correspondence relating to matters under the cognizance of the Reading Room (including requests for purchase of indexes) shall be addressed to: DA Military Review Boards Agency, Attention: SFBA (Reading Room), Room 1E520, The Pentagon, Washington, DC 20310.

(m) *Privacy Act information.* Information protected under the Privacy Act is involved in the discharge review functions. The provisions of part 286a of this title shall be observed throughout the processing of a request for review of discharge or dismissal.

(n) *Information requirement.* Each Military Department shall provide the Deputy Assistant Secretary of Defense (Military Personnel and Force Management) DASD (MP&FM), Office of the

ASD (MRA&L), with a semiannual report of discharge review actions in accordance with § 70.11.

[47 FR 37785, Aug. 26, 1982, as amended at 48 FR 9855, Mar. 9, 1983; 48 FR 35644, Aug. 5, 1983]

### § 70.9 Discharge review standards.

(a) *Objective of review*. The objective of a discharge review is to examine the propriety and equity of the applicant's discharge and to effect changes, if necessary. The standards of review and the underlying factors that aid in determining whether the standards are met shall be historically consistent with criteria for determining honorable service. No factors shall be established that require automatic change or denial of a change in discharge. Neither a DRB nor the Secretary of the Military Department concerned shall be bound by any methodology of weighting of the factors in reaching a determination. In each case, the DRB or the Secretary of the Military Department concerned shall give full, fair, and impartial considerations to all applicable factors before reaching a decision. An applicant may not rceive a less favorable discharge than that issued at the time of separation. This does not preclude correction of clerical errors.

(b) *Propriety*. (1) A discharge shall be deemed proper unless, in the course of discharge review, it is determined that:

(i) There exists an error of fact, law, procedure, or discretion associated with the discharge at the time of issuance; and that the rights of the applicant were prejudiced thereby (such error shall constitute prejudicial error if there is substantial doubt that the discharge would have remained the same if the error had not been made); or

(ii) A change in policy by the Military Service of which the applicant was a member, made expressly retroactive to the type of discharge under consideration, requires a change in the discharge.

(2) When a record associated with the discharge at the time of issuance involves a matter in which the primary responsibility for corrective action rests with another organization (for example, another Board, agency, or court), the DRB will recognize an error only to the extent that the error has been corrected by the organization with primary responsibility for correcting the record.

(3) The primary function of the DRB is to exercise its discretion on issues of equity by reviewing the individual merits of each application on a case-by-case basis. Prior decisions in which the DRB exercised its discretion to change a discharge based on issues of equity (including the factors cited in such decisions or the weight given to factors in such decisions) do not bind the DRB in its review of subsequent cases because no two cases present the same issues of equity.

(4) The following applies to applicants who received less than fully Honorable administrative discharges because of their civilian misconduct while in an inactive reserve component and who were discharged or had their discharge reviewed on or after April 20, 1971: the DRB shall either recharacterize the discharge to Honorable without any additional proceedings or additional proceedings shall be conducted in accordance with the Court's Order of December 3, 1981, in *Wood v. Secretary of Defense* to determine whether proper grounds exist for the issuance of a less than Honorable discharge, taking into account that;

(i) An Other than Honorable (formerly undesirable) Discharge for an inactive reservist can only be based upon civilian misconduct found to have affected directly the performance of military duties;

(ii) A General Discharge for an inactive reservist can only be based upon civilian misconduct found to have had an adverse impact on the overall effectiveness of the military, including military morale and efficiency.

(c) *Equity*. A discharge shall be deemed to be equitable unless:

(1) In the course of a discharge review, it is determined that the policies and procedures under which the applicant was discharged differ in material respects from policies and procedures currently applicable on a Service-wide basis to discharges of the type under consideration provided that:

(i) Current policies or procedures represent a substantial enhancement of the rights afforded a respondent in such proceedings; and

(ii) There is substantial doubt that the applicant would have received the same discharge if relevant current policies and procedures had been available to the applicant at the time of the discharge proceedings under consideration.

(2) At the time of issuance, the discharge was inconsistent with standards of discipline in the Military Service of which the applicant was a member.

(3) In the course of a discharge review, it is determined that relief is warranted based upon consideration of the applicant's service record and other evidence presented to the DRB viewed in conjunction with the factors listed in this section and the regulations under which the applicant was discharged, even though the discharge was determined to have been otherwise equitable and proper at the time of issuance. Areas of consideration include, but are not limited to:

(i) Quality of service, as evidenced by factors such as:

(A) Service history, including date of enlistment, period of enlistment, highest rank achieved, conduct or efficiency ratings (numerical or narrative);

(B) Awards and decorations;

(C) Letters of commendation or reprimand;

(D) Combat service;

(E) Wounds received in action;

(F) Records of promotions and demotions;

(G) Level of responsibility at which the applicant served;

(H) Other acts of merit that may not have resulted in a formal recognition through an award or commendation;

(I) Length of service during the service period which is the subject of the discharge review;

(J) Prior military service and type of discharge received or outstanding postservice conduct to the extent that such matters provide a basis for a more thorough understanding of the performance of the applicant during the period of service which is the subject of the discharge review;

(K) Convictions by court-martial;

(L) Records of nonjudicial punishment;

(M) Convictions by civil authorities while a member of the Service, reflected in the discharge proceedings or otherwise noted in military service records;

(N) Records of periods of unauthorized absence;

(O) Records relating to a discharge instead of court-martial.

(ii) Capability to serve, as evidenced by factors such as:

(A) *Total capabilities*. This includes an evaluation of matters, such as age, educational level, and aptitude scores. Consideration may also be given whether the individual met normal military standards of acceptability for military service and similar indicators of an individual's ability to serve satisfactorily, as well as ability to adjust to military service.

(B) *Family and Personal Problems*. This includes matters in extenuation or mitigation of the reason for discharge that may have affected the applicant's ability to serve satisfactorily.

(C) *Arbitrary or capricious action*. This includes actions by individuals in authority that constitute a clear abuse of such authority and that, although not amounting to prejudicial error, may have contributed to the decision to discharge or to the characterization of service.

(D) *Discrimination*. This includes unauthorized acts as documented by records or other evidence.

### § 70.10 Complaints concerning decisional documents and index entries.

(a) *General*. (1) The procedures in this section—are established for the sole purpose of ensuring that decisional documents and index entries issued by the DRBs of the Military Departments comply with the decisional document and index entry principles of this part.

(2) This section may be modified or supplemented by the DASD(MP&FM).

(3) The following persons may submit complaints:

(i) A former member of the Armed Forces (or the former member's counsel) with respect to the decisional document issued in the former member's own case; and

(ii) A former member of the Armed Forces (or the former member's counsel) who states that correction of the decisional document will assist the

former member in preparing for an administrative or judicial proceeding in which the former member's own discharge will be at issue.

(4) The Department of Defense is committed to processing of complaints within the priorities and processing goals set forth in paragraph (d)(1)(iii) of this section. This commitment, however, is conditioned upon reasonable use of the complaint process under the following considerations. The DRBs were established for the benefit of former members of the Armed Forces. The complaint process can aid such persons most effectively if it is used by former members of the Armed Forces when necessary to obtain correction of their own decisional documents or to prepare for discharge reviews. If a substantial number of complaints submitted by others interferes with the ability of the DRBs to process applications for discharge review in a timely fashion, the Department of Defense will adjust the processing goals to ensure that the system operates to the primary advantage of applicants.

(5) The DASD(MP&FM) is the final authority with respect to action on such correspondence.

(b) *The Joint Service Review Activity (JSRA).* A three member JSRA consisting of one judge advocate from each Military Department shall advise the DASD(MP&FM). The operations of the JSRA shall be coordinated by a full-time administrative director, who shall serve as recorder during meetings of the JSRA. The members and the administrative director shall serve at the direction of the DASD(MP&FM).

(c) *Classification and control of correspondence*—(1) *Address of the JSRA.* Correspondence with the OSD concerning decisional documents or index entries issued by the DRBs shall be addressed as follows: Joint Service Review Activity, OASD(MRA&L) (MP&FM), Washington, DC 20301.

(2) *Docketing.* All such correspondence shall be controlled by the administrative director through the use of a uniform docketing procedure.

(3) *Classification.* Correspondence shall be reviewed by the administrative director and categorized either as a complaint or an inquiry in accordance with the following:

(i) *Complaints.* A complaint is any correspondence in which it is alleged that a decisional document issued by a DRB or SRA contains a specifically identified violation of the Stipulation of Dismissal, Settlement Agreement, or related Orders in the *Urban Law* case or the decisional document or index entry principles of this Directive. A complainant who alleges error with respect to a decisional document issued to another person is encouraged to set forth specifically the grounds for determining that a reasonable person familiar with the discharge review process cannot understand the basis for the decision. *See* paragraph (d)(1)(i)(B) of this section.

(ii) *Inquiries.* An inquiry is any correspondence other than a complaint.

(d) *Review of complaints*—(1) *Guidance.* The following guidance applies to review of complaints:

(i) *Standards.* Complaints shall be considered under the following standards:

(A) *The applicant's case.* A complaint by an applicant with respect to the decisional document issued in the applicant's own discharge review shall be considered under the Stipulation of Dismissal in the *Urban Law* case and other decisional document requirements applicable at the time the document was issued, including those contained in the Settlement Agreement and related Orders, subject to any limitations set forth therein with respect to dates of applicability. If the authority empowered to take corrective action has a reasonable doubt whether a decisional document meets applicable requirements of the *Urban Law* case or other applicable rules, the complaint shall be resolved in the applicant's favor.

(B) *Other cases.* With respect to all other complaints, the standard shall be whether a reasonable person familiar with the discharge review process can understand the basis for the decision, including the disposition of issues raised by the applicant. This standard is designed to ensure that the complaint process is not burdened with the need to correct minor errors in the preparation of decisional documents.

(ii) *Use of DD Form 293.* With respect to any decisional document issued on

or after November 27, 1982, a complaint alleging failure of the DRB to address adequately matter not submitted on DD Form 293 or expressly incorporated therein will be resolved in the complainant's favor only if the failure to address the issue was arbitrary, capricious, or an abuse of discretion.

(iii) *Scope of review*. When a complaint concerns a specific issue in the applicant's own discharge review, the complaint review process shall involve a review of all the evidence that was before the DRB or SRA, including the testimony and written submissions of the applicant, to determine whether the issue was submitted, and if so, whether it was addressed adequately with respect to the Stipulation of Dismissal, Settlement Agreement, or related Orders in the *Urban Law* case and other applicable provisions of this Directive. With respect to all other complaints about specific issues, the complaint review process may be based solely on the decisional document, except when the complainant demonstrates that facts present in the review in question raise a reasonable likelihood of a violation of applicable provisions of the Stipulation of Dismissal and a reasonable person, familiar with the discharge review process, could resolve the complaint only after a review of the evidence that was before the DRB.

(iv) *Allegations pertaining to an applicant's submission*. The following additional requirements apply to complaints about modification of an applicant's issue or the failure to list or address an applicant's issue:

(A) When the complaint is submitted by the applicant, and the record of the hearing is ambiguous on the question whether there was a meeting of minds between the applicant and the DRB as to modification or omission of the issue, the ambiguity will be resolved in favor of the applicant.

(B) When the complaint is submitted by a person other than the applicant, it must set forth facts (other than the mere omission or modification of an issue) demonstrating a reasonable likelihood that the issue was omitted or modified without the applicant's consent.

(C) When the complaint is rejected on the basis of the presumption of regularity, the response to the complaint must be set forth the reasons why the evidence submitted by the complainant was not sufficient to overcome the presumption.

(D) With respect to decisional documents issued on or after the effective date of the amendments to § 70.8, any change in wording of an applicant's issue which is effected in violation of the principles set forth in § 70.8(a)(5)(iii) constitutes an error requiring corrective action. With respect to a decisional document issued before that date, corrective action will be taken only when there has been a complaint by the applicant or counsel with respect to the applicant's own decisional document and it is determined that the wording was changed or the issue was omitted without the applicant's consent.

(E) If there are references in the decisional document to matters not raised by the applicant and not otherwise relied upon in the decision, there is no requirement under the *Urban Law* case that such matters be accompanied by a statement of findings, conclusions, or reasons. For example, when the DRB discusses an aspect of the service record not raised as an issue by the applicant, and the issue is not a basis for the DRB's decision, the DRB is not required to discuss the reasons for declining to list that aspect of the service record as an issue.

(v) *Guidance as to other types of complaints*. The following guidance governs other specified types of complaints:

(A) The Stipulation of Dismissal requires only that those facts that are essential to the decision be listed in the decisional document. The requirement for listing specified facts from the military record was not established until March 29, 1978, in 32 CFR part 70 Decisional documents issued prior to that date are sufficient if they meet the requirements of the Stipulation.

(B) When an applicant submits a brief that contains material in support of a proposed conclusion on an issue, the DRB is not required to address each aspect of the supporting material in the brief. However, the decisional document should permit the applicant to

understand the DRB's position on the issue and provide reviewing authorities with an explanation that is sufficient to permit review of the DRB's decision. When an applicant submits specific issues and later makes a statement before the DRB that contains matter in support of that issue, it is not necessary to list such supporting matter as a separate issue.

(C) For all decisional documents issued before November 27, 1982, failure to respond to an issue raised by an applicant constitutes error unless it reasonably may be inferred from the record that the DRB response relied on one of the exceptions listed in § 70.8(d)(3)(ii); (e)(3)(ii)(C) (*3*) through (*4*) and (e)(6)(ii)(C) (*3*) through (*4*). If the decisional document supports a basis for not addressing an issue raised by the applicant (for example, if it is apparent that resolving the issue in the applicant's favor would not warrant an upgrade), there is no requirement in the Stipulation of Dismissal that the decisional document explain why the DRB did not address the issue. With respect to decisional documents issued on or after November 27, 1982, a response shall be prepared in accordance with the decisional document principles set forth in § 70.8.

(D) When a case is reviewed upon request of an applicant, and the DRB upgrades the discharge to ''General,'' the DRB must provide reasons why it did not upgrade to ''Honorable'' unless the applicant expressly requests lesser relief. This requirement applies to all requests for corrective action submitted by an applicant with respect to his or her decisional document. In all other cases, this requirement applies to decisional documents issued on or after November 9, 1978. When the DRB upgrades to General, its explanation for not upgrading to Honorable may consist of reference to adverse matter from the applicant's military record. When a discharge is upgraded to General in a review on the DRB's own motion, there is no requirement to explain why the discharge was not upgraded to Honorable.

(E) There is no requirement under the Stipulation of Dismissal to provide reasons for uncontested findings. The foregoing applies to decisional documents issued before November 27, 1982. With respect to decisional documents issued on or after that date, the following guidance applies with respect to an uncontested issue of fact that forms the basis for a grant or denial of a change in discharge: the decisional document shall list the specific source of information relied upon in reaching the conclusion, except when the information is listed in the portion of the decisional document that summarizes the service record.

(F) The requirements of § 70.8(e)(3)(ii)(B)(*2*) and (e)(6) (ii)(B)(*2*) with respect to explaining use of the presumption of regularity apply only to decisional documents issued on or after November 27, 1982. When a complaint concerning a decisional document issued before that date addresses the adequacy of the DRB's use of the presumption of regularity, or words having a similar import, corrective action will be required only if a reasonable person familiar with the discharge review process can not understand the basis for relying on the presumption.

(G) When the DRB balances mitigrating factors against aggravating factors as the reason for a conclusion, the Stipulation of Dismissal does not require the statement of reasons to set forth the specific factors that were balanced if such factors are otherwise apparent on the fact of the decisional document. The foregoing applies to decisional documents prepared before November 27, 1982. With respect to decisional documents prepared after that date, the statements addressing decisional issues in such a case will list or refer to the factors supporting the conclusion in accordance with § 70.8(e)(6)(ii).

(vi) *Documents that were the subject of a prior complaint*. The following applies to a complaint concerning a decisional document that has been the subject of prior complaints:

(A) If the complaint concerns a decisional document that was the subject of a prior complaint in which action was completed, the complainant will be informed of the substance and disposition of the prior complaint, and will be further informed that no additional action will be taken unless the

complainant within 30 days demonstrates that the prior disposition did not produce a decisional document that comports with the requirements of paragraph (d)(1)(i)(A) of this section.

(B) If the complaint concerns a decisional document that is the subject of a pending complaint, the complainant will be informed that he or she will be provided with the results of the pending complaint.

(C) These limitations do not apply to the initial complaint submitted on or after the effective date of the amendments to this section by an applicant with respect to his or her own decisional document.

(2) *Duties of the administrative director*. The administrative director shall take the following actions:

(i) Acknowledge receipt of the complaint;

(ii) Assign a docket number and note the date of receipt; and

(iii) Forward the complaint to the Military Department concerned, except that the case may be forwarded directly to the DASD (MP&FM) when the administrative director makes an initial determination that corrective action is not required.

(3) *Administrative processing*. The following guidance applies to administrative processing of complaints:

(i) Complaints normally shall be processed on a first-in/first-out basis, subject to the availability of records, pending discharge review actions, and the following priorities:

(A) The first priority category consists of cases in which (*1*) there is a pending discharge review and the complainant is the applicant; and (*2*) the complainant sets forth the relevance of the complaint to the complainant's pending discharge review application.

(B) The second priority category consists of requests for correction of the decisional document in the complainant's own discharge review case.

(C) The third priority category consists of complaints submitted by former members of the Armed Forces (or their counsel) who state that the complaint is submitted to assist the former member's submission of an application for review.

(D) The fourth priority category consists of other complaints in which the complainant demonstrates that correction of the decisional document will substantially enhance the ability of applicants to present a significant issue to the DRBs.

(E) The fifth priority category consists of all other cases.

(ii) Complainants who request consideration in a priority category shall set forth in the complaint the facts that give rise to the claim of placement in the requested category. If the complaint is relevent to a pending discharge review in which the complainant is applicant or counsel, the scheduled date of the review should be specified.

(iii) The administrative director is responsible for monitoring compliance with the following processing goals:

(A) The administrative director normally shall forward correspondence to the Military Department concerned within 3 days after the date of receipt specified in the docket number. Correspondence forwarded directly to the DASD(MP&FM) under paragraph (d)(2)(iii) of this section, normally shall be transmitted within 7 days after the date of receipt.

(B) The Military Department normally shall request the necessary records within 5 working days after the date of receipt from the administrative director. The Military Department normally shall complete action under paragraph (d)(4) of this section within 45 days after receipt of all necessary records. If action by the Military Department is required under paragraph (d)(9) of this section, normally it shall be completed within 45 days after action is taken by the DASD(MP&FM).

(C) The JSRA normally shall complete action under paragraph (d)(7) of this section at the first monthly meeting held during any period commencing 10 days after the administrative director receives the action of the Military Department under paragraph (d)(5) of this section.

(D) The DASD(MP&FM) normally shall complete action under paragraph (d)(8) of this section within 30 days after action is taken by the JSRA under paragraph (d)(7) of this section or by the administrative director under paragraph (d)(2)(iii) of this section.

(E) If action is not completed within the overall processing goals specified in this paragraph, the complainant shall be notified of the reason for the delay by the administrative director and shall be provided with an approximate date for completion of the action.

(iv) If the complaints are submitted in any 30 day period with respect to more than 50 decisional documents, the administrative director shall adjust the processing goals in light of the number of complaints and discharge review applications pending before the DRBs.

(v) At the end of each month, the administrative director shall send each Military Department a list of complaints, if any, in which action has not been completed within 60 days of the docket date. The Military Department shall inform the administrative director of the status of each case.

(4) *Review of complaints by the Military Departments*. The Military Department shall review the complaint under the following guidance:

(i) *Rejection of complaint*. If the Military Department determines that all the allegations contained in the complaint are not specific or have no merit, it shall address the allegations using the format at attachment 1 (Review of Complaint).

(ii) *Partial agreement*. If the Military Department determines that some of the allegations contained in the complaint are not specific or have no merit and that some of the allegations contained in the complaint have merit, it shall address the allegations using the format at attachment 1 and its DRB shall take appropriate corrective action in accordance with paragraph (d)(4)(v) of this section.

(iii) *Full agreement*. If the Military Department determines that all of the allegations contained in the complaint have merit, its DRB shall take appropriate corrective action in accordance with paragraph (d)(4)(v) of this section.

(iv) *Other defects*. If, during the course of its review, the Military Department notes any other defects in the decisional document or index entries (under the applicable requirements of the *Urban Law* case or under this part) the DRB shall take appropriate corrective action under paragraph (d)(4)(v) of this section. This does not establish a requirement for the Military Department to review a complaint for any purpose other than to determine whether the allegations contained in the complaint are specific and have merit; rather, it simply provides a format for the Military Department to address other defects noted during the course of processing the complaint.

(v) *Appropriate corrective action*. The following procedures govern appropriate corrective action:

(A) If a complaint concerns the decisional document in the complainant's own discharge review case, appropriate corrective action consists of amending the decisional document or providing the complainant with an opportunity for a new discharge review. An amended decisional document will be provided if the applicant requests that form of corrective action.

(B) If a complaint concerns a decisional document involving an initial record review under the Special Discharge Review Program or the Pub. L. 95–126 rereview program, appropriate corrective action consists of (*1*) amending the decisional document; or (*2*) notifying the applicant and counsel, if any, of the opportunity to obtain a priority review using the letter providing at attachment 6. When the DRB takes corrective action under this provision by amending a decisional document, it shall notify the applicant and counsel, if any, of the opportunity to request a *de novo* review under the Special Discharge Review Program or under Pub. L. 95–126 rereview program, as appropriate.

(C) When corrective action is taken with respect to a decisional document in cases prepared under Pub. L. 95–126 the DRB must address issues previously raised by the DRB or the applicant during review of the same case during the SDRP only insofar as required by the following guidance:

(*1*) When the DRB bases its decision upon issues previously considered during the SDRP, the new decisional document under Pub. L. 95–126 must address those issues;

(*2*) If, during consideration of the case under Pub. L. 95–126 the applicant presents issues previously considered

during the SDRP, the new decisional document must address those issues; and

(*3*) If a decisional document concerning an initial record review under Pub. L. 95–126 is otherwise defective and corrective action is taken after a request by the applicant for a priority review in response to the letter at attachment 6, the new decisional document shall address all issues previously raised by the applicant during the SDRP.

(D) Except for cases falling under paragraph (d)(4)(v)(B) of this section, if a complaint concerns a decisional document in which the applicant received an Honorable Discharge and the full relief requested, if any, with respect to the reason for discharge, appropriate corrective action consists of amending the decisional document.

(E) In all other cases, appropriate corrective action consists of amending the decisional document or providing the applicant with the opportunity for a new review, except that an amended decisional document will be provided when the complainant expressly requests that form of corrective action.

(vi) *Amended decisional documents.* One that reflects a determination by a DRB panel (or the SRA) as to what the DRB panel (or SRA) that prepared the defective decisional document would have entered on the decisional document to support its decision in this case.

(A) The action of the amending authority does not necessarily reflect substantive agreement with the decision of the original DRB panel (or SRA) on the merits of the case.

(B) A corrected decisional document created by amending a decisional document in response to a complaint will be based upon the complete record before the DRB (or the SRA) at the time of the original defective statement was issued, including, if available, a transcript, tape recording, videotape or other record of a hearing, if any. The new decisional document will be indexed under categories relevant to the new statements.

(C) When an amended decisional document is required under paragraphs (d)(4)(v)(A) and (d)(4)(v)(D) of this section and the necessary records cannot be located, a notation to that effect will be made on the decisional document, and the applicant and counsel, if any, will be afforded an opportunity for a new review, and the complainant will be informed of the action.

(D) When an amended decisional document is requested under paragraph (d)(4)(v)(C) and the necessary records cannot be located, a notation to that effect will be made on the decisional document, and the complainant will be informed that the situation precludes further action.

(vii) *Time limit for requesting a new review.* An applicant who is afforded an opportunity to request a new review may do so within 45 days.

(viii) *Interim notification.* When the Military Department determines that some or all of the allegations contained in the complaint are not specific or have no merit but its DRB takes corrective action under paragraph (d)(4)(ii) or (d)(4)(iv) of this section, the DRB's notification to the applicant and counsel, if any, and to the complainant, if other than the applicant or counsel, should include the following or similar wording: ''This is in partial response to (your)/(a) complaint to the Office of the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics) dated _____ concerning _____ Discharge Review Board decisional document _____. A final response to (your)/(the) complaint, which has been returned to the Office of the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics) for further review, will be provided to you in the near future.''

(ix) *Final notification.* When the Discharge Review Board takes corrective action under paragraphs (d)(4)(iii) and (d)(9) of this section _____ its notification to the applicant and counsel, if any, and to the complainant, if other than the applicant or counsel, should include the following or similar wording: ''This is in response to (your)/(a) complaint to the Office of the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics) dated _____ concerning _____ Discharge Review Board decisional document _____.

(5) *Transmittal to the administrative director.* The Military Department shall

return the complaint to the administrative Director with a copy of the decisional document and, when applicable, any of the following documents:

(i) The ''Review of Complaint.''

(ii) A copy of the amendment to the decisional document and the accompanying transmittal letter or letters to the applicant and counsel, if any, and to the complainant, if other than the applicant or counsel.

(iii) A copy of the notification to the applicant and counsel, if any, of the opportunity to request a new review, and a copy of the notification to the complainant, if other than the applicant or counsel, that the applicant has been authorized a new review.

(6) *Review by the administrative director*. The administrative director shall review the complaint and accompanying documents to ensure the following:

(i) If the Military Department determined that any of the allegations contained in the complaint are not specific or have no merit, the JSRA shall review the complaint and accompanying documents. The JSRA shall address the allegations using the format at attachment 2 (Review of and Recommended Action on Complaint) and shall note any other defects in the decisional document or index entries not previously noted by the Military Department. This does not establish a requirement for the JSRA to review such complaints for any purpose other than to address the allegations contained in the complaint; rather, it simply provides a format for the JSRA to address other defects noted in the course of processing the complaint.

(ii) If the Military Department determined that all of the allegations contained in the complaint have merit and its DRB amended the decisional document, the amended decisional document shall be subject to review by the JSRA on a sample basis each quarter using the format at attachment 3 (Review of any Recommendation on Amended Decisional Document).

(iii) If the Military Department determined that all of the allegations contained in the complaint have merit and its DRB notified the applicant and counsel, if any, of the opportunity to request a new review, review of such corrective action is not required.

(7) *Review by the JSRA*. The JSRA shall meet for the purpose of conducting the reviews required in paragraphs (d)(6)(i), (d)(6)(ii), and (d)(9)(iii)(A) of this section. The Administrative director shall call meetings once a month, if necessary, or more frequently depending upon the number of matters before the JSRA. Matters before the JSRA shall be presented to the members by the recorder. Each member shall have one vote in determining matters before the JSRA, a majority vote of the members determining all matters. Determinations of the JSRA shall be reported to the DASD(MP&FM) as JSRA recommendations using the prescribed format. If a JSRA recommendation is not unanimous, the minority member may prepare a separate recommendation for consideration by the DASD(MP&FM) using the same format. Alternatively, the minority member may indicate ''dissent'' next to his signature on the JSRA recommendation.

(8) *Review by the DASD(MP&FM)*. The DASD(MP&FM) shall review all recommendations of the JSRA and the administrative director as follows:

(i) The DASD(MP&FM) shall review complaints using the format at Attachment 4 (Review of and Action on Complaint). The DASD(MP&FM) is the final authority in determining whether the allegations contained in a complaint are specific and have merit. If the DASD(MP&FM) determines that no further action by the Military Department is warranted, the complainant and the Military Department shall be so informed. If the DASD(MP&FM) determines that further action by the Military Department is required, the Military Department shall be directed to ensure that appropriate corrective action is taken by its DRB and the complainant shall be provided an appropriate interim response.

(ii) The DASD(MP&FM) shall review amended decisional documents using the format at attachment 5 (Review of and Action on Amended Decisional Document). The DASD(MP&FM) is the final authority in determining whether an amended decisional document complies with applicable requirements of

the *Urban Law* case and, when applicable, this Directive. If the DASD(MP&FM) determines that no further corrective action by the Military Department is warranted, the Military Department shall be so informed. If the DASD(MP&FM) determines that further corrective action by the Military Department is required, the Military Department shall be directed to ensure that appropriate corrective action is taken by its DRB.

(iii) It is noted that any violation of applicable requirements of the *Urban Law* case is also a violation of this part. However, certain requirements under this part are not requirements under the *Urban Law* case. If the allegations contained in a complaint are determined to have merit or if an amended decisional document is determined to be defective on the basis of one of these additional requirements under this part the DASD(MP&FM) determination shall reflect this fact.

(9) *Further action by the Military Department*. (i) With respect to a determination by the DASD (MP&FM) that further action by the Military Department is required, its DRB shall take appropriate corrective action in accordance with paragraph (d)(4) of this section.

(ii) The Military Department shall provide the administrative director with the following documents when relevant to corrective action taken in accordance with paragraph (d)(4) of this section:

(A) A copy of the amendment to the decisional document and the accompanying transmittal letter or letters to the applicant and counsel, if any, and to the complainant, if other than the applicant or counsel.

(B) A copy of the notification to the applicant and counsel, if any, of the opportunity to request a new review, and a copy of the notification to the complainant, if other than the applicant or counsel, that the applicant has been authorized a new review.

(iii) The administrative director shall review the documents relevant to corrective action taken in accordance with paragraph (d)(4) of this section, and ensure the following:

(A) If the DRB amended the decisional document, the amended decisional document shall be subject to review by the JSRA on a sample basis each quarter using the format at attachment 3 (Review of and Recommended Action on Amended Decisional Document).

(B) If the DRB notified the applicant and counsel, if any, of the opportunity to request a new review, review of such corrective action is not required.

(10) *Documents required by the JSRA or DASD (MP&FM)*. Upon request, the Military Department shall provide the administrative director with other documents required by the JSRA or the DASD (MP&FM) in the conduct of their reviews.

(e) *Responses to inquiries*. The following procedures shall be used in processing inquiries:

(1) The administrative director shall assign a docket number to the inquiry.

(2) The administrative director shall forward the inquiry to the Military Department concerned.

(3) The Military Department shall prepare a response to the inquiry and provide the administrative director with a copy of the response.

(4) The Military Department's response shall include the following or similar wording: ''This is in response to your inquiry to the Office of the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics) dated _____ concerning _____.

(f) *Indexing*. The DRB concerned shall reindex all amended decisional documents and shall provide copies of the amendments to the decisional documents to the Armed Forces Discharge Review/Correction Board Reading Room.

(g) *Disposition of documents*. The administrative director is responsible for the disposition of all Military Department, DRB, JSRA, and DASD (MP&FM) documents relevant to processing complaints and inquiries.

(h) *Referral by the General Counsel, Department of Defense*. The Stipulation of Dismissal permits *Urban Law* plaintiffs to submit complaints to the General Counsel, DoD, for comment. The General Counsel, DoD, may refer such complaints to the Military Department concerned or to the JSRA for initial comment.

(i) *Decisional document and index entry principles*. The DASD (MP&FM) shall identify significant principles concerning the preparation of decisional documents and index entries as derived from decisions under this section and other opinions of the Office of General Counsel, DoD. This review shall be completed not later than October 1 and April 1 of each year, or more frequently if deemed appropriate by the DASD (MP&FM). The significant principles identified in the review shall be coordinated as proposed as amendments to the sections of this part.

(j) *Implementation of amendments*. The following governs the processing of any correspondence that is docketed prior to the effective date of amendments to this section except as otherwise provided in such amendments:

(1) Any further action on the correspondence shall be taken in accordance with the amendments; and

(2) No revision of any action taken prior to the effective date of such amendments is required.

ATTACHMENT 1—REVIEW OF COMPLAINT

*Military Department:*

*Decisional Document Number:*

*Name of Complainant:*

*Docket Number:*

*Date of this Review:*

1. Specific allegation(s) noted:

2. With respect in support of the conclusion, enter the following information:

a. Conclusion whether corrective action is required.

b. Reasons in support of the conclusion, including findings of fact upon which the conclusion is based.

3. Other defects noted in the decisional document or index entries:

(Authentication)

ATTACHMENT 2—JOINT SERVICE REVIEW ACTIVITY

*Office of the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics)*

Review by the Joint Service Review Activity

*Military Department:*

*Decisional Document Number:*

*Name of Complainant:*

*Name of Applicant:*

*Docket Number:*

*Date of this Review:*

1. The Military Department's ''Review of Complaint'' is attached as enclosure 1.

2. Specific Allegations: See part 1 of Military Department's ''Review of Complaint'' (enclosure 1).

3. Specific allegation(s) not noted by the Military Department:

4. With respect to each allegation, enter the following information:

a. Conclusion as to whether corrective action is required.

b. Reasons in support of the conclusion, including findings of fact upon which conclusion is based.

NOTE. If JSRA agrees with the Military Departments, the JSRA may respond by entering a statement of adoption.

5. Other defects in the decisional document or index entries not noted by the Military Departments:

6. *Recommendation:*

[ ] The complainant and the Military Department should be informed that no further action on the complaint is warranted.

[ ] The Military Department should be directed to take corrective action consistent with the above comments.

Army Member, JSRA
Air Force Member, JSRA
Navy Member, JSRA
Recorder, JSRA

ATTACHMENT 3—JOINT SERVICE REVIEW ACTIVITY

*Office of the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics)*

Review of Amended Decisional Document (Quarterly Review)

*Military Department:*

*Decisional Document Number:*

*Name of Complainant:*

*Name of Applicant:*

*Docket Number:*

*Date of this Review:*

*Recommendation:*

[ ] The amended decisional document complies with the requirements of the Stipulation of Dismissal and, when applicable, DoD Directive 1332.28. The Military Department should be informed that no further corrective action is warranted.

[ ] The amended decisional document does not comply with the Stipulation of Dismissal or DoD Directive 1332.28 as noted herein. The Military Department should be directed to ensure that corrective action consistent with the defects noted is taken by its Discharge Review Board.

Army Member, JSRA
Air Force Member, JSRA
Navy Member, JSRA
Recorder, JSRA

| Yes | No | NA | Item | Source |
|---|---|---|---|---|
| ☐ | ☐ | ☐ | 1. *Date of discharge* ..... | 1. DoD Directive 1332.28, enclosure 3, subsection H.1.; Stipulation (Jan. 31, 1977) para. 5.A.(1)(d)(i) (reference (1)). |
| ☐ | ☐ | ☐ | a. Date of discharge. | |
| ☐ | ☐ | ☐ | b. Character of discharge. | |
| ☐ | ☐ | ☐ | c. Reason for discharge. | |
| ☐ | ☐ | ☐ | d. Specific regulatory authority under which discharge was issued. | |
| ☐ | ☐ | ☐ | 2. *Service data.* (This requirement applies only in conjunction with Military Department Implementation of General Counsel, DoD, letter dated July 20, 1977, or to discharge reviews conducted on or after March 29, 1978.) | 2. DoD Directive 1332.28, enclosure 3, subsection H.1.; Annex B, (June ____, 1982) para. 2–2 (reference (1)). |
| ☐ | ☐ | ☐ | a. Date of enlistment. | |
| ☐ | ☐ | ☐ | b. Period of enlistment. | |
| ☐ | ☐ | ☐ | c. Age at enlistment. | |
| ☐ | ☐ | ☐ | d. Length of service. | |
| ☐ | ☐ | ☐ | e. Periods of unauthorized absence*. | |
| ☐ | ☐ | ☐ | f. Conduct and efficiency ratings (numerical and narrative)*. | |
| ☐ | ☐ | ☐ | g. Highest rank achieved. | |
| ☐ | ☐ | ☐ | h. Awards and decorations*. | |
| ☐ | ☐ | ☐ | i. Educational level. | |
| ☐ | ☐ | ☐ | j. Aptitude test scores. | |
| ☐ | ☐ | ☐ | k. Art. 15s (including nature and date of offense or punishment)*. | |
| ☐ | ☐ | ☐ | l. Convictions by court-martial*. | |
| ☐ | ☐ | ☐ | m. Prior military service and type of discharge(s) received*. | |
| ☐ | ☐ | ☐ | 3. *Reference to materials presented by applicant.* (This requirement applies only to discharge reviews conducted on or after March 29, 1978.) | 3. DoD Directive 1332.28, enclosure 3, subsection H.2.; H.3. |
| ☐ | ☐ | ☐ | a. Written brief*. | |
| ☐ | ☐ | ☐ | b. Documentary evidence*. | |
| ☐ | ☐ | ☐ | c. Testimony*. | |
| ☐ | ☐ | ☐ | 4. *Items submitted as issues.* (See issues worksheet) ..... | 4. DoD Directive 1332.28, enclosure 3, subsection H.6. |
| ☐ | ☐ | ☐ | 5. *Conclusions.* The decisional document must indicate clearly the DRB's conclusion concerning: | 5. Dod Directive 1332.28, enclosure 3, subsection H.5.; Stipulation (Jan. 31, 1977), paragraph 5.A.(1)(d)(iv) (reference (1)). |
| ☐ | ☐ | ☐ | a. Determination of whether a discharge upgraded under SDRP would have been upgraded under DoD Directive 1332.28. (This applies only to mandatory reviews under P.L. 95–126 or Special Discharge Review Program (SDRP). | |

| Yes | No | NA | Item | Source |
|---|---|---|---|---|
| ☐ | ☐ | ☐ | b. Character of discharge, when applicable [1]. | |
| ☐ | ☐ | ☐ | c. Reason for discharge, when applicable [2]. | |
| ☐ | ☐ | ☐ | 6. *Reasons for conclusions.* The decisional document must list and discuss the items submitted as issues by the applicant; and list and discuss the decisional issues providing the basis for the DRB's conclusion concerning: | 6. DoD Directive 1332.28, enclosure 3, subsection H.7., H.8.; Stipulation (Jan. 31, 1977) para. 5.A.(1)(d)(v) (reference (1)). |
| ☐ | ☐ | ☐ | a. Whether a discharge upgraded under the SDRP would have been upgraded under DoD Directive 1332.28. (This applies only to mandatory rereviews under P.L. 95–126 or SDRP reviews.). | |
| ☐ | ☐ | ☐ | b. Character of discharge, where applicable [1]. | |
| ☐ | ☐ | ☐ | c. Reason for discharge, where applicable [2]. | |
| ☐ | ☐ | ☐ | 7. *Advisory opinions** ..... | 7. DoD Directive 1332.28, enclosure 3, subsection H.12., Stipulation (Jan. 31, 1977) para. 5.A.(1)(f) (reference (1)). |
| ☐ | ☐ | ☐ | 8. *Recommendation of DRB President* ..... | 8. DoD Directive 1332.28, enclosure 3, subsection H.12., Stipulation (Jan. 31, 1977) para. 5.A.(1)(g) (reference (1)). |
| ☐ | ☐ | ☐ | 9. *A record of voting* ..... | 9. DoD Directive 1332.28, enclosure 3, subsection H.13., Stipulation (Jan. 31, 1977) para. 5.A.(3) (reference (1)). |
| ☐ | ☐ | ☐ | 10. *Indexing of decisional document* ..... | 10. DoD Directive 1332.28, enclosure 3, subsection H.14., Stipulation (Jan. 31, 1977) para. 5.A.(5)(a) (reference (1)). |
| ☐ | ☐ | ☐ | 11. *Authentication of decisional document.* (This requirement applies only to discharge reviews conducted on or after March 29, 1978.) | 11. DoD Directive 1332.28, enclosure 3, subsection H.15. |
| ☐ | ☐ | ☐ | 12. *Other* ..... | 12. As appropriate. |

Explanation of items marked "No."

Key:

Yes: The decisional document meets the requirements of the Stipulation of Dismissal and, when applicable, DoD Directive 1332.28.

No: The decisional document does not meet the requirements of the Stipulation of Dismissal or DoD Directive 1332.28.

NA: Not applicable.

*Items marked by an asterisk do not necessarily pertain to each review. If the decisional document contains no reference to such an item, NA shall be indicated. When there is a specific complaint with respect to an item, the underlying discharge review record shall be examined to address the complaint.

[1] In this instance "when applicable" means all reviews except:

a. Mandatory rereviews under P.L. 95–126 or SDRP reviews.

b. Reviews in which the applicant requested only a change in the reason for discharge and the DRB did not raise the character of discharge as a decisional issue.

[2] In this instance "when applicable" means all reviews in which:

a. The applicant requested a change in the reason for discharge.

b. The DRB raised the reason for discharge as a decisional issue.

c. A change in the reason for discharge is a necessary component of a change in the character of discharge.

ATTACHMENT 4—ISSUES WORKSHEETS [1]

| | Listed | Addressed | Corrective action required |
|---|---|---|---|
| A. Decisional issues providing a basis for the conclusion regarding a change in the character of or reason for discharge. (DoD Directive 1332.28, enclosure 3, subsection D.2): | | | |
| 1. | ☐ | ☐ | ☐ |
| 2. | ☐ | ☐ | ☐ |
| 3. | ☐ | ☐ | ☐ |
| B. Items submitted as issues by the applicant that are not identified as decisional issues. (DoD Directive 1332.28, enclosure 3, subsection D.3): | | | |
| 1. | ☐ | ☐ | ☐ |
| 2. | ☐ | ☐ | ☐ |
| 3. | ☐ | ☐ | ☐ |
| C. Remarks: | | | |

[1] This review may be made based upon the decisional document without reference to the underlying discharge review record except as follows: if there is an allegation that a specific contention made by the applicant to the DRB was not addressed by the DRB. In such a case, the complaint review process shall involve a review of all the evidence that was before the DRB, including the testimony and written submissions of the applicant, to determine whether the contention was made, and if so, whether it was addressed adequately with respect to the Stipulation of Dismissal and, when applicable, DoD Directive 1332.28.

This review may be based upon the decisional document without reference to the regulation governing the discharge in question except as follows: if there is a specific complaint that the DRB failed to address a specific factor required by applicable regulations to be considered for determination of the character of and reason for the discharge in question [where such factors are a basis for denial of any of the relief requested by the applicant]. (The material in brackets pertains only to discharge reviews conducted on or before March 28, 1978.)

ATTACHMENT 5—OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE (MANPOWER, RESERVE AFFAIRS, AND LOGISTICS)

*Review of Complaint (DASD(MP&FM))*

*Military Department:*

*Decisional Document Number:*

*Name of Complainant:*

*Name of Applicant:*

*Docket Number:*

*Date of this Review:*

1. Each allegation is addressed as follows:

a. Allegation.

b. Conclusion whether corrective action is required.

c. Reasons in support of the conclusion, including findngs of fact upon which the conclusion is based.

NOTE: If the DASD(MP&FM) agrees with the JSRA, he may respond by entering a statement of adoption.

2. Other defects noted in the decisional document or index entries:

3. *Determinations:*

[ ] No further action on the complaint is warranted.

[ ] Corrective action consistent with the above comments is required.

Deputy Assistant Secretary of Defense
(Military Personnel & Force Management)

ATTACHMENT 6—OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE (MANPOWER, RESERVE AFFAIRS, AND LOGISTICS)

*Review of Amended Decisional Document (DASD (MP&FM))*

*Military Department:*

*Decisional Document Number:*

*Name of Complainant:*

*Name of Applicant:*

*Docket Number:*

*Date of this Review:*

*Recommendation:*

[ ] The amended decisional document complies with the requirements of the Stipulation of Dismissal and, when applicable, DoD Directive 1332.28. No further corrective action is warranted.

[ ] The amended decisional document does not comply with the Stipulation of Dismissal or DoD Directive 1332.28 as noted herein. Further corrective action is required consistent with the defects noted in the attachment.

Deputy Assistant Secretary of Defense
(Military Personnel & Force Management)

Remarks:

ATTACHMENT 7

Dear _____:

It has been determined that the decisional document issued in your case by the (Army) (Navy) (Air Force) Discharge Review Board

during the (Special Discharge Review Program) (rereview program under Pub. L. No. 95–126) should be reissued to improve the clarity of the statement of findings, conclusions, and reasons for the decision in your case.

In order to obtain a new decisional document you may elect one of the following options to receive a new review under the (Special Discharge Review Program) (rereview program mandated by Pub. L. No. 95–126):

1. You may request a new review, including a personal appearance hearing if you so desire, by responding on or before the suspense date noted at the top of this letter. Taking this action will provide you with a priority review before all other classes of cases.

2. You may request correction of the original decisional document issued to you by responding on or before the suspense date noted at the top of this letter. After you receive a corrected decisional document, you will be entitled to request a new review, including a personal appearance hearing if you so desire. If you request correction of the original decisional document, you will not receive priority processing in terms of correcting your decisional document or providing you with a new review; instead, your case will be handled in accordance with standard processing procedures, which may mean a delay of several months or more.

If you do not respond by the suspense date noted at the top of this letter, no action will be taken. If you subsequently submit a complaint about this decisional document, it will be processed in accordance with standard procedures.

To ensure prompt and accurate processing of your request, please fill out the form below, cut it off at the dotted line, and return it to the Discharge Review Board of the Military Department in which you served at the address listed at the top of this letter.

Check only one:

[ ] I request a new review of my case on a priority basis. I am requesting this priority review rather than requesting correction of the decisional document previously issued to me. I have enclosed DD Form 293 as an application for my new review.

[ ] I request correction of the decisional document previously issued to me. I understand that this does not entitle me to priority action in correcting my decisional document. I also understand that I will be able to obtain a further review of my case upon my request after receiving the corrected decisional document, but that such a review will not be held on a priority basis.

Dates _____

Signatures _____

Printed Name and Address

_____

[47 FR 37785, Aug. 26, 1982, as amended at 48 FR 9856, Mar. 9, 1983]

### § 70.11 DoD semiannual report.

(a) Semiannual reports will be submitted by the 20th of April and October for the preceding 6-month reporting period (October 1 through March 31 and April 1 through September 30).

(b) The reporting period will be inclusive from the first through the last days of each reporting period.

(c) The report will contain four parts:

(1) *Part 1.* Regular Cases.

(2) *Part 2.* Reconsideration of President Ford's Memorandum of January 19, 1977, and Special Discharge Review Program Cases.

(3) *Part 3.* Cases Heard under Pub. L. 95–126 by waiver of 10 U.S.C. 1553, with regard to the statute of limitations.

(4) *Part 4.* Total Cases Heard.

SEMIANNUAL DRB REPORT—RCS DD-M(SA) 1489; SUMMARY OF STATISTICS FOR DISCHARGE REVIEW BOARD (FY )

[Sample format]

| Name of board | Nonpersonal appearance | | | Personal appearance | | | | Total | |
|---|---|---|---|---|---|---|---|---|---|
| | Applied | Number approved | Percent approved | Applied | Number approved | Percent approved | Applied | Number approved | Percent approved |
| ..... | ..... | ..... | ..... | ..... | ..... | ..... | ..... | ..... | ..... |

Note:
Identify numbers separately for traveling panels, regional panels, or hearing examiners, as appropriate.
Use of additional footnotes to clarify or amplify the statistics being reported is encouraged.

## PART 74—APPOINTMENT OF DOCTORS OF OSTEOPATHY AS MEDICAL OFFICERS

Sec.

74.1 Purpose.
74.2 Policy.

AUTHORITY: 10 U.S.C. 3294, 5574, 8294.

SOURCE: 25 FR 14370, Dec. 31, 1960, unless otherwise noted.

### § 74.1 Purpose.

The purpose of this part is to implement the provisions of Pub. L. 763, 84th Congress (70 Stat. 608), relating to the appointment of doctors of osteopathy as medical officers.

### § 74.2 Policy.

In the interest of obtaining maximum uniformity, the following criteria are established for the appointment of doctors of osteopathy as medical officers:

(a) To be eligible for appointment as Medical Corps officers in the Army and Navy or designated as medical officers in the Air Force, a doctor of osteopathy must:

(1) Be a citizen of the United States;

(2) Be a graduate of a college of osteopathy whose graduates are eligible for licensure to practice medicine or surgery in a majority of the States, and be licensed to practice medicine, surgery, or osteopathy in one of the States or Territories of the United States or in the District of Columbia;

(3) Possess such qualifications as the Secretary concerned may prescribe for his service, after considering the recommendations for such appointment by the Surgeon General of the Army or the Air Force or the Chief of the Bureau of Medicine and Surgery of the Navy;

(4) Have completed a minimum of three years college work prior to entrance into a college of osteopathy;

(5) Have completed a four-year course with a degree of Doctor of Osteopathy from a school of osteopathy approved by the American Osteopathic Association; and

(6) Have had subsequent to graduation from an approved school of osteopathy 12 months or more of intern or residency training approved by the American Osteopathic Association.

(b) [Reserved]

## PART 77—PROGRAM TO ENCOURAGE PUBLIC AND COMMUNITY SERVICE

Sec.

77.1 Purpose.
77.2 Applicability and scope.
77.3 Definitions.
77.4 Policy.
77.5 Responsibilities.
77.6 Procedures.
APPENDIX A TO PART 77—DD FORM 2580, OPERATION TRANSITION DEPARTMENT OF DEFENSE OUTPLACEMENT AND REFERRAL SYSTEM/PUBLIC AND COMMUNITY SERVICE INDIVIDUAL APPLICATION
APPENDIX B TO PART 77—DD FORM 2581, OPERATION TRANSITION EMPLOYER REGISTRATION
APPENDIX C TO PART 77—DD FORM 2581–1, PUBLIC AND COMMUNITY SERVICE ORGANIZATION VALIDATION

AUTHORITY: 10 U.S.C. 1143 (c).

SOURCE: 59 FR 40809, Aug. 10, 1994, unless otherwise noted.

### § 77.1 Purpose.

This part implements Pub. L. 102–484, Section 4462 and Pub. L. 103–160, Section 561 by establishing policy, assigning responsibilities, and prescribing procedures to:

(a) Encourage and assist separating Service members, Service members retiring with 20 or more years of service, DoD civilian personnel leaving the Government, and spouses to enter public and community service employment.

(b) Encourage and assist Service members requesting retirement with fewer than 20 years of service to register for public and community service employment.

### § 77.2 Applicability and scope.

This part applies to:

(a) The Office of the Secretary of Defense, the Military Departments, the Chairman of the Joint Chiefs of Staff, the Unified Combatant Commands, and the Defense Agencies (hereafter referred to collectively as ''the DoD Components''). The term ''Military Services,'' as used herein, refers to the Army, the Navy, the Air Force, and the Marine Corps.

(b) All active duty Service members and former members under Pub. L. 102–484, Section 4462 and Pub. L. 103–160, Section 561, and DoD civilian personnel leaving the Government, and their spouses.

### § 77.3 Definitions.

(a) *Community service employment.* Work in nonprofit organizations that provide or coordinate services listed in paragraphs (d) (1) through (12) of this

section. ''Nonprofit'' is defined as having been recognized by the Internal Revenue Service as having a tax-exempt status under 26 U.S.C. 501 (c)(3) or (c)(4). These organizations shall not be administered by businesses organized for profit, labor unions, partisan political organizations, or organizations engaged in religious activities, unless such activities are unrelated to religious instructions, worship services, or any form of proselytization.

(b) *Creditable early retirement public or community service employment for service members*. Employment in a DoD-registered public and community service organization that provides the services listed in paragraphs (d) (1) through (12) of this section, or that coordinates the provision of the services listed in paragraphs (d) (1) through (12) of this section. Federal employment shall count toward recomputed military retirement pay and Survivor Benefit Plan base amount for early retirees: however, working in a DoD-registered Federal public service organization may trigger the dual-compensation restrictions of 5 U.S.C. 5532. Employment must have occurred between that date of early retirement and the date in which the Service member would have attained 20 years of credible service for computing retired pay, or he or she must have retired on or after October 23, 1992 and before October 1, 1999.

(c) *Early retirement*. Retirement from active duty with at least 15 but fewer than 20 years of service, as provided by Pub. L. 102–484, Section 4403.

(d) *Public and community service organization*. Government or private organizations that provide or coordinate the provision of the following services.

(1) Elementary, secondary, or post secondary school teaching or administration.

(2) Support of teachers or school administrators.

(3) Law enforcement.

(4) Public health care.

(5) Social services.

(6) Public safety.

(7) Emergency relief.

(8) Public housing.

(9) Conservation.

(10) Environment.

(11) Job training.

(12) Other public and community service not listed previously, but consistent with or related to services described in paragraphs(d)(1) through (11) of this section.

(e) *Public service employment*. Work in a Federal, state or local government organization which provides or coordinates services listed in paragraphs (d)(1) through (12) of this section.

(f) *Separation*. Normal separation from activity duty or civil service, military retirement with 20 or more year's service, release from active military service, and reduction in force.

(g) *Transition assistance program counselor*. A person charged with the responsibility of conducting transition programs. Examples include personnel assigned to family centers, military or civilian personnel offices, unit transition counselors, and as command career counselors.

**§ 77.4 Policy.**

It is DoD policy that:

(a) All separating Service members and former members shall be encouraged to enter public or community service employment.

(b) Service members determined to be eligible by the Secretary of their Military Department for, and who do request retirement with fewer than 20 years of service, are required by Pub. L. 102–484, Section 4403 to register for public and community service employment.

(1) This registration normally shall take place not earlier than 90 days before retirement or terminal/transition leave.

(2) In order to have their military retired pay and Survivor Benefit Plan base amount (if applicable) recomputed in accordance with DoD Instruction 1340.19[1] early retirees must be employed with a DoD-registered public or community service organization that provides the services listed in sections 77.3(d)(1) through (d)(12), or that coordinates the provision of services listed in section 77.3(d)(1) through (d)(12).

(c) DoD civilian personnel leaving the Government, their spouses, and

[1] Copies may be obtained, at cost, from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161.

spouses of Service members who are seeking employment shall be encouraged to register for public and community service employment.

**§77.5 Responsibilities.**

(a) The Under Secretary of Defense for Personnel and Readiness shall:

(1) Monitor compliance with this rule.

(2) Establish policy and provide guidance related to public and community service employment.

(3) Provide program information to the public on the Department of Defense's public and community service employment program.

(4) Ensure that the Director, Defense Manpower Data Center (DMDC):

(i) Maintains the Public and Community Service Organizational Registry.

(ii) Maintains the Public and Community Service Personnel Registry.

(5) Decide the status of requests for reconsideration from employers resubmitting their request to be included on the Public and Community Service Organizational Registry, but whose first request was disapproved.

(b) The Secretaries of the Military Departments shall:

(1) Ensure compliance with this rule.

(2) Encourage public and community service employment for separating Service members, their spouses, DoD civilian personnel leaving the Government, and their spouses.

(3) Coordinate with the Under Secretary of Defense for Personnel and Readiness before promulgating public and community service employment policies and regulations.

**§77.6 Procedures.**

(a) Military personnel offices shall advise Service members desiring to apply for early retirement that they shall register, normally, within 90 days of their retirement date, for public and community service (PACS) employment, and refer them to a Transition Assistance Program Counselor for registration.

(b) Personnel offices shall advise separating Service members, DoD civilian personnel leaving the Government, and their spouses to contact a Transition Assistance Program Counselor about PACS employment and registration.

(c) Transition Assistance Program Counselors shall counsel separating Service members (during preseparation counseling established by DoD Instruction 1332.36[2]), DoD civilian personnel leaving the Government, and their spouses on PACS employment. Counselors shall update into the Defense Outplacement Referral System (DORS) database Service members requesting early retirement and other DoD personnel or spouses who request registration. Transition Assistance Program Counselors shall use DD Form 2580 (Appendix A to this part) to register personnel for PACS employment. In addition, Counselors shall ensure that Service members who are requesting early retirement are advised that:

(1) Registering for PACS employment is a requirement for consummation of their early retirement under Pub. L. 102–484, Section 4403 or Pub. L. 103–160, Section 561.

(2) Early retirees must provide a copy of their confirmation DORS mini-resume to their servicing military personnel office for filing in their Service record before their final retirement processing.

(3) Subsequent PACS employment is encouraged but not required.

(4) Working in a DoD-approved Federal public service organization may subject him or her to dual compensation restrictions of 5 U.S.C. 5532.

(5) DoD-approved PACS employment qualifies the Service member who is retired under Pub. L. 102–484, Section 4403 or Pub. L. 103–160, Section 561 for increased retired pay effective on the first day of the first month beginning after the date on which the member or former member attains 62 years of age. The former Service member must have worked in DoD-approved PACS employment between the date of early retirement and the date in which he or she would have attained 20 years of creditable service for computing retired pay, and have retired on or after October 23, 1992 and before October 1, 1999.

(6) It is the early retiree's responsibility to ensure that the DMDC is advised when the early retiree's PACS employment starts, and of any subsequent changes.

[2] See footnote 1 to section 77.4(b)(2).

(d) Military personnel offices shall ensure a copy of the confirmation DORS mini-resume is filed in the permanent document section of the Service record of Service members who retire early.

(e) DMDC shall maintain the PACS Personnel Registry, which includes information on the particular job skills, qualifications, and experience of registered personnel.

(f) DMDC shall maintain the PACS Organizational Registry, which includes information regarding each organization, including its location, size, types of public or community service positions in the organization, points of contact, procedures for applying for such positions, and a description of each position that is likely to be available.

(g) PACS Organizations shall use DD Form 2581 (Appendix B to this part) and DD Form 2581–1 (Appendix C to this part) to request registration on the PACS Organizational Registry. Instructions on how to complete the forms and where to send them are on the forms.

(h) DMDC shall register those organizations meeting the definition of a PACS organization and include them on the PACS Organizational Registry. For organizations that do not appear to meet the criteria, DMDC shall refer the request to the Transition Support and Services Directorate, Office of the Assistant Secretary of Defense for Personnel and Readiness. The Transition Support and Services Directorate may consult individually on an ad hoc basis with appropriate agencies to determine whether or not the organization meets the validation criteria. For organizations which are denied approval as a creditable early retirement organization and which request reconsideration, the Transition Support and Services Directorate will forward that request to the next higher level for a final determination. DMDC shall advise organizations of their status.

## APPENDIX A TO PART 77—DD FORM 2580, OPERATION TRANSITION DEPARTMENT OF DEFENSE

### OUTPLACEMENT AND REFERRAL SYSTEM/PUBLIC AND COMMUNITY SERVICE INDIVIDUAL APPLICATION

**OPERATION TRANSITION**
**DEPARTMENT OF DEFENSE OUTPLACEMENT AND REFERRAL SYSTEM/ PUBLIC AND COMMUNITY SERVICE INDIVIDUAL APPLICATION**

*Form Approved*
*OMB No. 0704-0324*
*Expires Dec 31, 1996*

Public reporting burden for this collection of information is estimated to average 15 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Department of Defense, Washington Headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202-4302, and to the Office of Management and Budget, Paperwork Reduction Project (0704-0324), Washington, DC 20503.

**PLEASE DO NOT RETURN YOUR COMPLETED FORM TO EITHER OF THESE ADDRESSES.**
**RETURN COMPLETED FORM TO YOUR LOCAL MILITARY TRANSITION OFFICE.**

**PRIVACY ACT STATEMENT**

**AUTHORITY:** 10 U.S.C. 1143, 1144; EO 9397.

**PRINCIPAL PURPOSE(S):** To assist separating DoD personnel and their spouses in securing employment. Individuals participating in the Defense Outplacement Referral System (DORS) and Public and Community Service Registry will have their employment skills included in a data base designed to link prospective employers with DORS and Public and Community Service applicants.

**ROUTINE USE(S):** To public and private employers (including Federal, State, and local employment agencies and outplacement agencies, public and community service agencies).

**DISCLOSURE:** Voluntary; however, failure to provide all requested information will result in applicant data not being included in the system.

If you are an active duty Servicemember, the following information will be added to your job referral form from your official military personnel records, if available: Rank, Years of Service, Most Recent Primary Occupation, and Branch of Service and Security Clearance. Information on race, ethnic background, sex, age, marital status, and religious preference will not be released to employers. Operation Transition is an equal opportunity program *(Completion of questions pertaining to the DORS program is voluntary.)*.

**SECTION I - TO BE FILLED OUT BY ALL APPLICANTS** *(Print or Type)*

**1. REGISTRATION REQUEST** *(Check all that apply)*

☐ DORS ONLY ☐ PUBLIC AND COMMUNITY SERVICE ONLY ☐ BOTH

| 2a. NAME *(Last, First, Middle Initial)* | 2b. SOCIAL SECURITY NUMBER | 3. DATE AVAILABLE FOR WORK *(YYMMDD)* |
|---|---|---|
| | | |

**4. FILING STATUS** *(X all that apply)*

a. MILITARY *(Branch of Service)*
☐ (1) Army ☐ (3) Marine Corps
☐ (2) Navy ☐ (4) Air Force

☐ b. SPOUSE OF ACTIVE DUTY MILITARY OR CIVIL SERVICE EMPLOYEE
☐ c. CIVIL SERVICE EMPLOYEE

**5. U.S. CITIZEN** *(X one)* ☐ YES ☐ NO

**6. ADDRESS** *(For next 6 months) (Street, City, State, Country, and Zip Code)* **AND TELEPHONE NUMBER** *(Include Area Code)*

| | |
|---|---|
| a. ADDRESS LINE 1 | f. COUNTRY CODE |
| b. ADDRESS LINE 2 | g. FOREIGN ZIP CODE |
| c. CITY | h. U.S. TELEPHONE NUMBER |
| d. STATE / e. U.S. ZIP CODE | i. FOREIGN TELEPHONE NUMBER |

| 7a. JOB TYPE PREFERENCES *(See Instructions for job codes) (Enter one digit per block)* | b. INCLUDE MAJOR DUTIES ON RESUME? *(X one)* | 8. REGIONAL WORK PREFERENCE *(See Instructions) (Enter one digit per block)* | 9. SPECIFIC WORK PREFERENCES *(Nearest large town or city within commuting distance - does not have to be in region)* | |
|---|---|---|---|---|
| | | | a. STATE | b. CITY |
| | ☐ Yes | | (1) | |
| | ☐ No | | (2) | |

**10. HIGHEST EDUCATION LEVEL ACHIEVED** *(X one)*

☐ a. Non-High School Graduate
☐ b. High School Graduate or GED
☐ c. Less than 2 years of college
☐ d. Associate Degree or equivalent
☐ e. Less than 4 years of college
☐ f. Bachelor's Degree
☐ g. Post Bachelor's Degree
☐ h. Master's Degree
☐ i. Post Master's Degree
☐ j. Doctorate Degree

| 11. YEAR ACHIEVED | 12. SUBJECT OF DEGREE *(If applicable)* | 13. COLLEGE / UNIVERSITY FROM WHICH DEGREE ACHIEVED *(If applicable)* |
|---|---|---|
| | | |

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**14. PERSONAL INFORMATION** *(See Instructions). (Please provide no more than 10 lines (76 spaces per line; maximum of 760 spaces). Database limitations do not permit entering additional personal information.)*

SAMPLE

**SECTION II - SPOUSE**
*(Military Member - Go to Section III)*

**15. SPONSOR DATA**

| a. NAME *(Last, First, Middle Initial)* | b. SOCIAL SECURITY NUMBER |
|---|---|
| | |

**16. YOUR JOB HISTORY** *(See Instructions for job codes) (Enter one digit per block)*

| | a. JOB CODE | b. LENGTH OF TIME JOB HELD | |
|---|---|---|---|
| (1) CURRENT JOB | | YEARS | MONTHS |
| (2) PRIOR JOB | | YEARS | MONTHS |
| (3) PRIOR JOB | | YEARS | MONTHS |

**17. HAVE YOU EVER HELD A SUPERVISORY POSITION?** *(X one)*
☐ YES ☐ NO

**18. HAVE YOU EVER HELD A SECURITY CLEARANCE?** *(X one)*
☐ YES ☐ NO

**SECTION III - ALL APPLICANTS MUST READ AND SIGN**

**19. AUTHORIZATION**

I hereby authorize release of the data on this form to civilian agencies and / or private organizations for employment purposes. If I am a civil service employee or an active duty service member, I also authorize the release of data from extracts of my computerized personnel records.

| a. SIGNATURE | b. DATE SIGNED *(YYMMDD)* |
|---|---|
| | |

DD Form 2580, FEB 94

## OPERATION TRANSITION DEPARTMENT OF DEFENSE OUTPLACEMENT AND REFERRAL SYSTEM/PUBLIC AND COMMUNITY SERVICE INDIVIDUAL APPLICATION

### DETAILED INSTRUCTIONS

**SECTION I - TO BE FILLED OUT BY ALL APPLICANTS**

If you are a service member, complete Items 1 through 14 and Item 19 (in their entirety). You do not need to fill out Items 15 through 18. They will be extracted from your personnel records. It is important that you verify the accuracy of these records prior to entering this program to ensure that the information that is put on your resume is accurate. If you are a spouse, you must complete all items on the form.

**Item 1.** Place an X next to the program(s) you wish to register for. If you selected the early retirement option, you must X Public and Community Service or both.

**Item 2a. Name.** Print / type your name, last name first.

**Item 2b. SSN.** Enter your Social Security Number.

**Item 3. Date Available for Work.** Enter the date you will be available for work as year, month, day (YYMMDD). Availability should not be beyond 6 months from the current date.

**Item 4. Filing Status.** Place an X in the box that applies.

**Item 5. Citizenship.** If you are a U.S. citizen, X the YES box. If not, X the NO box.

**Item 6. Address and Telephone Number.** Print/type the address and telephone number where you can be contacted during the next three months.

**Item 7. a. Job Type Preferences.** Enter up to three codes from the Guideline of Standard Occupation Classification (SOC) Codes, FIPS Pub 92, that most closely match(es) the type of job(s) you are seeking/qualified to perform.

**b.** If you select yes, your primary occupational description will be included in your resume. Select no if you do not want your primary occupational description included.

**Item 8. Regional Work Preference.** Refer to the regional preference list below, and enter the two-digit code for the geographical area in which you are seeking employment.

REGION 0
Only the specific cities selected

REGION 1
Connecticut
Maine
Massachusetts
New Hampshire
Rhode Island
Vermont

REGION 2
Delaware
New Jersey
New York
Pennsylvania

REGION 3
District of Columbia
Maryland
North Carolina
South Carolina
Virginia
West Virginia

REGION 4
Alabama
Florida
Georgia
Mississippi
Puerto Rico
Tennessee
Virgin Islands

REGION 5
Indiana
Kentucky
Michigan
Ohio

REGION 6
Iowa
Minnesota
Montana
North Dakota
South Dakota
Wisconsin

REGION 7
Illinois
Kansas
Missouri
Nebraska

REGION 8
Arkansas
Louisiana
Oklahoma
Texas

REGION 9
Arizona
Colorado
Idaho
Nevada
New Mexico
Utah
Wyoming

REGION 10
California
Oregon
Washington

REGION 11
Alaska

REGION 12
American Samoa
Hawaii
Guam

REGION 13
Anywhere in the U.S.A.

REGION 14
Outside the U.S.A.

REGION 15
Anywhere

**Item 9. Specific Work Preferences.** Enter your first and second work location preferences. Refer to the list below and enter the two-letter abbreviation for the state and print / type the name of the largest city within commuting distance of where you want to work for your first and second work preferences. These cities do not have to be in the region chosen in Item 8.

| STATE | CODE | STATE | CODE | STATE | CODE |
|---|---|---|---|---|---|
| Alabama | AL | Kentucky | KY | North Dakota | ND |
| Alaska | AK | Louisiana | LA | Ohio | OH |
| Arizona | AZ | Maine | ME | Oklahoma | OK |
| Arkansas | AR | Maryland | MD | Oregon | OR |
| California | CA | Massachusetts | MA | Pennsylvania | PA |
| Colorado | CO | Michigan | MI | Rhode Island | RI |
| Connecticut | CT | Minnesota | MN | South | |
| Delaware | DE | Mississippi | MS | Carolina | SC |
| District of | | Missouri | MO | South Dakota | SD |
| Columbia | DC | Montana | MT | Tennessee | TN |
| Florida | FL | Nebraska | NE | Texas | TX |
| Georgia | GA | Nevada | NV | Utah | UT |
| Hawaii | HI | New | | Vermont | VT |
| Idaho | ID | Hampshire | NH | Virginia | VA |
| Illinois | IL | New Jersey | NJ | Washington | WA |
| Indiana | IN | New Mexico | NM | West Virginia | WV |
| Iowa | IA | New York | NY | Wisconsin | WI |
| Kansas | KS | North Carolina | NC | Wyoming | WY |

**Item 10. Highest Education Level Achieved.** X the box which most closely matches your highest education level achieved.

**Item 11. Year Achieved.** Enter the year you achieved Item 10.

**Item 12. Subject of Degree.** Print/type the degree achieved (if applicable) in Item 10 (e.g. BS, Mechanical Engineering; BA, Western Civilization; MS, Physics; etc.).

**Item 13. College/University.** Print/type the name of the college/ university where Item 10 was obtained if applicable.

**Item 14. Personal Information.** Print/type in this space any information about yourself you feel would help you obtain a job in the field you are searching. All information in this space will be printed verbatim on your DORS resume. If you are seeking a job in a field other than your primary military duty this information is the most important since it will comprise a majority of your resume. Carefully choose your words and grammar. Examples:

- Fluent in Chinese, Russian and Spanish
- Virginia State licensed electrician
- 14 years experience in personnel management
- Owned personal computer training business, Jones Computer Training
- American Society of Mechanical Engineers member

**SECTION II - SPOUSE**

This section is to be completed only by spouses of military and DoD civilians whose personnel files are not kept by the government.

**Item 15. Sponsor Data.**

a. Name. Print/type your sponsor's name, last name first.

b. SSN. Enter your sponsor's Social Security Number.

**Item 16. Your Job History.**

a. Job Codes. Consult the Guideline for Standard Occupational Classification (SOC) Codes, FIPS Pub 92, and enter the job codes that most closely match the previous three jobs you held.

b. Length of Time Job Held. Enter the number of years and months the job was held (03 years, 09 months).

**Item 17. Supervisory Experience.** If you have supervisory experience, X the YES box. If not, X the NO box.

**Item 18. Security Clearance.** If you had a security clearance, X the YES box. If not, X the NO box.

**SECTION III**

All applicants must sign and date. Turn in the completed form to the transition assistance office.

DD Form 2580, FEB 94

## Appendix B to Part 77—DD Form 2581, Operation Transition Employer Registration

**OPERATION TRANSITION EMPLOYER REGISTRATION**

*Form Approved*
*OMB No. 0704-0324*
*Expires Dec 31, 1996*

Public reporting burden for this collection of information is estimated to average 15 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Department of Defense, Washington Headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202-4302, and to the Office of Management and Budget, Paperwork Reduction Project (0704-0324), Washington, DC 20503.

**PLEASE DO NOT RETURN YOUR COMPLETED FORM TO EITHER OF THESE ADDRESSES ABOVE.**

**RETURN COMPLETED FORM TO: DMDC, ATTENTION: OPERATION TRANSITION, BOX 100, FORT ORD, CA 93941-0100**

**1. ORGANIZATION NAME AND ADDRESS** *(Include 9-digit ZIP Code)*

**2. EMPLOYMENT CONTACT ADDRESS** *(If different from Item 1) (Include 9-digit ZIP Code)*

**3. ORGANIZATION CONTACT**

**4. EMPLOYMENT CONTACT** *(If different from Item 3)*

**5. ORGANIZATION TELEPHONE NUMBER**

**6. EMPLOYMENT CONTACT TELEPHONE NUMBER** *(If different from Item 5)*

**7. FAX TELEPHONE NUMBER**

**8. FAX ROUTING ADDRESS**

**9. HOW DID YOU HEAR ABOUT OPERATION TRANSITION?**

**10. IS YOUR ORGANIZATION A** *(Check one)*

- ☐ **a. Private Sector Employer**
- ☐ **b. Public or Community Service Employer**

**11. TYPES AND LOCATIONS OF POSITIONS IN ORGANIZATION LIKELY TO BE AVAILABLE** *(Briefly describe)*

**12. PROCEDURES FOR APPLYING FOR AVAILABLE POSITIONS** *(Please indicate if you do not wish to receive unsolicited resumes)*

**13a. SIZE OF ORGANIZATION**

**13b. MAJOR FUNCTION/BUSINESS ACTIVITY OF ORGANIZATION**

**14a. IS YOUR ORGANIZATION INVOLVED IN** *(Check applicable block(s))*

- ☐ **(1) Placement Services**
- ☐ **(2) Direct Marketing**
- ☐ **(3) Multi-level Marketing**
- ☐ **(4) Franchise Operations**
- ☐ **(5) None of the above**

**14b. ARE YOUR POSITION(S)**

- ☐ **(1) Commission only**
- ☐ **(2) Salary only**
- ☐ **(3) Combination of commission and salary**

**14c. IS AN INVESTMENT OR FEE NECESSARY**

- ☐ **(1) YES**
- ☐ **(2) NO**
- **(3) IF YES, SPECIFY AMOUNT**

$

**15. AGREEMENT**

I understand this agreement covers the use of Operation Transition automated systems including the Defense Outplacement Referral System (DORS), the Public and Community Service (PACS) Personnel Registry, and the Transition Bulletin Board (TBB). I hereby agree to use the DORS and PACS Personnel Registry only for employment purposes at no charge to the individual. I also agree not to use the DORS and PACS Personnel Registry to develop mailing lists or to promote business opportunities such as franchise or direct or multi-level marketing operations.

I certify that the information provided is true, accurate, and complete. I acknowledge that any false statement may be punishable pursuant to Title 18 U.S.C. Section 1001.

**16. SIGNATURE**

**17. DATE (YYMMDD)**

**GOVERNMENT USE ONLY**

**18. REGISTRATION NUMBER**

**19. CLERK**

**20. DATE (YYMMDD)**

DD Form 2581, FEB 94

**INSTRUCTIONS FOR COMPLETING DD FORM 2581**

**1. ORGANIZATION NAME AND ADDRESS.** Enter your organization name and address exactly as you would like it to appear on information mailed to you. P.O. Boxes not preferred.

**2. EMPLOYMENT CONTACT ADDRESS.** Enter the address of your Human Resources Department *(if different from item 1)*.

**3. ORGANIZATION CONTACT.** Enter the name of the individual who will serve as organizational contact to Operation Transition.

**4. EMPLOYMENT CONTACT.** Enter the name of an individual in your Human Resources Department who can answer specific questions on employment and positions available *(if different from item 3)*.

**5. ORGANIZATION TELEPHONE NUMBER.** Enter the area code and telephone number for your organization. Please enter a direct line or voice mail, if available.

**6. EMPLOYMENT CONTACT TELEPHONE NUMBER.** Enter the area code and telephone number for your employment contact *(if different from item 5)*. Please enter a direct line or voice mail, if available .

**7. FAX TELEPHONE NUMBER.** Enter the area code and telephone number of your FAX machine.

**8. FAX ROUTING ADDRESS.** Enter any additional information that may be needed on the FAX cover sheet.

**9. HOW DID YOU HEAR ABOUT OPERATION TRANSITION.** List the source(s) where you first heard about Operation Transition.

**10. IS YOUR ORGANIZATION A...** Check the appropriate box: a. Private Sector employers are those who operate on a "for profit" basis. b. Public Service Employers are local, state, or federal governmental entities. Community Service Employers are certified non-profit organizations or associations.

**11. TYPES AND LOCATIONS OF POSITIONS IN ORGANIZATION LIKELY TO BE AVAILABLE.** Briefly describe the positions *(job types or titles)* and the location of the positions which may be available for employment referrals.

**12. PROCEDURES FOR APPLYING FOR AVAILABLE POSITIONS.** Briefly describe how the applicants should apply for available positions.

**13a. SIZE OF ORGANIZATION.** Briefly describe size *(number of personnel, branch offices, etc.)* of your organization.

**13b. MAJOR FUNCTION/BUSINESS ACTIVITY OF ORGANIZATION.** Briefly describe the major business activities *(financial consulting, food processing, etc.)* of your organization.

**14a. IS YOUR ORGANIZATION INVOLVED IN...** Please indicate if your organization is involved in these activities. Specific services are available. If none of the above applies check box "5."

**14b. ARE YOUR POSITION(S)...** Indicate if the compensation for these positions is commission only, salary only, or commission and salary combined.

**14c. IS AN INVESTMENT OR FEE NECESSARY.** Indicate if acceptance of the position requires a monetary outlay by the applicant. This includes: membership fees, agency fees, start-up kits, inventory investments, or tuition. If yes, specify the amount the applicant would be expected to pay.

**15. AGREEMENT.** Your signature in item 16 indicates acceptance of the agreement in this item.

Please make certain that all items above have been completed in their entirety. Sign and date the form in items 16 and 17.

**MAIL OR FAX THE COMPLETED FORM TO:**

DMDC
ATTENTION: Operation Transition
Box 100
Fort Ord, CA 93941-0100
FAX: (408) 656-2132

DD Form 2581, FEB 94 (BACK)

## APPENDIX C TO PART 77—DD FORM 2581–1, PUBLIC AND COMMUNITY SERVICE ORGANIZATION VALIDATION

**PUBLIC AND COMMUNITY SERVICE ORGANIZATION VALIDATION**

*Form Approved*
*OMB No. 0704-0324*
*Expires Dec 31, 1996*

Public reporting burden for this collection of information is estimated to average 3 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Department of Defense, Washington Headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202-4302, and to the Office of Management and Budget, Paperwork Reduction Project (0704-0324), Washington, DC 20503.

**PLEASE DO NOT RETURN YOUR COMPLETED FORM TO EITHER OF THESE ADDRESSES ABOVE.**
**RETURN COMPLETED FORM TO: DMDC, ATTN: OPERATION TRANSITION, BOX 100, FORT ORD, CA 93941-0100**

**1. NAME OF ORGANIZATION**

**2. ADDRESS OF ORGANIZATION** *(Include Room/Suite Number and 9-digit ZIP Code)*

**3. POINT OF CONTACT FOR ORGANIZATION**

**4. POINT OF CONTACT TELEPHONE NUMBER** *(Include Area Code)*

**5. PRIMARY SERVICE CATEGORY (IES)** *(If your primary service category is not used, go to Item 6)*

| | | | |
|---|---|---|---|
| | a. ELEMENTARY, SECONDARY, OR POSTSECONDARY SCHOOL TEACHING OR SCHOOL ADMINISTRATION | | |
| | b. SUPPORT OF ELEMENTARY, SECONDARY, OR POSTSECONDARY SCHOOL TEACHING OR SCHOOL ADMINISTRATION | | |
| | c. SOCIAL SERVICES | d. PUBLIC HEALTH CARE | e. LAW ENFORCEMENT |
| | f. PUBLIC HOUSING | g. PUBLIC SAFETY | h. CONSERVATION |
| | i. EMERGENCY MANAGEMENT | j. ENVIRONMENT | k. JOB TRAINING |

**6. IF YOUR ORGANIZATION PROVIDES PRIMARY FUNCTIONS OTHER THAN THOSE LISTED IN ITEM 5, BRIEFLY DESCRIBE THESE MAJOR FUNCTIONS.**

**7. TYPE OF SERVICE**

| | |
|---|---|
| | a. PUBLIC *(Federal, State, or Local Government - go to Item 8)* |
| | b. COMMUNITY *(Non-profit Organization or Association - go to Item 9)* |

**8. PUBLIC SERVICE HEADQUARTERS AGENCY**

**a. ORGANIZATION NAME AND ADDRESS** *(Include 9-digit ZIP Code)*

**b. HEADQUARTERS POINT OF CONTACT AND POSITION**

**c. TELEPHONE NUMBER FOR POINT OF CONTACT** *(Include Area Code)*

**9. COMMUNITY SERVICE / NON-PROFIT ORGANIZATION**

**IMPORTANT: Please attach a copy of the IRS Letter of Determination indicating your organization has received IRS 501 (C) (3) tax-exempt status. Also include a copy of your organization's annual report, mission statement, or other documentation of its function. Indicate below if your organization is affiliated with the United Way, Combined Federal Campaign or some other non-profit association.**

**a. AFFILIATE NAME AND ADDRESS** *(Include 9-digit ZIP Code)*

**b. AFFILIATE POINT OF CONTACT AND POSITION**

**c. TELEPHONE NUMBER FOR POINT OF CONTACT** *(Include Area Code)*

**10. AGREEMENT**

**I understand this form provides information to help the Department of Defense establish a Public and Community Service organizational registry which will be accessible to departing Service members. I also understand certain individuals may receive additional entitlements based on the information specified in Public Law 102-484. I certify the information provided is true, accurate, and complete. I acknowledge that any false statement may be punishable pursuant to Title 18 U.S.C. Section 1001.**

| a. NAME AND TITLE *(Please print or type)* | b. SIGNATURE | c. DATE *(YYMMDD)* |
|---|---|---|
| | | |

DD Form 2581-1, FEB 94

15

**INSTRUCTIONS FOR COMPLETING DD FORM 2581-1**

This form collects information to be used to certify an organization on the Public and Community Service Organization Registry under the provisions of Section 4462 of Public Law 102-484.

Public service organizations are defined as federal, state, or local governmental entities.

Community service organizations are non-profit organizations or associations which provide or coordinate the delivery of services in the public interest. Organizations affiliated with the United Way or Combined Federal Campaign presumptively qualify as community service organizations.

Organizations involved in the following activities will not be considered public or community service organizations:

(1) Businesses organized for profit;

(2) Labor unions;

(3) Partisan political organizations; and

(4) Organizations engaged in religious activities, unless such activities are unrelated to religious instruction, worship services, or any form of proselytization.

Public Law 102-484 also provides that certain members of the military services retiring early from active duty receive additional military retirement credits by working in public or community service organizations. To receive this credit, the retiree's employing organization must be on the Public and Community Service Organization Registry and have as its primary function(s) one or more of the following categories of public or community service:

a. Elementary, secondary, or postsecondary school teaching or school administration.

b. Support of elementary, secondary, postsecondary school teaching or school administration.

c. Social services

d. Public health care

e. Law enforcement

f. Public housing

g. Public safety

h. Conservation

i. Emergency management

j. Environment

k. Job training

**ALL ITEMS MUST BE COMPLETED**

**1. NAME OF ORGANIZATION.** Print or type the name of your organization. Please be specific. For example, if the police department of the city of Oakdale is registering, use "Oakdale Police Department" as the organization instead of the "City of Oakdale."

**2. ADDRESS OF ORGANIZATION.** Enter the address of your organization exactly as you would like it to appear on information mailed to you. Please avoid P.O. Boxes when possible.

**3. POINT OF CONTACT FOR ORGANIZATION.** Provide the name and job title of a person who can answer specific questions about the organization.

**4. POINT OF CONTACT TELEPHONE NUMBER.** Enter the area code and telephone number for the point of contact. Please enter a direct line or voice mail extension if available.

**5. PRIMARY SERVICE CATEGORY (IES).** Select the category that represents the core mission of your organization or department. If you provide primary services in two or more of the categories, select all applicable categories. As discussed above, the organization's primary functions must be in one or more of the listed categories (5a - 5k) for a military retiree to be eligible for additional retirement credit. If your primary service category is not listed, go to Item 6.

**6. ORGANIZATION FUNCTIONS.** If your organization provides primary services in categories other than 5a-5k, briefly describe those function (s).

**7. TYPE OF SERVICE.** Indicate whether your organization provides public or community service by checking the appropriate block. Public service refers to federal, state, local government organizations or agencies. Community service refers to certified nonprofit organizations or associations.

**8. PUBLIC SERVICE HEADQUARTERS AGENCY.** If public service, provide the name and address of the organization, if any, to which your organization reports. Include the name, job title, and telephone number of a person who can answer specific questions about the headquarters organization.

**9. COMMUNITY SERVICE / NON-PROFIT ORGANIZATION.** If a community service organization, attach a copy of the IRS Letter of Determination indicating that your organization has received IRS 501 (C) (3) tax-exempt status. A community service organization will NOT be validated without the Letter of Determination. Also include a copy of your organization's annual report or mission statement or attach other documentation about your organization's functions.

Provide the name and address of the organization, if any, to which your organization reports or with which it is affiliated. Provide the name, job title, and telephone number of a person who can answer specific questions about the headquarters affiliate.

**10. AGREEMENT.** Completion of this section and a signature by an organization's representative attests to the information's accuracy and completeness. Mail or fax the completed form to:

DMDC
ATTN: OPERATION TRANSITION
Box 100
Ft. Ord, CA 93941-0100

FAX: (408) 656-2132

Please call the Defense Manpower Data Center (DMDC) Help Desk at 1-800-727-3677 between the hours of 6 AM and 6 PM Pacific time if you have questions or need assistance with this form.

**Community service organizations - - Remember to attach a copy of your IRS Letter of Determination and an annual report or mission statement.**

DD Form 2581-1, FEB 94 (BACK)

# PART 78—VOLUNTARY STATE TAX WITHHOLDING FROM RETIRED PAY

Sec.
78.1 Purpose.
78.2 Applicability and scope.
78.3 Definitions.
78.4 Policy.
78.5 Procedures.
78.6 Responsibilities.
78.7 Standard agreement.

AUTHORITY: 10 U.S.C. 1045.

SOURCE: 50 FR 47220, Nov. 15, 1985, unless otherwise noted.

### § 78.1 Purpose.

Under 10 U.S.C. 1045, this part provides implementing guidance for voluntary State tax withholding from the retired pay of uniformed Service members. The policy and procedures for this part are also located in the DoD Financial Management Regulation (''DoDFMR''), Volume 7B, Chapter 26, ''State and Local Taxes'' (DoD 7000.14–R).

[50 FR 47220, Nov. 15, 1985, as amended at 71 FR 40657, July 18, 2006]

### § 78.2 Applicability and scope.

(a) This part applies to the Office of the Secretary of Defense, the Military Departments, the Coast Guard (under agreement with the Department of Transportation), the Public Health Service (PHS) (under agreement with the Department of Health and Human Services and the National Oceanic and Atmospheric Administration (NOAA) (under agreement with the Department of Commerce). The term ''Uniformed Services,'' as used herein, refers to the Army, Navy, Air Force, Marine Corps, Coast Guard, commissioned corps of the PHS, and the Commissioned corps of the NOAA.

(b) It covers members retired from the regular and reserve components of the Uniformed Services who are receiving retired pay.

### § 78.3 Definitions.

(a) *Income tax*. Any form of tax under a State statute where the collection of that tax either imposes on employers generally the duty of withholding sums from the compensation of employees and making returns of such sums to the State, or grants employers generally the authority to withhold sums from the compensation of employees if any employee voluntarily elects to have such sum withheld. And, the duty to withhold generally is imposed, or the authority to withhold generally is granted, with respect to the compensation of employees who are residents of such State.

(b) *Member*. A person originally appointed or enlisted in, or conscripted into, a Uniformed Service who has retired from the regular or reserve component of the Uniformed Service concerned.

(c) *Retired pay*. Pay and benefits received by a member based on conditions of the retirement law, pay grade, years of service, date of retirement, transfer to the Fleet Reserve or Fleet Marine Corps Reserve, or disability. It also is known as retainer pay.

(d) *State*. Any State, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

### § 78.4 Policy.

(a) It is the policy of the Uniformed Services to accept written requests from members for voluntary income tax withholding from retired pay when the Department of Defense has an agreement for such withholding with the State named in the request.

(b) The Department of Defense shall enter into an agreement for the voluntary withholding of State income taxes from retired pay with any State within 120 days of a request for agreement from the proper State official. The agreement shall provide that the Uniformed Services shall withhold State income tax from the monthly retired pay of any member who voluntarily requests such withholding in writing.

### § 78.5 Procedures.

(a) The Uniformed Services shall comply with the payment requirements of the state, city, or county tax laws. Therefore, the payment requirements (biweekly, monthly, or quarterly) of the state, city, or county tax laws currently in effect will be observed by the Uniformed Services. However, payment will not be made more frequently than required by the state, city, or county, or more frequently than the payroll is paid by the Uniformed Services. Payment procedures shall conform, to the extent practicable, to the usual fiscal practices of the Uniformed Services.

(b) A member may request that the State designated for withholding be changed and that the subsequent withholdings be remitted as amended. A member may revoke his or her request for withholding at any time. Any request for a change in the State designated or any revocation is effective

on the first day of the month after the month in which the request or revocation is processed by the Uniformed Service concerned, but in no event later than on the first day of the second month beginning after the day on which the request or revocation is received by the Uniformed Service concerned.

(c) A member may have in effect at any time only one request for withholding under this part. A member may not have more than two such requests in effect during any one calendar year.

(d) The agreements with States may not impose more burdensome requirements on the United States than on employers generally or subject the United States, or any member, to a penalty or liability because of such agreements.

(e) The Uniformed Services shall perform the services under this part without accepting payment from States for such services.

(f) The Uniformed Services may honor a retiree's request for refund until a payment has been made to the State. After that, the retiree may seek a refund of any State tax overpayment by filing the appropriate State tax form with the State that received the voluntary withholding payments. The Uniformed Services may honor a retiree's request for refund until a payment has been made to the State. State refunds will be in accordance with State income tax policy and procedures.

(g) A member may request voluntary tax withholding by writing the retired pay office of his or her Uniformed Service. The request shall include: The member's full name, social security number, the fixed amount to be withheld monthly from retired pay, the State designated to receive the withholding, and the member's current residence address. The request shall be signed by the member, or in the case of incompetence, his or her guardian or trustee. The amount of the request for State tax withholding must be an even dollar amount, not less than $10 or less than the State's minimum withholding amount, if higher. The Uniformed Services' retired pay office addresses are given as follows:

(1) Defense Finance and Accounting Service, Attn: DFAS/PRR/CL, 1240 East Ninth Street, Cleveland, OH 44199–2055.

(2) Coast Guard: Commanding Officer (RPB), U.S. Coast Guard Human Resources Service and Information Center, 444 S. E. Quincy Street, Topeka, KS 66683–3591.

(3) U.S. Public Health Service Compensation Branch, 5600 Fishers Lane, Room 4–50, Rockville, MD 20857.

(4) National Oceanic and Atmospheric Administration, Commanding Officer (RPB), U.S. Coast Guard Human Resources Service and Information Center, 444 S. E. Quincy Street, Topeka, KS 66683–3591.

(h) If a member's retired pay is not sufficient to satisfy a member's request for a voluntary State tax, then the withholding will cease. A member may initiate a new request when such member's retired pay is restored in an amount sufficient to satisfy the withholding request.

(i) A State requesting an agreement for the voluntary withholding of State tax from the retired pay of members of the Uniformed Services shall indicate, in writing, its agreement to be bound by the provisions of this part. If the State proposes an agreement that varies from the Standard Agreement, the State shall indicate which provisions of the Standard Agreement are not acceptable and propose substitute provisions. The letter shall be addressed to the Director, Defense Finance and Accounting Service, 1931 Jefferson Davis Highway, Arlington, VA 22240. To be effective, the letter must be signed by a State official authorized to bind the State under an agreement for tax withholding. Copies of applicable State laws that authorize employers to withhold State income tax and authorize the official to bind the State under an agreement for tax withholding shall be enclosed with the letter. The letter also shall indicate the title and address of the official whom the Uniformed Services may contact to obtain information necessary for implementing withholding.

(j) Within 120 days of the receipt of a letter from a State, the Director, Defense Finance and Accounting Service, or designee, will notify the State, in writing, that DoD has either entered

into the Standard Agreement or that an agreement cannot be entered into with the State and the reasons for that determination.

[50 FR 47220, Nov. 15, 1985, as amended at 50 FR 49930, Dec. 6, 1985; 68 FR 36914, June 20, 2003]

### § 78.6 Responsibilities.

(a) The Assistant Secretary of Defense (Comptroller) shall provide guidance, monitor compliance with this part, and have the authority to change or modify the procedures set forth.

(b) The Secretaries of the Military Departments and Heads of the other Uniformed Services shall comply with this part.

### § 78.7 Standard agreement.

Standard Agreement For Voluntary State Tax Withholding From The Retired Pay Of Uniformed Service Members

*Article I—Purpose*

This agreement, hereafter referred to as the ''Standard Agreement,'' establishes administrative procedures and assigns responsibilities for voluntary State tax withholding from the retired pay of Uniformed Service members consistent with section 654 of the Department of Defense Authorization Act for Fiscal Year 1985 (Pub. L. 98–525), codified as 10 U.S.C. 1045.

*Article II—Parties*

The parties to this agreement are the Department of Defense on behalf of the Uniformed Services and the State that has entered into this agreement pursuant to 10 U.S.C. 1045.

*Article III—Procedures*

The parties to the Standard Agreement are bound by the provisions in title 32, Code of Federal Regulations, part 78. The Secretary of Defense may amend, modify, supplement, or change the procedures for voluntary State tax withholding from retired pay of Uniformed Service members after giving notice in the FEDERAL REGISTER. In the event of any such changes, the State will be given 45 days to terminate this agreement.

*Article IV—Reporting*

Copies of Internal Revenue Service Form 1099R, ''Distribution From Pensions, Annuities, Retirement, or Profit Sharing Plan, IRAs, Insurance Contracts, etc.'' may be used for reporting withheld taxes to the State. The media for reporting (paper copy, magnetic tape, electronic file transfer, etc.) will comply with the state reporting standards that apply to employers in general.

*Article V—Other Provisions*

A. This agreement shall be subject to any amendment of 10 U.S.C. 1045 and any regulations issued pursuant to such statutory change.

B. In addition to the provisions of Article III, the agreement may be terminated by a party to the Standard Agreement by providing the other party with written notice to that effect at least 90 days before the proposed termination.

C. Nothing in this agreement shall be deemed to:

1. Require the collection of delinquent tax liabilities of retired members of the Uniformed Services;

2. Consent to the application of any provision of State law that has the effect of imposing more burdensome requirements upon the United States than the State imposes on other employers, or subjecting the United States or any member to any penalty or liability;

3. Consent to procedures for withholding, filing of returns, and payment of the withheld taxes to States that do not conform to the usual fiscal practices of the Uniformed Services;

4. Allow the Uniformed Services to accept payment from a State for any services performed with regard to State income tax withholding from the retired pay of Uniformed Service members.

[50 FR 47220, Nov. 15, 1985, as amended at 68 FR 36915, June 20, 2003]

## PART 80—PROVISION OF EARLY INTERVENTION SERVICES TO ELIGIBLE INFANTS AND TODDLERS WITH DISABILITIES AND THEIR FAMILIES, AND SPECIAL EDUCATION CHILDREN WITH DISABILITIES WITHIN THE SECTION 6 SCHOOL ARRANGEMENTS

Sec.

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APPENDIX A TO PART 80—PROCEDURES FOR THE PROVISION OF EARLY INTERVENTION SERVICES FOR INFANTS AND TODDLERS WITH DISABILITIES, AGES 0–2 (INCLUSIVE), AND THEIR FAMILIES

APPENDIX B TO PART 80—PROCEDURES FOR SPECIAL EDUCATIONAL PROGRAMS (INCLUDING RELATED SERVICES) AND FOR PRESCHOOL CHILDREN AND CHILDREN WITH DISABILITIES (3–21 YEARS INCLUSIVE)
APPENDIX C TO PART 80—HEARING PROCEDURES

AUTHORITY: 20 U.S.C. 1400 et seq.; 20 U.S.C. 241; 20 U.S.C. 241 note.

SOURCE: 59 FR 37680, July 25, 1994, unless otherwise noted.

### § 80.1 Purpose.

This part:

(a) Establishes policies and procedures for the provision of early intervention services to infants and toddlers with disabilities (birth to age 2 inclusive) and their families, and special education and related services to children with disabilities (ages 3–21 inclusive) entitled to receive special educational instruction or early intervention services from the Department of Defense under Pub. L. 81–874, sec. 6, as amended; Pub. L. 97–35, sec. 505(c); the Individuals with Disabilities Education Act, Pub. L. 94–142, as amended; Pub. L. 102–119, sec. 23; and consistent with 32 CFR parts 285 and 310, and the Federal Rules of Civil Procedures (28 U.S.C.).

(b) Establishes policy, assigns responsibilities, and prescribes procedures for:

(1) Implementation of a comprehensive, multidisciplinary program of early intervention services for infants and toddlers ages birth through 2 years (inclusive) with disabilities and their families.

(2) Provision of a free, appropriate education including special education and related services for preschool children with disabilities and children with disabilities enrolled in the Department of Defense Section 6 School Arrangements.

(c) Establishes a Domestic Advisory Panel (DAP) on Early Intervention and Education for Infants, Toddlers, Preschool Children and Children with Disabilities, and a DoD Coordinating Committee on Domestic Early Intervention, Special Education and Related Services.

(d) Authorizes the publication of DoD Regulations and Manuals, consistent with DoD 5025.1–M,[1] and DoD forms consistent with DoD 5000.12–M[2] and DoD Directive 8910.1[3] to implement this part.

### § 80.2 Applicability and scope.

This part:

(a) Applies to the Office of the Secretary of Defense, the Military Departments, the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Unified and Specified Commands, the Inspector General of the Department of Defense, the Defense Agencies, and the DoD Field Agencies (hereafter referred to collectively as ''the DoD Components'').

(b) Encompasses infants, toddlers, preschool children, and children receiving or entitled to receive early intervention services or special educational instruction from the DoD on installations with Section 6 School Arrangements, and the parents of those individuals with disabilities.

(c) Applies only to schools operated by the Department of Defense within the Continental United States, Alaska, Hawaii, Puerto Rico, Wake Island, Guam, American Samoa, the Northern Mariana Islands, and the Virgin Islands.

### § 80.3 Definitions.

(a) *Assistive technology device*. Any item, piece of equipment, or product system, whether acquired commercially or off the shelf, modified, or customized, that is used to increase, maintain, or improve functional capabilities of individuals with disabilities.

(b) *Assistive technology service*. Any service that directly assists an individual with a disability in the selection, acquisition, or use of an assistive technology device. This term includes:

(1) Evaluating the needs of an individual with a disability, including a functional evaluation of the individual in the individual's customary environment.

[1] Copies may be obtained, at cost, from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161.

[2] See footnote 1 to § 80.1(c).

[3] See footnote 1 to § 80.1(c).

(2) Purchasing, leasing, or otherwise providing for the acquisition of assistive technology devices by individuals with disabilities.

(3) Selecting designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing of assistive technology devices.

(4) Coordinating and using other therapies, interventions, or services with assistive technology devices, such as those associated with existing educational and rehabilitative plans and programs.

(5) Training or technical assistance for an individual with disabilities, or, where appropriate, the family of an individual with disabilities.

(6) Training or technical assistance for professionals (including individuals providing educational rehabilitative services), employers, or other individuals who provide services to, employ, or are otherwise substantially involved in the major life functions of an individual with a disability.

(c) *Attention deficit disorder (ADD)*. As used to define students, encompasses attention-deficit hyperactivity disorder and attention deficit disorder without hyperactivity. The essential features of this disorder are developmentally inappropriate degrees of inattention, impulsiveness, and hyperactivity.

(1) A diagnosis of ADD may be made only after the child is evaluated by appropriate medical personnel, and evaluation procedures set forth in this part (appendix B to this part) are followed.

(2) A diagnosis of ADD, in and of itself, does not mean that a child requires special education; it is possible that a child diagnosed with ADD, as the only finding, can have his or her educational needs met within the regular education setting.

(3) For a child with ADD to be eligible for special education, the Case Study Committee, with assistance from the medical personnel conducting the evaluation, must then make a determination that the ADD is a chronic or acute health problem that results in limited alertness, which adversely affects educational performance. Children with ADD who are eligible for special education and medically related services will qualify for services under ''Other Health Impaired'' as described in Criterion A, paragraph (h)(1) of this section.

(d) *Autism*. A developmental disability significantly affecting verbal and non-verbal communication and social interaction generally evident before age 3 that adversely affects educational performance. Characteristics of autism include irregularities and impairments in communication, engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. The term does not include children with characteristics of the disability of serious emotional disturbance.

(e) *Case Study Committee (CSC)*. A school-based committee that determines a child's eligibility for special education, develops and reviews a child's individualized education program (IEP), and determines appropriate placement in the least restrictive environment. A CSC is uniquely composed for each child. Participants on a CSC must include:

(1) The designated representative of the Section 6 School Arrangement, who is qualified to supervise the provision of special education. Such representative may not be the child's special education teacher.

(2) One, or more, of the child's regular education teachers, if appropriate.

(3) A special education teacher.

(4) One, or both, of the child's parents.

(5) The child, if appropriate.

(6) A member of the evaluation team or another person knowledgeable about the evaluation procedures used with the child.

(7) Other individuals, at the discretion of the parent or the Section 6 School Arrangement, who may have pertinent information.

(f) *Child-find*. The ongoing process used by the Military Services and a Section 6 School Arrangement to seek and identify children (from birth to 21 years of age) who show indications that they might be in need of early intervention services or special education

and related services. Child-find activities include the dissemination of information to the public and identification, screening, and referral procedures.

(g) *Children with disabilities ages 5–21 (inclusive).* Those children ages 5–21 years (inclusive), evaluated in accordance with this part, who are in need of special education as determined by a CSC and who have not been graduated from a high school or who have not completed the requirements for a General Education Diploma. The terms ''child'' and ''student'' may also be used to refer to this population. The student must be determined eligible under one of the following four categories:

(1) *Criterion A.* The educational performance of the student is adversely affected, as determined by the CSC, by a physical impairment; visual impairment including blindness; hearing impairment including deafness; orthopedic impairment; or other health impairment, including ADD, when the condition is a chronic or acute health problem that results in limited alertness; autism; and traumatic brain injury requiring environmental and/or academic modifications.

(2) *Criterion B.* A student who manifests a psychoemotional condition that is the primary cause of educational difficulties; a student who exhibits maladaptive behavior to a marked degree and over a long period of time that interferes with skill attainment, classroom functioning or performance, social-emotional condition, and who as a result requires special education. The term does not usually include a student whose difficulties are primarily the result of:

(i) Intellectual deficit;

(ii) Sensory or physical impairment;

(iii) Attention deficit hyperactivity disorder;

(iv) Antisocial behavior;

(v) Parent-child or family problems;

(vi) Disruptive behavior disorders;

(vii) Adjustment disorders;

(viii) Interpersonal or life circumstance problems; or

(ix) Other problems that are not the result of a severe emotional disorder.

(3) *Criterion C.* The educational performance of the student is adversely affected, as determined by the CSC, by a speech and/or language impairment.

(4) *Criterion D.* The measured academic achievement of the student in math, reading, or language is determined by the CSC to be adversely affected by underlying disabilities (including mental retardation and specific learning disability) including either an intellectual deficit or an information processing deficit.

(5) *Criterion E.* A child, 0–5 inclusive, whose functioning level as determined by the CSC, is developmentally delayed and would qualify for special education and related services as determined by this regulation.

(h) *Consent.* This term means that:

(1) The parent of an infant, toddler, child, or preschool child with a disability has been fully informed, in his or her native language, or in another mode of communication, of all information relevant to the activity for which permission is sought.

(2) The parent understands and agrees in writing to the implementation of the activity for which his or her permission is sought. The writing must describe that activity, list the child's records that will be released and to whom, and acknowledge that the parent understands consent is voluntary and may be prospectively revoked at any time.

(3) The parent of an infant, toddler, preschool child or child must consent to the release of records. The request for permission must describe that activity, list each individual's records that will be released and to whom, and acknowledge that the parent understands that consent is voluntary and may be prospectively revoked at any time.

(4) The written consent of a parent of an infant or toddler with a disability is necessary for implementation of early intervention services described in the individualized family service plan (IFSP). If such parent does not provide consent with respect to a particular early intervention service, then the early intervention services for which consent is obtained shall be provided.

(i) *Deaf.* A hearing loss or deficit so severe that the child is impaired in processing linguistic information

through hearing, with or without amplification, to the extent that his or her educational performance is adversely affected.

(j) *Deaf-blind*. Concomitant hearing and visual impairments, the combination of which causes such severe communication and other developmental and educational problems that they cannot be accommodated in special education programs solely for children with deafness or children with blindness.

(k) *Developmental delay*. A significant discrepancy in the actual functioning of an infant or toddler when compared with the functioning of a nondisabled infant or toddler of the same chronological age in any of the following areas of development: Physical development, cognitive development, communication development, social or emotional development, and adaptive development as measured using standardized evaluation instruments and confirmed by clinical observation and judgment. A significant discrepancy exists when the one area of development is delayed by 25 percent or 2 standard deviations or more below the mean or when two areas of development are each delayed by 20 percent or 1½ standard deviations or more below the mean. (Chronological age should be corrected for prematurity until 24 months of age.)

(l) *Early intervention service coordination services*. Case management services that include integration and oversight of the scheduling and accomplishment of evaluation and delivery of early intervention services to an infant or toddler with a disability and his or her family.

(m) *Early intervention services*. Developmental services that:

(1) Are provided under the supervision of a military medical department.

(2) Are provided using Military Health Service System and community resources.

(i) Evaluation IFSP development and revision, and service coordination services are provided at no cost to the infant's or toddler's parents.

(ii) Incidental fees (e.g., child care fees) that are normally charged to infants, toddlers, and children without disabilities or their parents may be charged.

(3) Are designed to meet the developmental needs of an infant or toddler with a disability in any one or more of the following areas: Physical development, cognitive development, communication development, social or emotional development, or adaptive development.

(4) Meet the standards developed by the Assistant Secretary of Defense for Health Affairs (ASD(HA)).

(5) Include the following services: Family training, counseling, and home visits; special instruction; speech pathology and audiology; occupational therapy; physical therapy; psychological services; early intervention program coordination services; medical services only for diagnostic or evaluation purposes; early identification, screening, and assessment services; vision services; and social work services. Also included are assistive technology devices and assistive technology services; health services necessary to enable the infant or toddler to benefit from the above early intervention services; and transportation and related costs that are necessary to enable an infant or toddler and the infant's or toddler's family to receive early intervention services.

(6) Are provided by qualified personnel, including: Special educators; speech and language pathologists and audiologists; occupational therapists; physical therapists; psychologists; social workers; nurses' nutritionists; family therapists; orientation and mobility specialists; and pediatricians and other physicians.

(7) To the maximum extent appropriate, are provided in natural environments, including the home and community settings in which infants and toddlers without disabilities participate.

(8) Are provided in conformity with an IFSP.

(n) *Evaluation*. Procedures used to determine whether an individual (birth through 21 inclusive) has a disability under this part and the nature and extent of the early intervention services and special education and related services that the individual needs. These procedures must be used selectively with an individual and may not include

basic tests administered to, or used with, all infants, toddlers, preschool children or children in a school, grade, class, program, or other grouping.

(o) *Family training, counseling, and home visits.* Services provided, as appropriate, by social workers, psychologists, and other qualified personnel to assist the family of an infant or toddler eligible for early intervention services in understanding the special needs of the child and enhancing the infant or toddler's development.

(p) *Free appropriate public education.* Special education and related services for children ages 3–21 years (inclusive) that:

(1) Are provided at no cost (except as provided in paragraph (xx)(1) of this section, to parents or child with a disability and are under the general supervision and direction of a Section 6 School Arrangement.

(2) Are provided at an appropriate preschool, elementary, or secondary school.

(3) Are provided in conformity with an Individualized Education Program.

(4) Meet the requirements of this part.

(q) *Frequency and intensity.* The number of days or sessions that a service will be provided, the length of time that the service is provided during each session, whether the service is provided during each session, and whether the service is provided on an individual or group basis.

(r) *Health services.* Services necessary to enable an infant or toddler, to benefit from the other early intervention services under this part during the time that the infant or toddler is receiving the other early intervention services. The term includes:

(1) Such services as clean intermittent catheterization, tracheostomy care, tube feeding, the changing of dressings or osteotomy collection bags, and other health services.

(2) Consultation by physicians with other service providers on the special health care needs of infants and toddlers with disabilities that will need to be addressed in the course of providing other early intervention services.

(3) The term does not include the following:

(i) Services that are surgical in nature or purely medical in nature.

(ii) Devices necessary to control or treat a medical condition.

(iii) Medical or health services that are routinely recommended for all infants or toddlers.

(s) *Hearing impairment.* A hearing loss, whether permanent or fluctuating, that adversely affects an infant's, toddler's, preschool child's, or child's educational performance.

(t) *High probability for developmental delay.* An infant or toddler with a medical condition that places him or her at substantial risk of evidencing a developmental delay before the age of 5 years without the benefit of early intervention services.

(u) *Include; such as.* Not all the possible items are covered, whether like or unlike the ones named.

(v) *Independent evaluation.* An evaluation conducted by a qualified examiner who is not employed by the DoD Section 6 Schools.

(w) *Individualized education program (IEP).* A written statement for a preschool child or child with a disability (ages 3–21 years inclusive) developed and implemented in accordance with this part (appendix B to this part).

(x) *Individualized family service plan (IFSP).* A written statement for an infant or toddler with a disability and his or her family that is based on a multidisciplinary assessment of the unique needs of the infant or toddler and concerns and the priorities of the family, and an identification of the services appropriate to meet such needs, concerns, and priorities.

(y) *Individuals with disabilities.* Infants and toddlers with disabilities, preschool children with disabilities, and children with disabilities, collectively, ages birth to 21 years (inclusive) who are either entitled to enroll in a Section 6 School Arrangement or would, but for their age, be so entitled.

(z) *Infants and toddlers with disabilities.* Individuals from birth to age 2 years (inclusive), who need early intervention services because they:

(1) Are experiencing a developmental delay, as measured by appropriate diagnostic instruments and procedures, of 25 percent (or 2 standard deviations below the mean), in one or more areas,

or 20 percent (or 1½ standard deviations below the mean), in two or more of the following areas of development: Cognitive, physical, communication, social or emotional, or adaptive development.

(2) Are at-risk for a developmental delay; i.e., have a diagnosed physical or mental condition that has a high probability of resulting in developmental delay; e.g., chromosomal disorders and genetic syndromes.

(aa) *Intercomponent*. Cooperation among the DoD Components and programs so that coordination and integration of services to individuals with disabilities and their families occur.

(bb) *Medically related services*. (1) Medical services (as defined in paragraph (cc) of this section) and those services provided under professional medical supervision that are required by a CSC either to determine a student's eligibility for special education or, if the student is eligible, the special education and related services required by the student under this part in accordance with 32 CFR part 345.

(2) Provision of either direct or indirect services listed on an IEP as necessary for the student to benefit from the educational curriculum. These services may include: Medical; social work; community health nursing; dietary; psychiatric diagnosis; evaluation, and follow up; occupational therapy; physical therapy; audiology; ophthalmology; and psychological testing and therapy.

(cc) *Medical services*. Those evaluative, diagnostic, and supervisory services provided by a licensed and credentialed physician to assist CSCs and to implement IEPs. Medical services include diagnosis, evaluation, and medical supervision of related services that by statute, regulation, or professional tradition are the responsibility of a licensed and credentialed physician.

(dd) *Mental retardation*. Significantly subaverage general intellectual functioning, existing concurrently with deficits in adaptive behavior and manifested during the developmental period, that adversely affects a preschool child's or child's educational performance.

(ee) *Multidisciplinary*. The involvement of two or more disciplines or professions in the provision of integrated and coordinated services, including evaluation and assessment activities, and development of an IFSP or IEP.

(ff) *Native language*. When used with reference to an individual of limited English proficiency, the language normally used by such individuals, or in the case of an infant, toddler, preschool child or child, the language normally used by the parent of the infant, toddler, preschool child or child.

(gg) *Natural environments*. Settings that are natural or normal for the infant or toddler's same age peers who have no disability.

(hh) *Non-section 6 school arrangement or facility*. A public or private school or other institution not operated in accordance with 32 CFR part 345. This term includes Section 6 special contractual arrangements.

(ii) *Nutrition services*. These services include:

(1) Conducting individual assessments in nutritional history and dietary intake; anthropometric, biochemical and clinical variables; feeding skills and feeding problems; and food habits and food preferences.

(2) Developing and monitoring appropriate plans to address the nutritional needs of infants and toddlers eligible for early intervention services.

(3) Making referrals to appropriate community resources to carry out nutrition goals.

(jj) *Orthopedic impairment*. A severe physical impairment that adversely affects a child's educational performance. The term includes congenital impairments (such as club foot and absence of some member), impairments caused by disease (such as poliomyelitis and bone tuberculosis), and impairments from other causes such as cerebral palsy, amputations, and fractures or burns causing contracture.

(kk) *Other health impairment*. Having an autistic condition that is manifested by severe communication and other developmental and educational problems; or having limited strength, vitality, or alertness due to chronic or acute health problems that adversely affect a child's educational performance as determined by the CSC, such

as: ADD, heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle cell anemia, hemophilia, epilepsy, lead poisoning, leukemia, and diabetes.

(ll) *Parent*. The biological father or mother of a child; a person who, by order of a court of competent jurisdiction, has been declared the father or mother of a child by adoption; the legal guardian of a child; or a person in whose household a child resides, provided that such person stands in loco parentis to that child and contributes at least one-half of the child's support.

(mm) *Personally identifiable information*. Information that includes the name of the infant, toddler, preschool child, child, parent or other family member; the home address of the infant, toddler, preschool child, child, parent or other family member; another personal identifier, such as the infant's, toddler's, preschool child's, child's, parent's or other family member's social security number; or a list of personal characteristics or other information that would make it possible to identify the infant, toddler, preschool child, child, parent, or other family member with reasonable certainty.

(nn) *Preschool children with disabilities*. These are students, ages 3–5 years (inclusive), who need special education services because they:

(1) Are experiencing developmental delays, as measured by appropriate diagnostic instruments and procedures in one or more of the following areas: Cognitive development, physical development, communication development, social or emotional development, and adaptive development; and

(2) Who, by reason thereof, need special education and related services.

(oo) *Primary referral source*. The DoD Components, including child care centers, pediatric clinics, and parents that suspect an infant, toddler, preschool child or child has a disability and bring that infant, toddler, preschool child or child to the attention of the Early Intervention Program or school CSC.

(pp) *Public awareness program*. Activities focusing on early identification of infants and toddlers with disabilities, including the preparation and dissemination by the military medical department to all primary referral sources of information materials for parents on the availability of early intervention services. Also includes procedures for determining the extent to which primary referral sources within the Department of Defense, especially within DoD medical treatment facilities, and physicians disseminate information on the availability of early intervention services to parents of infants or toddlers with disabilities.

(qq) *Qualified*. With respect to instructional personnel, a person who holds at a minimum a current and applicable teaching certificate from any of the 50 States, Puerto Rico, or the District of Columbia, or has met other pertinent requirements in the areas in which he or she is providing special education or related services not of a medical nature to children with disabilities. Providers of early intervention services and medically related services must meet standards established by the ASD(HA).

(rr) *Related services*. This includes transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology; psychological services; physical and occupational therapy; recreation, including therapeutic recreation and social work services; and medical and counseling services), including rehabilitation counseling (except that such medical services shall be for diagnostic and evaluative purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in preschool children or children. The following list of related services is not exhaustive and may include other developmental, corrective, or supportive services (such as clean intermittent catheterization), if they are required to assist a child with a disability to benefit from special education, as determined by a CSC.

(1) *Audiology*. This term includes:

(i) Audiological, diagnostic, and prescriptive services provided by audiologists who have a Certificate of Clinical Competence—Audiology (CCC-A) and pediatric experience. Audiology shall not include speech therapy.

(ii) Identification of children with hearing loss.

(iii) Determination of the range, nature, and degree of hearing loss, including referral for medical or other professional attention designed to ameliorate or correct that loss.

(iv) Provision of ameliorative and corrective activities, including language and auditory training, speech-reading (lip-reading), hearing evaluation, speech conservation, the recommendation of amplification devices, and other aural rehabilitation services.

(v) Counseling and guidance of children, parents, and service providers regarding hearing loss.

(vi) Determination of the child's need for group and individual amplification, selecting and fitting an appropriate aid, and evaluating the effectiveness of amplification.

(2) *Counseling services.* Services provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel to help a preschool child or child with a disability to benefit from special education.

(3) *Early identification.* The implementation of a formal plan for identifying a disability as early as possible in the individual's life.

(4) *Medical services.* Those evaluative, diagnostic, and supervisory services provided by a licensed and credentialed physician to assist CSCs in determining whether a child has a medically related disability condition that results in the child's need for special education and related services and to implement IEPs. Medical services include diagnosis, evaluation, and medical supervision of related services that, by statute, regulation, or professional tradition, are the responsibility of a licensed and credentialed physician.

(5) *Occupational therapy.* Therapy that provides developmental evaluations and treatment programs using selected tasks to restore, reinforce, or enhance functional performance. It addresses the quality and level of functions in areas such as behavior, motor coordination, spatial orientation; visual motor and sensory integration; and general activities of daily living. This therapy, which is conducted or supervised by a qualified occupational therapist, provides training and guidance in using special equipment to improve the patient's functioning in skills of daily living, work, and study.

(6) *Parent counseling and training.* Assisting parents in understanding the special needs of their preschool child or child and providing parents with information about child development and special education.

(7) *Physical therapy.* Therapy that provides evaluations and treatment programs using exercise, modalities, and adaptive equipment to restore, reinforce, or enhance motor performance. It focuses on the quality of movement, reflex development, range of motion, muscle strength, gait, and gross motor development, seeking to decrease abnormal movement and posture while facilitating normal movement and equilibrium reactions. The therapy, which is conducted by a qualified physical therapist, provides for measurement and training in the use of adaptive equipment and prosthetic and orthotic appliances. Therapy may be conducted by a qualified physical therapist assistant under the clinical supervision of a qualified physical therapist.

(8) *Psychological services.* Services listed in paragraphs (rr) (8) (i) through (rr) (8) (iv) of this section that are provided by a qualified psychologist:

(i) Administering psychological and educational tests and other assessment procedures.

(ii) Interpreting test and assessment results.

(iii) Obtaining, integrating, and interpreting information about a preschool child's or child's behavior and conditions relating to his or her learning.

(iv) Consulting with other staff members in planning school programs to meet the special needs of preschool children and children, as indicated by psychological tests, interviews, and behavioral evaluations.

(v) Planning and managing a program of psychological services, including psychological counseling for preschool children, children, and parents. For the purpose of these activities, a qualified psychologist is a psychologist licensed in a State of the United States who has a degree in clinical or school

psychology and additional pediatric training and/or experience.

(9) *Recreation*. This term includes:

(i) Assessment of leisure activities.

(ii) Therapeutic recreational activities.

(iii) Recreational programs in schools and community agencies.

(iv) Leisure education.

(10) *School health services*. Services provided, pursuant to an IEP, by a qualified school health nurse, or other qualified person, that are required for a preschool child or child with a disability to benefit from special education.

(11) *Social work counseling services in schools*. This term includes:

(i) Preparing a social and developmental history on a preschool child or child identified as having a disability.

(ii) Counseling the preschool child or child with a disability and his or her family on a group or individual basis, pursuant to an IEP.

(iii) Working with problems in a preschool child's or child's living situation (home, school, and community) that adversely affect his or her adjustment in school.

(iv) Using school and community resources to enable the preschool child or child to receive maximum benefit from his or her educational program.

(12) *Speech pathology*. This term includes the:

(i) Identification of preschool children and children with speech or language disorders.

(ii) Diagnosis and appraisal of specific speech or language disorders.

(iii) Referral for medical or other professional attention to correct or ameliorate speech or language disorders.

(iv) Provision of speech and language services for the correction, amelioration, and prevention of communicative disorders.

(v) Counseling and guidance of preschool children, children, parents, and teachers regarding speech and language disorders.

(13) *Transportation*. This term includes transporting the individual with a disability and, when necessary, an attendant or family member or reimbursing the cost of travel ((e.g., mileage, or travel by taxi, common carrier or other means) and related costs (e.g., tolls and parking expenses)) when such travel is necessary to enable a preschool child or child to receive special education (including related services) or an infant or toddler and the infant's or toddler's family to receive early intervention services. Transportation services include:

(i) Travel to and from school and between schools, including travel necessary to permit participation in educational and recreational activities and related services.

(ii) Travel from school to a medically related service site and return.

(iii) Travel in and around school buildings.

(iv) Travel to and from early intervention services.

(v) Specialized equipment (including special or adapted buses, lifts, and ramps) if required to provide special transportation for an individual with a disability.

(vi) If necessary, attendants assigned to vehicles transporting an individual with a disability when that individual requires assistance to be safely transported.

(ss) *Section 6 School Arrangement*. The schools (pre-kindergarten through grade 12) operated by the Department of Defense within the CONUS, Alaska, Hawaii, Puerto Rico, Wake Island, Guam, American Samoa, the Northern Mariana Islands, and the Virgin Islands. Section 6 School Arrangements are operated under DoD Directive 1342.21.[4]

(tt) *Separate facility*. A school or a portion of a school, regardless of whether it is used by the Section 6 School Arrangement, that is only attended by children with disabilities.

(uu) *Serious emotional disturbance*. The term includes:

(1) A condition that has been confirmed by clinical evaluation and diagnosis and that, over a long period of time and to a marked degree, adversely affects educational performance and that exhibits one or more of the following characteristics:

(i) An inability to learn that cannot be explained by intellectual, sensory, or health factors.

[4] See footnote 1 to § 80.1(c).

(ii) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.

(iii) Inappropriate types of behavior under normal circumstances.

(iv) A tendency to develop physical symptoms or fears associated with personal or school problems.

(v) A general, pervasive mood of unhappiness or depression.

(2) Schizophrenia, but does not include children who are socially maladjusted, unless it is determined that they are otherwise seriously emotionally disturbed.

(vv) *Service provider*. Any individual who provides services listed in an IEP or an IFSP.

(ww) *Social work services*. This term includes:

(1) Preparing a social or developmental history on an infant, toddler, preschool child or child with a disability.

(2) Counseling with the infant, toddler, preschool child or child and family in a group or individual capacity.

(3) Working with individuals with disabilities (0–21 inclusive) in the home school, and/or community environment to ameliorate those conditions that adversely affect development or educational performance.

(4) Using school and community resources to enable the child to receive maximum benefit from his or her educational program or for the infant, toddler, and family to receive maximum benefit from early intervention services.

(xx) *Special education*. Specially designed instruction, at no cost to the parent, to meet the unique needs of a preschool child or child with a disability, including instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings, and instruction in physical education. The term includes speech pathology or any other related service, if the service consists of specially designed instruction, at no cost to the parents, to meet the unique needs of a preschool child or child with a disability, and is considered ''special education'' rather than a ''related service.'' The term also includes vocational education if it consists of specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability.

(1) *At no cost*. With regard to a preschool child or child eligible to attend Section 6 School Arrangements, specially designed instruction and related services are provided without charge, but incidental fees that are normally charged to nondisabled students, or their parents, as a part of the regular educational program may be imposed.

(2) *Physical education*. The development of:

(i) Physical and motor fitness.

(ii) Fundamental motor skills and patterns.

(iii) Skills in aquatics, dance, and individual and group games and sports (including intramural and lifetime sports).

(iv) A program that includes special physical education, adapted physical education, movement education, and motor development.

(3) *Vocational education*. This term means organized educational programs that are directly related to the preparation of individuals for paid or unpaid employment, or for additional preparation for a career requiring other than a baccalaureate or advanced degree.

(yy) *Special instruction*. This term includes:

(1) Designing learning environments and activities that promote the infant's, toddler's, preschool child's or child's acquisition of skills in a variety of developmental areas, including cognitive processes and social interaction.

(2) Planning curriculum, including the planned interaction of personnel, materials, and time and space, that leads to achieving the outcomes in the infant's, toddler's, preschool child's or child's IEP or IFSP.

(3) Providing families with information, skills, and support related to enhancing the skill development of the infant, toddler, or preschool child or child.

(4) Working with the infant, toddler, preschool child, or child to enhance the infant's, toddler's, preschool child's or child's development and cognitive processes.

(zz) *Specific learning disability*. A disorder in one or more of the basic psychological processes involved in understanding or in using spoken or written

language that may manifest itself as an imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. The term includes such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. The term does not include preschool children or children who have learning problems that are primarily the result of visual, hearing, or motor disabilities, mental retardation, emotional disturbance, or environmental, cultural, or economic differences.

(aaa) *Speech and language impairments*. A communication disorder, such as stuttering, impaired articulation, voice impairment, or a disorder in the receptive or expressive areas of language that adversely affects a preschool child's or child's educational performance.

(bbb) *Superintendent*. The chief official of a Section 6 School Arrangement responsible for the implementation of this part on his or her installation.

(ccc) *Transition services*. A coordinated set of activities for a toddler that may be required to promote movement from early intervention, preschool, and other educational programs into different programs or educational settings. For a student 14 years of age and older, transition services are designed within an outcome-oriented process, which promotes movement from school to post-school activities, including post-secondary education, vocational training, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation. The coordinated set of activities shall be based upon the individual student's needs, taking into account the student's preferences and interests, and shall include instruction, community experiences, the development of employment and other post-school adult living objectives, and when appropriate, acquisition of daily living skills and functional vocational evaluation.

(ddd) *Traumatic brain injury*. An injury to the brain caused by an external physical force or by an internal occurrence, such as stroke or aneurysm, resulting in total or partial functional disability or psychosocial maladjustment that adversely affects educational performance. The term includes open or closed head injuries resulting in mild, moderate, or severe impairments in one or more areas, including cognition; language, memory; attention; reasoning; abstract thinking; judgment; problem solving; sensory; perceptual and motor abilities; psychosocial behavior; physical function; and information processing and speech. The term does not include brain injuries that are congenital or degenerative or brain injuries that are induced by birth trauma.

(eee) *Vision services*. Services necessary to ameliorate the effects of sensory impairment resulting from a loss of vision.

(fff) *Visual impairment*. A sensory impairment including blindness that, even with correction, adversely affects a preschool child's or child's educational performance. The term includes both partially seeing and blind preschool children and children.

### § 80.4 Policy.

It is DoD policy that:

(a) All individuals with disabilities ages 3 to 21 years receiving or entitled to receive educational instruction from the Section 6 School Arrangements shall be provided a free, appropriate education under this part in accordance with the IDEA as amended, 20 U.S.C. Chapter 33; Pub. L. 102–119, Section 23; and DoD Directive 1342.21.

(b) All individuals with disabilities ages birth through 2 years (inclusive) and their families are entitled to receive early intervention services under this part, provided that such infants and toddlers would be eligible to enroll in a Section 6 School Arrangement but for their age.

### § 80.5 Responsibilities.

(a) The Under Secretary of Defense for Personnel and Readiness (USD(P&R)) shall:

(1) Ensure that all infants and toddlers with disabilities (birth through 2 years inclusive) who but for their age would be eligible to attend the Section 6 Arrangement Schools, and their families are provided early intervention services in accordance with IDEA as

amended, (20 U.S.C., Chapter 33, Subchapter VIII.) and in conformity with the procedures in appendix A to this part.

(2) Ensure that preschool children and children with disabilities ages 3–21 years (inclusive) receiving educational instruction from Section 6 School Arrangements are provided a free appropriate public education and that the educational needs of such preschool children and children with disabilities are met using the procedures established by this part.

(3) Ensure that educational facilities and services provided by Section 6 School Arrangements for preschool children and children with disabilities are comparable to educational facilities and services for non-disabled students.

(4) Maintain records on special education and related services provided to children with disabilities, consistent with 32 CFR part 310.

(5) Ensure the provision of all necessary diagnostic services and special education and related services listed on an IEP (including those supplied by or under the supervision of physicians) to preschool children and children with disabilities who are enrolled in Section 6 School Arrangements. In fulfilling this responsibility, (USD(P&R)), or designee, may use intercomponent arrangements, or act through contracts with private parties, when funds are authorized and appropriated.

(6) Develop and implement a comprehensive system of personnel development, in accordance with 20 U.S.C. 1413–(a)(3), for all professional staff employed by a Section 6 School Arrangement. This system shall include:

(i) Inservice training of general and special educational instructional and support personnel,

(ii) Implementing innovative strategies and activities for the recruitment and retention of medically related service providers,

(iii) Detailed procedures to assure that all personnel necessary to carry out the purposes of this part are appropriately and adequately prepared and trained, and

(iv) Effective procedures for acquiring and disseminating to teachers and administrators of programs for children with disabilities significant information derived from educational research, demonstration, and similar projects, and

(v) Adopting, where appropriate, promising practices, materials, and technology.

(7) Provide technical assistance to professionals in Section 6 School Arrangements involved in, or responsible for, the education of preschool children or children with disabilities.

(8) Ensure that child-find activities are coordinated with other relevant components and are conducted to locate and identify every individual with disabilities.

(9) Issue guidance implementing this part.

(10) Undertake evaluation activities to ensure compliance with this part through monitoring, technical assistance, and program evaluation.

(11) Chair the DoD Coordinating Committee on Domestic Early Intervention, Special Education, and Related Services, which shall be composed of representatives of the Secretaries of the Military Departments, the Assistant Secretary of Defense for Health Affairs (ASD(HA)), the General Counsel of the Department of Defense (GC, DoD), and the Director, Section 6 Schools.

(12) Through the DoD Coordinating Committee on Demestic Early Intervention, Special Education, and Related Services, monitor the provision of special education and related services and early intervention services furnished under this part, and ensure that related services, special education, and early intervention services are properly coordinated.

(13) Ensure that appropriate personnel are trained to provide mediation services in cases that otherwise might result in due process proceedings under this part.

(14) Ensure that transition services from early intervention services to regular or special education and from special education to the world of work are provided.

(15) Ensure that all DoD programs that provide services to infants and toddlers and their families (e.g., child

care, medical care, recreation) are involved in a comprehensive intercomponent system for early intervention services.

(16) Ensure, whenever practicable, that planned construction not yet past the 35 percent design phase and new design begun after the date of this part of renovation of school or child care facilities includes consideration of the space required for the provision of medically related services and early intervention services.

(17) Shall establish the Domestic Advisory Panel that shall:

(i) Consist of members appointed by the USD (P&R) or Principal Deputy USD (P&R). Membership shall include at least one representative from each of the following groups:

(A) Individuals with disabilities.

(B) Parents, including minority parents of individuals with disabilities from various age groups.

(C) Section 6 School Arrangements special education teachers.

(D) Section 6 School Arrangements regular education teachers.

(E) Section 6 School Arrangements Superintendent office personnel.

(F) The Office of Director, Section 6 Schools.

(G) The Surgeons General of the Military Departments.

(H) The Family Support Programs of the Military Departments.

(I) Section 6 School Arrangements School Boards.

(J) Early Intervention service providers on installations with Section 6 School Arrangements.

(K) Other appropriate personnel.

(ii) Meet as often as necessary.

(iii) Perform the following duties:

(A) Review information and provide advice to ASD (P&R) regarding improvements in services provided to individuals with disabilities in Section 6 Schools and early intervention programs.

(B) Receive and consider the views of various parent, student, and professional groups, and individuals with disabilities.

(C) When necessary, establish committees for short-term purposes composed of representatives from parent, student, family and other professional groups, and individuals with disabilities.

(D) Review the findings of fact and decision of each impartial due process hearing conducted pursuant to this part.

(E) Assist in developing and reporting such information and evaluations as may aid Section 6 Schools and the Military Departments in the performance of duties under the part.

(F) Make recommendations, based on program and operational information, for changes in the budget, organization, and general management of the special education program, and in policy and procedure.

(G) Comment publicly on rules or standards regarding the education of individuals with disabilities.

(H) Assist in developing recommendations regarding the transition of toddlers with disabilities to preschool services.

(b) The Assistant Secretary of Defense for Health Affairs in consultation with the USD(P&R), the GC, DoD, and the Secretaries of the Military Departments, shall:

(1) Establish staffing and personnel standards for personnel who provide early intervention services and medically related services.

(2) Develop and implement a comprehensive system of personnel development in accordance with 20 U.S.C. 1413(a)(3), including the training of professionals, paraprofessionals and primary referral sources, regarding the basic components of early intervention services and medically related services. Such a system may include:

(i) Implementing innovative strategies and activities for the recruitment and retention of early intervention service providers.

(ii) Ensuring that early intervention service providers and medically related service providers are fully and appropriately qualified to provide early intervention services and medically related services, respectively.

(iii) Training personnel to work in the military environment.

(iv) Training personnel to coordinate transition services for infants and toddlers with disabilities from an early intervention program to a preschool program.

(3) Develop and implement a system for compiling data on the numbers of infants and toddlers with disabilities and their families in need of appropriate early intervention services, the numbers of such infants and toddlers and their families served, the types of services, and other information required to evaluate the implementation of early intervention programs.

(4) Resolve disputes among the DoD Components arising under appendix A of this part.

(c) *Secretaries of the Military Departments* shall:

(1) Provide quality assurance for medically related services in accordance with personnel standards and staffing standards under DoD Directive 6025.13[5] developed by the Assistant Secretary of Defense for Health Affairs (ASD(HA)).

(2) Plan, develop, and implement a comprehensive, coordinated, intercomponent, community-based system of early intervention services for infants and toddlers with disabilities (birth through 2 inclusive) and their families who are living on an installation with a Section 6 School Arrangement, or who but for their age, would be entitled to enroll in a Section 6 School Arrangement, using the procedures established by this part and guidelines from the ASD(HA) on staffing and personnel standards.

(3) Undertake activities to ensure compliance with this part through technical assistance, program evaluation, and monitoring.

(d) The *Director, Defense Office of Hearings and Appeals (DOHA)* shall ensure the provision of impartial due process hearings under appendix C of this part.

## § 80.6 Procedures.

(a) Procedures for the provision of early intervention services for infants and toddlers with disabilities and their families are in appendix A to this part. Provision of early intervention services includes establishing a system of coordinated, comprehensive, multidisciplinary, intercomponent services providing appropriate early intervention services to all eligible infants and toddlers with disabilities and their families.

(b) Procedures for special educational programs (including related services) for preschool children and children with disabilities (3–21 years inclusive) are in appendix B to this part.

(c) Procedures for adjudicative requirements required by Pub. L. 101–476, as amended, and Pub. L. 102–119 are in appendix C to this part. These procedures establish adjudicative requirements whereby the parents of an infant, toddler, preschool child or child with a disability and the military department concerned or Section 6 School System are afforded an impartial due process hearing on early intervention services or on the identification, evaluation, and educational placement of, and the free appropriate public education provided to, such infant, toddler, preschool child or child, as the case may be.

## APPENDIX A TO PART 80—PROCEDURES FOR THE PROVISION OF EARLY INTERVENTION SERVICES FOR INFANTS AND TODDLERS WITH DISABILITIES, AGES 0–2 YEARS (INCLUSIVE), AND THEIR FAMILIES

### *A. Requirements For A System of Early Intervention Services*

1. A system of coordinated, comprehensive, multidisciplinary, and intercomponent programs providing appropriate early intervention services to all infants and toddlers with disabilities and their families shall include the following minimum components:

a. A timely, comprehensive, multidisciplinary evaluation of the functioning of each infant and toddler with a disability and the priorities and concerns of the infant's or toddler's family to assist in the development of the infant or toddler with a disability.

b. A mechanism to develop, for each infant and toddler with a disability, an IFSP and early intervention services coordination, in accordance with such service plan.

c. A comprehensive child-find system, coordinated with the appropriate Section 6 School Arrangement, including a system for making referrals to service providers that includes timelines and provides for participation by primary referral sources, such as the CDC and the pediatric clinic.

d. A public awareness program including information on early identification of infants and toddlers with disabilities and the availability of resources in the community to address and remediate these disabilities.

[5] See footnote 1 to § 80.1(c).

e. A central directory that includes a description of the early intervention services and other relevant resources available in the community.

*B. Each Military Medical Department Shall Develop and Implement a System To Provide for:*

1. The administration and supervision of early intervention programs and services, including the identification and coordination of all available resources.

2. The development of procedures to ensure that services are provided to infants and toddlers with disabilities and their families in a timely manner.

3. The execution of agreements with other DoD components necessary for the implementation of this appendix. Such agreements must be coordinated with the ASD(HA) and the GC, DoD, in consultation with the USD(P&R).

4. The collection and reporting of data required by ASD(HA).

5. A multidisciplinary assessment of the unique strengths and needs of the infant or toddler and the identification of services appropriate to meet such needs.

6. A family-directed assessment of the resources, priorities, and concerns of the family and the identification of the supports and services necessary to enhance the family's capacity to meet the developmental needs of its infant or toddler with a disability.

*C. Each Military Medical Department Shall Develop and Implement a Program To Ensure That an IFSP Is Developed for Each Infant or Toddler With a Disability and the Infant's or Toddler's Family According to the Following Procedures:*

1. The IFSP shall be evaluated once a year and the family shall be provided a review of the plan at 6-month intervals (or more often where appropriate), based on the needs of the infant or toddler and family.

2. Each initial meeting and each annual meeting to evaluate the IFSP must include the following participants:

a. The parent or parents of the infant or toddler.

b. Other family members, as requested by a parent, if feasible to do so.

c. An advocate, if his or her participation is requested by a parent.

d. The Early Intervention Program Services Coordinator who has been working with the family since the initial referral of the infant or toddler or who has been designated as responsible for the implementation of the IFSP.

e. A person or persons directly involved in conducting the evaluation and assessments.

f. Persons who will be providing services to the infant, toddler, or family, as appropriate.

g. If a person or persons listed in paragraph C.2 of this section is unable to attend a meeting, arrangements must be made for involvement through other means, including:

(1) Participating in a telephone call.

(2) Having a knowledgeable authorized representative attend the meeting.

(3) Making pertinent records available at the meeting.

3. The IFSP shall be developed within a reasonable time after the assessment. With the parent's consent, early intervention services may start before the completion of such an assessment under an IFSP.

4. The IFSP shall be in writing and contain:

a. A statement of the infant's or toddler's present levels of physical development, cognitive development, communication development, social or emotional development, and adaptive development, based on acceptable objective criteria.

b. A statement of the family's resources, priorities, and concerns for enhancing the development of the family's infant or toddler with a disability.

c. A statement of the major outcomes expected to be achieved for the infant or toddler and the family, and the criteria, procedures, and timelines used to determine the degree to which progress toward achieving the outcomes is being made and whether modifications or revisions of the outcomes or services are necessary.

d. A statement of the specific early intervention services necessary to meet the unique needs of the infant or toddler and the family, including the frequency, intensity, and the method of delivering services.

e. A statement of the natural environments in which early intervention services shall be provided.

f. The projected dates for initiation of services and the anticipated duration of such services.

g. The name of the Early Intervention Program Service Coordinator.

h. The steps to be taken supporting the transition of the toddler with a disability to preschool services or other services to the extent such services are considered appropriate.

5. The contents of the IFSP shall be fully explained to the parents by the Early Intervention Program Service Coordinator, and informed written consent from such parents shall be obtained before the provision of early intervention services described in such plan. If the parents do not provide such consent with respect to a particular early intervention service, then the early intervention services to which such consent is obtained shall be provided.

*D. Procedural Safeguards for the Early Intervention Program*

1. The procedural safeguards include:

a. The timely administrative resolution of complaints by the parent(s), including hearing procedures (appendix C to this part).

b. The right to protection of personally identifiable information under 32 CFR part 310.

c. The right of the parent(s) to determine whether they, their infant or toddler, or other family members will accept or decline any early intervention service without jeopardizing the delivery of other early intervention services to which such consent is obtained.

d. The opportunity for the parent(s) to examine records on assessment, screening, eligibility determinations, and the development and implementation of the IFSP.

e. Written prior notice to the parent(s) of the infant or toddler with a disability whenever the Military Department concerned proposes to initiate or change or refuses to initiate or change the identification, evaluation, placement, or the provision of appropriate early intervention services to the infant and toddler with a disability.

f. Procedures designed to ensure that the notice required in paragraph D.1.e. of this appendix fully informs the parents in the parents' native language, unless it clearly is not feasible to do so.

g. During the pending of any proceeding under appendix C to this part, unless the Military Department concerned and the parent(s) otherwise agree, the infant or toddler shall continue to receive the early intervention services currently being provided, or, if applying for initial services, shall receive the services not in dispute.

## APPENDIX B TO PART 80—PROCEDURES FOR SPECIAL EDUCATIONAL PROGRAMS (INCLUDING RELATED SERVICES) FOR PRESCHOOL CHILDREN AND CHILDREN WITH DISABILITIES (3–21 YEARS INCLUSIVE)

### *A. Identification and Screening*

1. Each Section 6 School Arrangement shall locate, identify, and, with the consent of a parent of each preschool child or child, evaluate all preschool children or children who are receiving or are entitled to receive an education from Section 6 School Arrangements and who may need special education and/or related services.

2. Each Section 6 School Arrangement shall:

a. Provide screening, through the review of incoming records and the use of basic skills tests in reading, language arts, and mathematics, to determine whether a preschool child or child may be in need of special education and related services.

b. Analyze school health data for those preschool children and children who demonstrate possible disabling conditions. Such data shall include:

(1) Results of formal hearing, vision, speech, and language tests.

(2) Reports from medical practitioners.

(3) Reports from other appropriate professional health personnel as may be necessary, under this part, to aid in identifying possible disabling conditions.

c. Analyze other pertinent information, including suspensions, exclusions, other disciplinary actions, and withdrawals, compiled and maintained by Section 6 School Arrangements that may aid in identifying possible disabling conditions.

3. Each Section 6 School Arrangement, in cooperation with cognizant authorities at the installation on which the Section 6 School Arrangement is located, shall conduct ongoing child-find activities that are designed to identify all infants, toddlers, preschool children, and children with possible disabling conditions who reside on the installation or who otherwise either are entitled, or will be entitled, to receive services under this part.

a. If an element of the Section 6 School Arrangement, a qualified professional authorized to provide related services, a parent, or other individual believes that an infant, toddler, preschool child or child has a possible disabling condition, that individual shall be referred to the appropriate CSC or early intervention coordinator.

b. A Section 6 School Arrangement CSC shall work in cooperation with the Military Departments in identifying infants, toddlers, preschool children and children with disabilities (birth to 21 years inclusive).

### *B. Evaluation Procedures*

1. Each CSC will provide a full and comprehensive diagnostic evaluation of special educational, and related service needs to any preschool child or child who is receiving, or entitled to receive, educational instruction from a Section 6 School Arrangement, operated by the Department of Defense under Directive 1342.21, and who is referred to a CSC for a possible disability. The evaluation will be conducted before any action is taken on the development of the IEP or placement in a special education program.

2. Assessment materials, evaluation procedures, and tests shall be:

a. Racially and culturally nondiscriminatory.

b. Administered in the native language or mode of communication of the preschool child or child unless it clearly is not feasible to do so.

c. Validated for the specific purpose for which they are used or intended to be used.

d. Administered by qualified personnel, such as a special educator, school psychologist, speech therapist, or a reading specialist, in conformity with the instructions

provided by the producers of the testing device.

e. Administered in a manner so that no single procedure is the sole criterion for determining eligibility and an appropriate educational program for a disabled preschool child or child.

f. selected to assess specific areas of educational strengths and needs, not merely to provide a single general intelligence quotient.

3. The evaluation shall be conducted by a multidisciplinary team and shall include a teacher or other specialist with knowledge in the areas of the suspected disability.

4. The preschool child or child shall be evaluated in all areas related to the suspected disability. When necessary, the evaluation shall include:

a. The current level of academic functioning, to include general intelligence.

b. Visual and auditory acuity.

c. Social and emotional status, to include social functioning within the educational environment and within the family.

d. Current physical status, including perceptual and motor abilities.

e. Vocational transitional assessment (for children ages 14–21 years (inclusive)).

5. The appropriate CSC shall met as soon as possible after the preschool child's or child's formal evaluation to determine whether he or she is in need of special education and related services. The preschool child's or child's parents shall be invited to the meeting and afforded the opportunity to participate in such a meeting.

6. The school CSC shall issue a written report that contains:

a. A review of the formal and informal diagnostic evaluation findings of the multidisciplinary team.

b. A summary of information from the parents, the preschool child or child, or other persons having significant previous contact with the preschool child or child.

c. A description of the preschool child's or child's current academic progress, including a statement of his or her learning style.

d. A description of the nature and severity of the preschool child's or child's disability(ies).

7. A preschool child or child with a disability shall receive an individual comprehensive diagnostic evaluation every 3 years, or more frequently if conditions warrant, or if the preschool child's or child's parent, teacher, or related service provider requests an evaluation. The scope and nature of the reevaluation shall be determined individually, based upon the preschool child's or child's performance, behavior, and needs when the reevaluation is conducted, and be used to update or revise the IEP.

*C. Individualized Education Program (IEP)*

1. Section 6 School Arrangements shall ensure that an IEP is developed and implemented for each preschool child or child with a disability enrolled in a Section 6 School Arrangement or placed on another institution by a Section 6 School Arrangement CSC under this part.

2. Each IEP shall include:

a. A statement of the preschool child's or child's present levels of educational performance.

b. A statement of annual goals, including short-term instructional objectives.

c. A statement of the specific special educational services and related services to be provided to the preschool child or child (including the frequency, number of times per week/month and intensity, amount of times each day) and the extent to which the preschool child or child may be able to participate in regular educational programs.

d. The projected anticipated date for the initiation and the anticipated length of such activities and services.

e. Appropriate objective criteria and evaluation procedures and schedules for determining, on an annual basis, whether educational goals and objectives are being achieved.

f. A statement of the needed transition services for the child beginning no later than age 16 and annually thereafter (and when determined appropriate for the child, beginning at age 14 or younger) including, when appropriate, a statement of DoD Component responsibilities before the child leaves the school setting.

3. Each preschool child or child with a disability shall be provided the opportunity to participate, with adaptations when appropriate, in the regular physical education program available to students without disabilities unless:

a. The preschool child or child with a disability is enrolled full-time in a separate facility; or

b. The preschool child or child with a disability needs specially designed physical education, as prescribed in his or her IEP.

4. If specially designed physical education services are prescribed in the IEP of a preschool child or child with a disability, the Section 6 School Arrangement shall provide such education directly, or shall make arrangements for the services to be provided through a non-Section 6 School Arrangement or another facility.

5. Section 6 School Arrangements shall ensure that a preschool child or child with a disability, enrolled by a CSC in a separate facility, receives appropriate, physical education in compliance with this part.

6. The IEP for each preschool child or child with a disability shall be developed and reviewed at least annually in meetings that include the following participants:

a. The designated representative of the Section 6 School Arrangement, who is qualified to supervise the provision of special education. Such representative may not be the preschool child's or child's special education teacher.

b. One, or more, of the preschool child's or child's regular education teachers, if appropriate.

c. The preschool child's or child's special education teacher or teachers.

d. One, or both, of the preschool child's or child's parents.

e. The child, if appropriate.

f. For a preschool child or child with a disability who has been evaluated, a member of the evaluation team or another person knowledgeable about the evaluation procedures used with that student and familiar with the results of the evaluation.

g. Other individuals, at the reasonable discretion of the parent(s) or the school.

7. Section 6 School Arrangements shall:

2a. Ensure that an IEP meeting is held, normally within 10 working days, following a determination by the appropriate CSC that the preschool child or child is eligible to receive special education and/or related services.

b. Address the needs of a preschool child or child with a current IEP who transfers from a school operated by the DoD in accordance with 32 CFR part[1] or from a Section 6 School Arrangement to a Section 6 School Arrangement, by:

(1)Implementing the current IEP; or

(2) Revising the current IEP with the consent of a parent; or

(3) Initiating, with the consent of a parent, an evaluation of the preschool child or child, while continuing to provide appropriate services through a current IEP; or

(4) Initiating, with the consent of the parent, an evaluation of the preschool child or child without the provision of the services in the current IEP; or

(5) Initiating mediation, and if necessary, due process procedures.

c. Afford the preschool child's or child's parent(s) the opportunity to participate in every IEP or CSC meeting about their preschool child or child by:

(1) Providing the parent(s) adequate written notice of the purpose, time, and place of the meeting.

(2) Attempting to schedule the meeting at a mutually agreeable time and place.

[1] Copies of DoD Directive 1342.6 may be obtained, at cost, from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161.

8. If neither parent can attend the meeting, other methods to promote participation by a parent, such as telephone conservations and letters, shall be used.

9. A meeting may be conducted without a parent in attendance if the Section 6 School Arrangement is unable to secure the attendance of the parent. In this case, the Section 6 School Arrangement must have written records of its attempts to arrange a mutually acceptable time and place.

10. If the parent(s) attends the IEP meeting, the Section 6 School Arrangement shall take necessary action to ensure that at least one of the parents understands the proceedings at the meeting, including providing an interpreter for a parent who is deaf or whose native language is other than English.

11. The section 6 School Arrangement shall give a parent a copy of the preschool child's IEP.

12. Section 6 School Arrangements shall provide special education and related services, in accordance with an IEP, provided that the Department of Defense, its constituent elements, and its personnel, are not accountable if a preschool child or child does not achieve the growth projected in the IEP.

13. Section 6 School Arrangements shall ensure that an IEP is developed and implemented for each preschool child or child with a disability whom the CSC places in a non-Section 6 School or other facility.

*D. Placement Procedures and Least Restrictive Environment*

1. The placement of a preschool child or child in any special education program by the Section 6 School Arrangement shall be made only under an IEP and after a determination has been made that such student has a disability and needs special education and/or related services.

2. The Section 6 School Arrangement CSC shall identify the special education and related services to be provided under the IEP.

3. A placement decision may not be implemented without the consent of a parent of the preschool child or child, except as otherwise provided in accordance with this part.

4. The placement decision must be designed to educate a preschool child or child with a disability in the least restrictive environment so that such student is educated to the maximum extent appropriate with students who do not have disabilities. Special classes, separate schooling, or other removal of preschool children or children with disabilities from the regular educational environment shall occur only when the nature or severity of the disability is such that the preschool child or child with disabilities cannot be educated satisfactorily in the regular classes with the use of supplementary aids and services, including related services.

5. Each educational placement for a preschool child or child with a disability shall be:

a. Determined at least annually by the appropriate CSC.

b. Based on the preschool child or child's IEP.

c. Located as close as possible to the residence of the parent who is sponsoring the preschool child or child for attendance in a Section 6 School Arrangement.

d. Designed to assign the preschool child or child to the school such student would attend if he or she were not a student with a disability, unless the IEP requires some other arrangement.

e. Predicated on the consideration of all factors affecting the preschool child's or child's well-being, including the effects of separation from parent(s).

f. To the maximum extent appropriate, designed so that the preschool child or child participates in school activities, including meals and recess periods, with students who do not have a disability.

*E. Children With Disabilities Placed in Non-Section 6 School Arrangements*

1. Before a Section 6 School Arrangement CSC, with the concurrence of the Section 6 School Arrangement Superintendent concerned, places a preschool child or child with a disability in a non-Section 6 School or facility, the Section 6 School CSC shall conduct a meeting in accordance with this part to initiate the development of an IEP for such student.

2. Preschool children and children with disabilities eligible to receive instruction in Section 6 School Arrangements who are referred to another school or facility by the Section 6 School CSC have all the rights of students with disabilities who are attending the Section 6 School Arrangement.

a. If a Section 6 School Arrangement CSC places a preschool child or child with a disability in a non-Section 6 School Arrangement or facility as a means of providing special education and related services, the program of that facility, including nonmedical care, room, and board, as set forth in the student's IEP, must be at no cost to the student or the student's parents.

b. A Section 6 School Arrangement CSC may place a preschool child or child with a disability in a non-Section 6 School Arrangement or facility only if required by an IEP. An IEP for a student placed in a non-Section 6 School is not valid until signed by the Section 6 School Arrangement Superintendent, or designee, who must have participated in the IEP meeting. The IEP shall include determinations that:

(1) The Section 6 School Arrangement does not currently have, and cannot reasonably create, an educational program appropriate to meet the needs of the student with a disability.

(2) The non-Section 6 School Arrangement or facility and its educational program conform to this part.

3. A Section 6 School Arrangement is not responsible for the cost of a non-Section 6 School Arrangement placement when placement is made unilaterally, without the approval of the cognizant CSC and the Superintendent, unless it is directed by a hearing officer under appendix C of this part or a court of competent jurisdiction.

*F. Procedural Safeguards*

1. Parents shall be given written notice before the Section 6 School Arrangement CSC proposes to initiate or change, or refuses to initiate or change, either the identification, evaluation, or educational placement of a preschool child or child receiving, or entitled to receive, special education and related services from a Section 6 School Arrangement, or the provision of a free appropriate public education by the Section 6 School Arrangement to the child. The notice shall fully inform a parent of the procedural rights conferred by this part and shall be given in the parent's native language, unless it clearly is not feasible to do so.

2. The consent of a parent of a preschool child or child with a disability or suspected of having a disability shall be obtained before any:

a. Initiation of formal evaluation procedures;

b. Initial special educational placement; or

c. Change in educational placement.

3. If a parent refuses consent to any formal evaluation or initial placement in a special education program, the Section 6 School Arrangement Superintendent may initiate an impartial due process hearing, as provided in appendix C of this part to show why an evaluation or placement in a special education program should occur without such consent. If the hearing officer sustains the Section 6 School Arrangement CSC position in the impartial due process hearing, the appropriate CSC may evaluate or provide special education and related services to the preschool child or child without the consent of a parent, subject to the parent's due process rights.

4. A parent is entitled to an independent evaluation of his or her preschool child or child at the Section 6 School Arrangement's expense, if the parent disagrees with the findings of an evaluation of the student conducted by the school and the parent successfully challenges the evaluation in an impartial due process hearing.

a. If an independent evaluation is provided at the expense of a Section 6 School Arrangement, it must meet the following criteria:

(1) Conform to the requirements of this part.

(2) Be conducted, when possible, within the area where the preschool child or child resides.

(3) Meet applicable DoD standards governing persons qualified to conduct an evaluation.

b. If the final decision rendered in an impartial due process hearing sustains the evaluation of the Section 6 School Arrangement CSC, the parent has the right to an independent evaluation, but not at the expense of the Department of Defense or any DoD Component.

5. The parents of a preschool child or child with a disability shall be afforded an opportunity to inspect and review all relevant educational records concerning the identification, evaluation, and educational placement of such student, and the provision of a free appropriate public education to him or her.

6. Upon complaint presented in a written petition, the parent of a preschool child or child with a disability or the Section 6 School System shall have the opportunity for an impartial due process hearing provided by the Department of Defense as prescribed by appendix C of this part.

7. During the pendency of any impartial due process hearing or judicial proceeding on the identification, evaluation, or educational placement of a preschool child or child with a disability receiving an education from a Section 6 School Arrangement or the provision of a free appropriate public education to such a student, unless the Section 6 School Arrangement and a parent of the student agree otherwise, the student shall remain in his or her present educational placement, subject to the disciplinary procedures prescribed in this part.

8. If a preschool child or child with a disability, without a current IEP, who is entitled to receive educational instruction from a Section 6 School Arrangement is applying for initial admission to a Section 6 School Arrangement, that student shall enter that Arrangement on the same basis as a student without a disability.

9. The parent of a preschool child or child with a disability or a Section 6 School Arrangement employee may file a written communication with the Section 6 School Arrangement Superintendent about possible general violations of this part or Pub. L. 101–476, as amended. Such communications will not be treated as complaints under appendix C of this part.

*G. Disciplinary Procedures*

1. All regular disciplinary rules and procedures applicable to students receiving educational instruction in the Section 6 School Arrangements shall apply to preschool children and children with disabilities who violate school rules and regulations or disrupt regular classroom activities, subject to the provisions of this section.

2. The appropriate CSC shall determine whether the conduct of a preschool child or child with a disability is the result of that disability before the long-term suspension (10 consecutive or cumulative days during the school year) or the expulsion of that student.

3. If the CSC determines that the conduct of such a preschool child or child with a disability results in whole or part from his or her disability, that student may not be subject to any regular disciplinary rules and procedures; and

a. The student's parent shall be notified in accordance with this part of the right to have an IEP meeting before any change in the student's special education placement. (A termination of the student's education for more than 10 days, either cumulative or consecutive, constitutes a change of placement.)

b. The Section 6 School Arrangement CSC or another authorized school official shall ensure that an IEP meeting is held to determine the appropriate educational placement for the student in consideration of his or her conduct before the tenth cumulative day of the student's suspension or an expulsion.

4. A preschool child or child with a disability shall neither be suspended for more than 10 days nor expelled, and his or her educational placement shall not otherwise be changed for disciplinary reasons, unless in accordance with this section, except that:

a. This section shall be applicable only to preschool children and children determined to have a disability under this part.

b. Nothing contained herein shall prevent the emergency suspension of any preschool child or child with a disability who endangers or reasonable appears to endanger the health, welfare, or safety of himself or herself, or any other student, teacher, or school personnel, provided that:

(1) The appropriate Section 6 School Arrangement CSC shall immediately meet to determine whether the preschool child's or child's conduct results from his or her disability and what change in special education placement is appropriate for that student.

(2) The child's parent(s) shall be notified immediately of the student's suspension and of the time, purpose, and location of the CSC meeting and their right to attend the meeting.

(3) A component is included in the IEP that addresses the behavioral needs of the student.

(4) The suspension of the student is only effective for the duration of the emergency.

## APPENDIX C TO PART 80—HEARING PROCEDURES

### *A. Purpose*

This appendix establishes adjudicative requirements whereby the parents of infants, toddlers, preschool children, and children who are covered by this part and, as the case may be, the cognizant Military Department or Section 6 School System are afforded impartial due process hearings and administrative appeals on the early intervention services or identification, evaluation, and educational placement of, and the free appropriate public education provided to, such children by the Department of Defense, in accordance with Pub. L. 101–476, as amended, 20 U.S.C. sec. 1401 et seq.; Pub. L. 81–874, sec. 6, as amended, 20 U.S.C. sec. 241; Pub. L. 97–35, sec. 505(c), 20 U.S.C. sec. 241 note; and Pub. L. 102–119, sec. 23, 20 U.S.C. sec. 241(a).

### *B. Administration*

1. The Directorate for the Defense Office of Hearings and Appeals (DOHA) shall have administrative responsibility for the proceedings authorized by this appendix.

2. This appendix shall be administered to ensure that the findings, judgments, and determinations made are prompt, fair, and impartial.

3. Impartial hearing officers, who shall be DOHA Administrative Judges, shall be appointed by the Director, DOHA, and shall be attorneys who are independent of the Section 6 School System or the Military Department concerned in proceedings conducted under this appendix. A parent shall have the right to be represented in such proceedings, at no cost to the government, by counsel and by persons with special knowledge or training with respect to the problems of individuals with disabilities. DOHA Department Counsel normally shall appear and represent the Section 6 School System in proceedings conducted under this appendix, when such proceedings involve a preschool child or child. When an infant or toddler is involved, the Military Department responsible under this part for delivering early intervention services shall either provide its own counsel or request counsel from DOHA.

### *C. Mediation*

1. Mediation can be initiated by either a parent or, as appropriate, the Military Department concerned or the Section 6 School System to resolve informally a disagreement on the early intervention services for an infant or toddler or the identification, evaluation, educational placement of, or the free appropriate public education provided to, a preschool child or child. The cognizant Military Department, rather than the Section 6 School System, shall participate in mediation involving early intervention services. Mediation shall consist of, but not be limited to, an informal discussion of the differences between the parties in an effort to resolve those differences. The parents and the appropriate school or Military Department officials may attend mediation sessions.

2. Mediation must be conducted, attempted, or refused in writing by a parent of the infant, toddler, preschool child or child whose early intervention or special education services (including related services) are at issue before a request for, or initiation of, a hearing authorized by this appendix. Any request by the Section 6 School System or Military Department for a hearing under this appendix shall state how this requirement has been satisfied. No stigma may be attached to the refusal of a parent to mediate or to an unsuccessful attempt to mediate.

### *D. Practice and Procedure*

#### 1. Hearing

a. Should mediation be refused or otherwise fail to resolve the issues on the provision of early intervention services or a free, appropriate public education to a disabled infant, toddler, preschool child or child or the identification, evaluation, or educational placement of such an individual, the parent or either the school principal, on behalf of the Section 6 School System, or the military medical treatment facility commander, on behalf of the Military Department having jurisdiction over the infant or toddler, may request and shall receive a hearing before a hearing officer to resolve the matter. The parents of an infant, toddler, preschool child or child and the Section 6 School System or Military Department concerned shall be the only parties to a hearing conducted under this appendix.

b. The party seeking the hearing shall submit a written request, in the form of a petition, setting forth the facts, issues, and proposed relief, to the Director, DOHA. The petitioner shall deliver a copy of the petition to the opposing party (that is, the parent or the school principal, on behalf of the Section 6 School System, or the military medical treatment facility commander, on behalf of the Military Department), either in person or by first-class mail, postage prepaid. Delivery is complete upon mailing. When the Section 6 School System or Military Department petitions for a hearing, it shall inform the other parties of the deadline for filing an answer under paragraph D.1.c. of this appendix, and shall provide the other parties with a copy of this part.

c. An opposing party shall submit an answer to the petition to the Director, DOHA,

with a copy to the petitioner, within 15 calendar days of receipt of the petition. The answer shall be as full and complete as possible, addressing the issues, facts, and proposed relief. The submission of the answer is complete upon mailing.

d. Within 10 calendar days after receiving the petition, the Director, DOHA, shall assign a hearing officer, who then shall have jurisdiction over the resulting proceedings. The Director, DOHA, shall forward all pleadings to the hearing officer.

e. The questions for adjudication shall be based on the petition and the answer, provided that a party may amend a pleading if the amendment is filed with the hearing officer and is received by the other parties at least 5 calendar days before the hearing.

f. The Director, DOHA, shall arrange for the time and place of the hearing, and shall provide administrative support. Such arrangements shall be reasonably convenient to the parties.

g. The purpose of a hearing is to establish the relevant facts necessary for the hearing officer to reach a fair and impartial determination of the case. Oral and documentary evidence that is relevant and material may be received. The technical rules of evidence shall be relaxed to permit the development of a full evidentiary record, with the Federal Rules of Evidence (28 U.S.C.) serving as a guide.

h. The hearing officer shall be the presiding officer, with judicial powers to manage the proceeding and conduct the hearing. Those powers shall include the authority to order an independent evaluation of the child at the expense of the Section 6 School System or Military Department concerned and to call and question witnesses.

i. Those normally authorized to attend a hearing shall be the parents of the individual with disabilities, the counsel and personal representative of the parents, the counsel and professional employees of the Section 6 School System or Military Department concerned, the hearing officer, and a person qualified to transcribe or record the proceedings. The hearing officer may permit other persons to attend the hearing, consistent with the privacy interests of the parents and the individual with disabilities, provided the parents have the right to an open hearing upon waiving in writing their privacy rights and those of the individual with disabilities.

j. A verbatim transcription of the hearing shall be made in written or electronic form and shall become a permanent part of the record. A copy of the written transcript or electronic record of the hearing shall be made available to a parent upon request and without cost. The hearing officer may allow corrections to the written transcript or electronic recording for the purpose of conforming it to actual testimony after adequate notice of such changes is given to all parties.

k. The hearing officer's decision of the case shall be based on the record, which shall include the petition, the answer, the written transcript or the electronic recording of the hearing, exhibits admitted into evidence, pleadings or correspondence properly filed and served on all parties, and such other matters as the hearing officer may include in the record, provided that such matter is made available to all parties before the record is closed under paragraph D.1.m. of this appendix.

l. The hearing officer shall make a full and complete record of a case presented for adjudication.

m. The hearing officer shall decide when the record in a case is closed.

n. The hearing officer shall issue findings of fact and render a decision in a case not later than 50 calendar days after being assigned to the case, unless a discovery request under section D.2. of this appendix is pending.

2. Discovery

a. Full and complete discovery shall be available to parties to the proceeding, with the Federal Rules of Civil Procedure (28 U.S.C.) serving as a guide.

b. If voluntary discovery cannot be accomplished, a party seeking discovery may file a motion to accomplish discovery, provided such motion is founded on the relevance and materiality of the proposed discovery to the issues. An order granting discovery shall be enforceable as is an order compelling testimony or the production of evidence.

c. A copy of the written or electronic transcription of a deposition taken by the Section 6 School System or Military Department concerned shall be made available free of charge to a parent.

3. Witnesses; Production of Evidence

a. All witnesses testifying at the hearing shall be advised that it is a criminal offense knowingly and willfully to make a false statement or representation to a Department or Agency of the United States Government as to any matter within the jurisdiction of the Department or Agency. All witnesses shall be subject to cross-examination by the parties.

b. A party calling a witness shall bear the witness' travel and incidental expenses associated with testifying at the hearing. The Section 6 School System or Military Department concerned shall pay such expenses when a witness is called by the hearing officer.

c. The hearing officer may issue an order compelling the attendance of witnesses or the production of evidence upon the hearing

officer's own motion or, if good cause be shown, upon motion of a party.

d. When the hearing officer determines that a person has failed to obey an order to testify or to produce evidence, and such failure is in knowing and willful disregard of the order, the hearing officer shall so certify.

e. The party or the hearing officer seeking to compel testimony or the production of evidence may, upon the certification provided for in paragraph D.3.d. of the section, file an appropriate action in a court of competent jurisdiction to compel compliance with the hearing officer's order.

4. Hearing Officer's Findings of Fact and Decision

a. The hearing officer shall make written findings of fact and shall issue a decision setting forth the questions presented, the resolution of those questions, and the rationale for the resolution. The hearing officer shall file the findings of fact and decision with the Director, DOHA, with a copy to the parties.

b. The Director, DOHA, shall forward to the Director, Section 6 Schools or the Military Department concerned and the Domestic Advisory Panel copies, with all personally identifiable information deleted, of the hearing officer's findings of fact and decision or, in cases that are administratively appealed, of the final decision of the DOHA Appeal Board.

c. The hearing officer shall have the authority to impose financial responsibility for early intervention services, educational placements, evaluations, and related services under his or her findings of fact and decision.

d. The findings of fact and decision of the hearing officer shall become final unless a notice of appeal is filed under section F.1. of this appendix. The Section 6 School System or Military Department concerned shall implement a decision as soon as practicable after it becomes final.

*E. Determination Without Hearing*

1. At the request of a parent of the infant, toddler, preschool child or child when early intervention or special educational (including related) services are at issue, the requirement for a hearing may be waived, and the case may be submitted to the hearing officer on written documents filed by the parties. The hearing officer shall make findings of fact and issue a decision within the period fixed by paragraph D.1.n. of this appendix.

2. The Section 6 School System or Military Department concerned may oppose a request to waive the hearing. In that event, the hearing officer shall rule on the request.

3. Documents submitted to the hearing officer in a case determined without a hearing shall comply with paragraph D.1.g. of this appendix. A party submitting such documents shall provide copies to all other parties.

*F. Appeal*

1. A party may appeal the hearing officer's findings of fact and decision by filing a written notice of appeal with the Director, DOHA, within 5 calendar days of receipt of the findings of fact and decision. The notice of appeal must contain the appellant's certification that a copy of the notice of appeal has been provided to all other parties. Filing is complete upon mailing.

2. Within 10 calendar days of the filing the notice of appeal, the appellant shall submit a written statement of issues and arguments to the Director, DOHA, with a copy to the other parties. The other parties shall submit a reply or replies to the Director, DOHA, within 15 calendar days of receiving the statement, and shall deliver a copy of each reply to the appellant. Submission is complete upon mailing.

3. The Director, DOHA, shall refer the matter on appeal to the DOHA Appeal Board. It shall determine the matter, including the making of interlocutory rulings, within 60 calendar days of receiving timely submitted replies under section F.2. of this appendix. The DOHA Appeal Board may require oral argument at a time and place reasonable convenient to the parties.

4. The determination of the DOHA Appeal Board shall be a final administrative decision and shall be in written form. It shall address the issues presented and set forth a rationale for the decision reached. A determination denying the appeal of a parent in whole or in part shall state that the parent has the right under Pub. L. 101–476, as amended, to bring a civil action on the matters in dispute in a district court of the United States without regard to the amount in controversy.

5. No provision of this part or other DoD guidance may be construed as conferring a further right of administrative review. A party must exhaust all administrative remedies afforded by this appendix before seeking judicial review of a determination made under this appendix.

*G. Publication and Indexing of Final Decisions*

The Director, DOHA, shall ensure that final decisions in cases arising under this Appendix are published and indexed to protect the privacy rights of the parents who are parties in those cases and the children of such parents, in accordance with 32 CFR part 310.

# PART 81—PATERNITY CLAIMS AND ADOPTION PROCEEDINGS INVOLVING MEMBERS AND FORMER MEMBERS OF THE ARMED FORCES

Sec.
81.1 Reissuance and purpose.
81.2 Applicability.
81.3 Policy.

AUTHORITY: Sec. 301, 80 Stat. 379; (5 U.S.C. 301).

SOURCE: 43 FR 15149, Apr. 11, 1978, unless otherwise noted.

## § 81.1 Reissuance and purpose.

This part reissued DoD Directive 1344.3, ''Paternity Claims and Adoption Proceedings Involving Members and Former Members of the Armed Forces,'' to standardize procedures for the handling of:

(a) Paternity claims against members and former members of the Armed Forces, and

(b) Requests from civilian courts concerning the availability of members and former members of the Armed Forces to appear at an adoption hearing where it is alleged that such member is the father of an illegitimate child.

## § 81.2 Applicability.

The provisions of this part apply to the Military Departments.

## § 81.3 Policy.

(a) *Members on active duty.* (1) Allegations of paternity against members of the Armed Forces who are on active duty will be transmitted to the individual concerned by the appropriate military authorities.

(2) If there exists a judicial order or decree of paternity or child support duly rendered by a United States or foreign court of competent jurisdiction against such a member, the commanding officer in the appropriate Military Departments will advise the member of his moral and legal obligations as well as his legal rights in the matter. See 42 U.S.C. 659. The member will be encouraged to render the necessary financial support to the child and take any other action considered proper under the circumstances.

(3) Communications from a judge of a civilian court, including a court summons or a judical order, concerning the availability of personnel to appear at an adoption hearing, where it is alleged that an active duty member is the father of an illegitimate child, shall receive a reply that:

(i) Due to military requirements, the member cannot be granted leave to attend any court hearing until (date), or

(ii) A request by the member for leave to attend an adoption court hearing on (date), if made, would be approved, or

(iii) The member has stated in a sworn written statement (forward a copy with response) that he is not the natural parent of the child, or

(iv) Due to the member's unavailability caused by a specific reason, a completely responsive answer cannnot be made.

(4) The member should be informed of the inquiry and the response and urged to obtain legal assistance for guidance (including an explanation of sections of the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. appendix, section 501 et seq., if appropriate).

(b) *Members not on active duty.* (1) Allegations of paternity against members of the Armed Forces who are not on active duty shall be forwarded to the individual concerned in such manner as to ensure that the allegations are delivered to the addressee only. Military channels will be used when practicable.

(2) Communications from a judge of a civilian court, including a court summons or judicial order, concerning the availability of personnel to appear at an adoption hearing, where it is alleged that the member not on active duty is the father of an illegitimate child shall receive a reply that such person is not on active duty. A copy of the communication and the reply will be forwarded to the named individual.

(3) When requested by a court, the last known address of inactive members may be furnished under the same conditions as set forth for former members under paragraph (c)(2) (i) and (ii) of this section.

(c) *Former members.* (1) In all cases of allegations of paternity against former members of the Armed Forces or communication from a judge of a civilian

court, including a judicial summons or court order, concerning the adoption of an illegitimate child of former members of the Armed Forces who have been separated from the Military Services, i.e., those members now holding no military status whatsoever, the claimant or requester will be (i) informed of the date of discharge, and (ii) advised that the individual concerned is no longer a member of the Armed Forces in any capacity, and that the Military Departments assume no responsibility for the whereabouts of individuals no longer under their jurisdiction. The correspondence and all accompanying documentation shall be returned to the claimant or requester.

(2) In addition, the last known address of the former member will be furnished to the requester:

(i) If the request is supported by a certified copy of either:

(A) A judicial order or decree of paternity or support duly rendered against a former member by a United States or foreign court of competent jurisdiction; or

(B) A document which establishes that the former member has made an official admission or statement acknowledging paternity or responsibility for support of a child before a court of competent jurisdiction, administrative or executive agency, or official authorized to receive it; or

(C) A court summons, judicial order, or similar document of a court within the United States in a case concerning the adoption of an illegitimate child; wherein the former serviceman is alleged to be the father.

(ii) If the claimant, with the corroboration of a physician's affidavit, alleges and explains an unusual medical situation which makes it essential to obtain information from the alleged father to protect the physical health of either the prospective mother or the unborn child.

# PART 85—HEALTH PROMOTION

Sec.
85.1 Purpose.
85.2 Applicability and scope.
85.3 Definitions.
85.4 Policy.
85.5 Responsibilities.
85.6 Procedures.

AUTHORITY: 5 U.S.C. 301.

SOURCE: 53 FR 33123, Aug. 30, 1988, unless otherwise noted.

## § 85.1 Purpose.

(a) This part establishes a health promotion policy within the Department of Defense to improve and maintain military readiness and the quality of life of DoD personnel and other beneficiaries.

(b) This part replaces 32 CFR part 203 and establishes policy on smoking in DoD occupied buildings and facilities.

## § 85.2 Applicability and scope.

(a) This part applies to the Office of the Secretary of Defense (OSD), the Military Departments, and the Defense Agencies.

(b) It is directed to all military personnel and retirees, their families, and, where specified, to civilian employees.

## § 85.3 Definitions.

*Health Promotion*. Any combination of health education and related organizational, social, economic or health care interventions designed to facilitate behavioral and environmental alterations that will improve or protect health. It includes those activities intended to support and influence individuals in managing their own health through lifestyle decisions and selfcare. Operationally, health promotion includes smoking prevention and cessation, physical fitness, nutrition, stress management, alcohol and drug abuse prevention, and early identification of hypertension.

*Lifestyle*. The aggregated habits and behaviors of individuals.

*Military Personnel*. Includes all U.S. military personnel on active duty, U.S. National Guard or Reserve personnel on active duty, and Military Service Academy cadets and midshipmen.

*Self-Care*. Includes acceptance of responsibility for maintaining personal health, and decisions concerning medical care that are appropriate for the individual to make.

*Target Populations*. Military personnel, retirees, their families, and civilian employees.

## § 85.4 Policy.

It is DoD policy to:

(a) Encourage military personnel, retirees, their families and civilian employees to live healthy lives through an integrated, coordinated and comprehensive health promotion program.

(b) Foster an environment that enhances the development of healthful lifestyles and high unit performance.

(c) Recognize the right of individuals working or visiting in DoD occupied buildings to an environment reasonably free of contaminants.

(d) Disallow DoD Components' participation with manufacturers or distributors of alcohol or tobacco products in promotional programs, activities, or contests aimed primarily at DoD personnel. This does not prevent accepting support from these manufacturers or distributors for worthwhile programs benefiting military personnel when no advertised cooperation between the Departmment of Defense and the manufacturer or distributor directly or indirectly identifying an alcohol or tobacco product with the program is required. Neither does it prevent the participation of military personnel in programs, activities, or contests approved by the manufacturers or distributors of such products when that participation is incidental to general public participation.

**§ 85.5 Responsibilities.**

(a) The *Assistant Secretary of Defense (Health Affairs)* (ASD(HA)) shall coordinate and monitor the DoD health promotion program in accordance with this part, executing this responsibility in cooperation with the Assistant Secretary of Defense (Force Management and Personnel) and the Assistant Secretary of Defense (Reserve Affairs). The Office of the Assistant Secretary of Defense (Health Affairs) (ASD(HA)) shall:

(1) Establish and chair the Health Promotion Coordinating Committee comprised of representatives of the Office of the Assistant Secretary of Defense (Force Management and Personnel) (OASD(FM&P)), Office of the Assistant Secretary of Defense (Acquisition and Logistics) (OASD(A&L)), the Office of the Assistant Secretary of Defense (Reserve Affairs) (OASD(RA)), each Military Service, and such other advisors as the OASD(HA) considers appropriate.

(2) Facilitate exchanges of technical information and problem solving within and among Military Services and Defense Agencies.

(3) Provide technical assistant, guidance and consultation.

(4) Coordinate health data collection efforts to ensure standardization and facilitate joint studies across DoD components.

(5) Review dietary standards for DoD dining facilities as specified in DoD Directive 3235.2[1]

(b) The *Assistant Secretary of Defense (Force Management and Personnel)* (ASD(FM&P)) shall, in collaboration with the ASD(HA), coordinate and monitor relevant aspects of the health promotion program. These include:

(1) Use of tobacco products in DoD occupied facilities.

(2) Operation of health promotion and screening programs at the worksite and in Professional Military Education, DoD Dependents Schools, and section 6 schools.

(3) Dietary regulation of DoD snack concessions, and vending machines.

(4) Reduction of stress in work setting.

(5) Designate two representatives to the Health Promotion Coordinating Committee.

(c) The *Assistant Secretary of Defense (Reserve Affairs)* (OASD(RA)) shall:

(1) Coordinate and monitor relevant aspects of the health promotion program as it pertains to National Guard and Reserve Personnel.

(2) Designate a representative to the Health Promotion Coordinating Committee.

(d) The *Secretaries of the Military Departments* shall:

(1) Develop a comprehensive health promotion program plan for their respective Service(s).

(2) Establish and operate an integrated, coordinated and comprehensive health promotion program as prescribed by this Directive.

[1] Copies may be obtained, if needed, from the U.S. Naval Publications and Forms Center, Attn: Code 1062, 5801 Tabor Avenue, Philadelphia, PA 19120.

(3) Designate from their respective Service(s) a health promotion coordinator who shall also serve as representative to the Health Promotion Coordinating Committee.

(4) Evaluate the effectiveness of their respective health promotion program(s).

(e) The *Directors of Defense Agencies* shall develop and implement health promotion plans and programs for their civilian employees in accordance with this part.

(f) The *Assistant Secretary of Defense (Comptroller)* (ASD(C)) shall develop and implement a health program promotion for OSD civilian employees.

**§ 85.6 Procedures.**

(a) Each Military Service shall establish a health promotion program coordinator to serve as the focal point for all health promotion program issues and to integrate the activities of the medical and personnel departments.

(b) A Health Promotion Coordinating Committee shall be established to enhance communication among the Military Services, recommend joint policy and program actions, review program implementation, and recommend methodologies and procedures for program evaluation. The Committee shall be chaired by the Assistant Secretary of Defense (Health Affairs) (ASD(HA)) or designee. Additional members shall include two representatives from the Office of the Assistant Secretary of Defense (Force Management and Personnel); one representative from the Office of the Assistant Secretary of Defense (Reserve Affairs); one representative from the office of the Assistant Secretary of Defense (Acquisition & Logistics); and the health promotion coordinator from each Military Service.

(c) Each Component shall prepare a plan for the implementation of a comprehensive health promotion program that includes specific objectives (planned accomplishments) with measurable action steps. The plan shall address all of the program elements identified in the definition of health promotion for each group in the target populations. The plan shall consider workload, systems support, and training needs of individuals charged with responsibility at all organizational levels.

(d) Health promotion plans and programs shall address smoking prevention and cessation, physical fitness, nutrition, stress management, alcohol and drug abuse, and early identification of hypertension.

(1) Smoking prevention and cessation programs shall aim to create a social environment that supports abstinence and discourage use of tobacco products, create a healthy working environment, and provide smokers with encouragement and professional assistance in quitting. In addition to these aims, smoking prevention and cessation programs shall include the following elements.

(i) Smoking shall be permitted in buildings only to the extent that it does not endanger the life or property, or risk impairing nonsmokers' health.

(ii) The smoking of tobacco products within DoD occupied space shall be controlled in accordance with the following guidelines:

(A) Smoking shall be prohibited in auditoriums, conference rooms and classrooms. No Smoking signs shall be prominently displayed, and ashtrays shall not be permitted. Receptacles may be placed at entrances so that visitors may dispose of lighted smoking material when entering a nonsmoking area.

(B) Nonsmoking areas shall be designated and posted in all eating facilities in DoD occupied buildings. Smoking areas shall be permitted only if adequate space is available for nonsmoking patrons and ventilation is adequate to provide them a healthy environment.

(C) Elevators shall be designated as nonsmoking areas.

(D) Smoking shall be prohibited in official buses and vans.

(E) Within the confines of medical treatment facilities, smoking shall be restricted to private offices and specially designated areas. Smoking by patients shall be limited to specially designated areas, and health care providers shall not smoke in the presence of patients while performing their duties. Smoking is permitted in visitor waiting areas only where space and ventilation capacities permit division

into smoking and nonsmoking sections.

(F) Smoking shall not be permitted in common work areas shared by smokers and nonsmokers unless adequate space is available for nonsmokers and ventilation is adequate to provide them a healthy environment. Where feasible, smoking preference should be considered when planning individual work stations so that smoking and nonsmoking areas may be established.

(G) When individual living quarters are not available and two or more individuals are assigned to one room, smoking and nonsmoking preferences shall be considered in the assignment of rooms.

(H) Smoking by students attending DoD Dependents Schools or section 6 schools shall not be permitted on school grounds except as provided by policy regulations promulgated by the Director, DoDDS. Faculty and staff shall smoke only in specifically designated areas and shall not smoke in the presence of students.

(iii) Installations shall assess the current resources, referral mechanisms, and need for additional smoking cessation programs. Occupational health clinics shall consider the feasibility of smoking cessation programs for civilian employees or, at a minimum, be able to refer employees to such programs. While smoking cessation should be encouraged, care shall be taken to avoid coercion or pressure on employees to enter smoking cessation programs against their will. Smoking prevention programs shall be made available in DoD Dependents Schools and section 6 schools.

(iv) Information on the health consequences of smoking shall be incorporated with the information on alcohol and drug abuse provided to military personnel at initial entry and at permanent change of station as specified in 32 CFR part 62a. At initial entry, nonsmokers shall be encouraged to refrain from smoking. Smokers shall be encouraged to quit and be offered assistance in quitting.

(v) As part of routine physical and dental examinations and at other appropriate times, health care providers should be encouraged to inquire about the patient's tobacco use, including use of smokeless tobacco products; to advise him or her of the risks associated with use, the health benefits of abstinence, and of where to obtain help to quit.

(vi) Appropriate DoD health care providers should advise all pregnant smokers of the risks to the fetus.

(vii) The Military Services shall conduct public education programs appropriate to various target audiences on the negative health consequences of smoking.

(2) Physical fitness programs shall aim to encourage and assist all target populations to establish and maintain the physical stamina and cardiorespiratory endurance necessary for better health and a more productive lifestyle. In addition to the provisions of DoD Directive 1308.1[2] and Secretary of Defense Memorandum physical fitness programs shall include the following elements.

(i) Health professionals shall consider exercise programs conducive to improved health, and encourage appropriate use by patients. For military personnel, recommendations shall accord with military readiness requirements.

(ii) Commanders and managers should assess the availability of fitness programs at or near work sites and should consider integrating fitness regimens into normal work routines for military personnel as operational commitments allow.

(iii) The chain of command should encourage and support community activities that develop and promote fitness among all target populations. Activities should be designed to encourage the active participation of many people rather than competition among a highly motivated few.

(3) Nutrition programs shall aim to encourage and assist all target populations to establish and maintain dietary habits contributing to good health, disease prevention, and weight control. Weight control involves both nutrition and exercise, and is addressed in part in DoD Directive 1308.1. Nutrition programs include efforts not only to help individuals develop appropriate dietary habits, but also to modify the

[2] See footnote 1 to § 85.5(a)(5).

environment so that it encourages and supports appropriate habits. Additionally, nutrition programs shall include the following elements.

(i) Nutritional advice and assistance shall be provided by appropriate DoD health care professionals to military personnel, retirees, and family members.

(ii) In military and civilian dining facilities, where feasible, calorie information and meals with reduced amounts of fat, salt, and calories shall be made readily available.

(iii) Snack concessions and vending machines, when feasible, shall offer nutritious alternatives, such as fresh fruit, fruit juices, and whole grain products.

(iv) Public information campaigns shall be conducted by the Military Services to alert all target populations about the relationship between diet and risk of chronic diseases.

(4) Stress management programs shall aim to reduce environmental stressors and help target populations cope with stress. Additionally, stress management programs shall include the following elements.

(i) Commanders should develop leadership practices, work policies and procedures, and physical settings that promote productivity and health for military personnel and civilian employees.

(ii) Health and fitness professionals are encouraged to advise target groups on scientifically supported stress management techniques.

(iii) The topic of stress management should be considered for integration into the curricula at appropriate Professional Military Education programs and in the DoD Dependents Schools and section 6 schools to familiarize students with scientifically supported concepts of stress management for day-to-day problems, life transitions, and life crises.

(5) Alcohol and drug abuse prevention programs shall aim to prevent the misuse of alcohol and other drugs, eliminate the illegal use of such substances, and provide counseling or rehabilitation to abusers who desire assistance in accordance with the provisions of 32 CFR parts 62a and 62 and DoD Instruction 1010.6[3] Additionally, alcohol and drug abuse prevention programs shall include the following elements.

(i) Appropriate DoD health care professionals shall advise all pregnant patients and patients contemplating pregnancy about the risks associated with the use of alcohol and other drugs during pregnancy.

(ii) The Military Services shall conduct public education programs appropriate to various target audiences. Programs should include such topics as alcohol and drug use and pregnancy, driving while intoxicated, and adolescent alcohol and drug abuse.

(6) Hypertension prevention programs shall aim to identify hypertension early, provide information regarding control and lifestyle factors, and provide treatment referral where indicated. Early identification of hypertension programs shall include the following elements.

(i) Hypertension screening shall be provided as part of all medical examinations and the annual dental examination for active duty service members. Screening shall also be provided to other beneficiaries, excluding those in the Children's Preventive Dentistry Program, at the time of their original request for care. Patients with abnormal screening results shall receive appropriate medical referrals.

(ii) Each DoD medical facility should periodically offer mass hypertension screening to encourage beneficiaries to monitor their blood pressure regularly.

(iii) Occupational health clinics shall make hypertension screening readily available to civilian employees, and shall encourage employees to use this service.

(iv) Public information campaigns emphasizing the dangers of hypertension and the importance of periodic hypertension screening and dietary regulation shall be conducted.

## PART 86—CRIMINAL HISTORY BACKGROUND CHECKS ON INDIVIDUALS IN CHILD CARE SERVICES

Sec.
86.1 Purpose.

[3] See footnote 1 to § 85.5(a)(5).

86.2 Applicability.
86.3 Definitions.
86.4 Policy.
86.5 Responsibilities.
86.6 Procedures.
APPENDIX A TO PART 86—CRIMINAL HISTORY BACKGROUND CHECK PROCEDURES
APPENDIX B TO PART 86—CRITERIA FOR CRIMINAL HISTORY BACKGROUND CHECK DISQUALIFICATIONS
APPENDIX C TO PART 86—STATE INFORMATION

AUTHORITY: 42 U.S.C. 13041.

SOURCE: 58 FR 52010, Oct. 6, 1993, unless otherwise noted.

## § 86.1 Purpose.

This part: (a) Implements Public Law 101–647, section 231 and Public Law 102–190, section 1094.

(b) Requires procedures for existing and newly hired individuals and includes a review of personnel and security records to include a Federal Bureau of Investigation (FBI) fingerprint check and State Criminal History Repositories (SCHR) checks of residences listed on employment or certification applications.

(c) Establishes policy, assigns responsibilities, and prescribes procedures for criminal history background checks for all existing and newly hired individuals involved in the provision of child care services as Federal employees, contractors, or in Federal facilities to children under the age of 18. The checks are required of all individuals in the Department of Defense involved in providing child care services defined in Public Law 101–647, and for policy reasons, those categories of individuals not expressly governed by the statute.

(d) Allows the Department to provisionally hire such individuals before the completion of a background check. However, at all times while children are in the care of that individual, the child care provider must be within sight and under the supervision of a staff person whose background check has been successfully completed. Healthcare personnel shall comply with guidance provided in the Memorandum from the Assistant Secretary of Defense for Health Affairs (ASD(HA))[1], April 20, 1992.

(e) Includes all individuals providing child care services to children in accordance with 32 CFR part 310, Federal Personnel Manual (FPM),[2] 32 CFR part 154, DoD Directive 6400.1,[3] DoD Instruction 6060.2,[4] DoD Instruction 6400.2,[5] DoD Directive 1400.13,[6] 32 CFR part 68, DoD Directive 6025.11,[7] DoD Directive 1015.1,[8], and 32 CFR part 212.

## § 86.2 Applicability.

This part applies to the Office of the Secretary of Defense, the Military Departments, the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Unified and Specified Commands, the Inspector General of the Department of Defense, the Defense Agencies, and the DoD Field Activities (hereafter referred to collectively as ''the DoD Components'').

## § 86.3 Definitions.

Terms used in this part are defined as follows.

(a) *Appropriated Fund (APF) Employees.* Personnel hired by DoD Components with appropriated funds as defined in the FPM, Chapter 731. This includes temporary employees, 18 years old or older, who work with children.

(b) *Care provider.* As defined in Public Law 101–647, section 231 and Public Law 102–190, section 1094. Providers included are current and prospective individuals hired with APF and nonappropriated funds (NAF) for education, treatment or healthcare, child care or youth activities, individuals employed under contract who work with children and those who are certified for care. Care providers are individuals working within programs that include alphabetically: Child Development Programs, DoD Dependents Schools, DoD-Operated or -Sponsored Activities, DoD Section 6 School Arrangements, Foster

[1] Copies may be obtained from OASD(HA) Room 3E346, The Pentagon, Washington, DC 220301–1200.

[2] Copies may be obtained from a Federal Depositary Library, or a Federal Agency Personnel Office.

[3] Copies may be obtained from the National Technical Information Service, 5285 Port Royal, Springfield, VA 22161.

[4] See footnote 3 to § 86.1(e).

[5] See footnote 3 to § 86.1(e).

[6] See footnote 3 to § 86.1(e).

[7] See footnote 3 to § 86.1(e).

[8] See footnote 3 to § 86.1(e).

Care, Private Organizations on DoD Installations, and Youth Programs. Background checks are required for all civilian and military providers (except military health care providers) involved in child care services who have regular contact with children.

(c) *Child*. An unmarried person, whether natural child, adopted child, foster child, stepchild, or ward, who is a family member of a military member or DoD civilian or their spouse, and who is under the age of 18 years; or is incapable of self support because of a mental or physical incapacity and for whom treatment is authorized in a medical facility of the Military Services, ad defined in DoD Directive 6400.1.

(d) *Child abuse and/or neglect*. The physical injury, sexual maltreatment, emotional maltreatment, deprivation of necessities, or other maltreatment of a child. The term encompasses both acts and omissions on the part of a responsible person, as defined in DoD Directive 6400.1.

(e) *Child care services*. DoD personnel and contractors who are involved in any of the following: ''Child protective services (including the investigation of child abuse and neglect reports), social services, health and mental health care, child (day) care, education (whether or not directly involved in teaching), foster care, residential care, recreational or rehabilitative programs, and detention, correctional, or treatment services,'' as defined in Public Law 101–647, section 231.

(f) *Child Development Center (CDC)*. An installation facility or part of a facility used for child care operated under the oversight of Component's Child Development Programs (CDPs) and as defined in DoD Instruction 6060.2.

(g) *Child Development Programs (CDPs)*. Programs for dependents of DoD personnel provided in CDCs, family child care (FCC) homes, and alternative child care options. The care provided is on a full-day, part-day, or hourly basis. Care is designed to protect the health and safety of children and promote their physical, social, emotional, and intellectual development, as defined in DoD Instruction 6060.2.

(h) *Child sexual abuse*. Employment, use, persuasion, inducement, enticement, or coercion of any child to engage in, or having a child assist any other person to engage in, any sexually explicit conduct (or any simulation of such conduct) or the rape, molestation, prostitution, or any other such form of sexual exploitation of children, or incest with children. All sexual activity between an offender and a child, when the offender is in a position of power over the child, is considered sexual maltreatment, as defined in DoD Instruction 6400.2.

(i) *Criminal history background check*. An investigation based on fingerprints and other identifying information obtained by a law enforcement officer conducted through the Federal Bureau of Investigation-Identification Division (FBI-ID) and SCHR of all States that an employee or prospective employee list as current and former residences on an employment application initiated through the personnel programs of the applicable Federal Agencies, as defined in Public Law 101–647 or through the personnel program of a given government contractor.

(j) *Defense Clearance and Investigations Index (DCII)*. The central DoD record of investigative files and adjudicative actions such as clearances and access determinations, revocations, and denials concerning military, civilian, and contract personnel.

(k) *DoD Dependents Schools (DoDDS)*. Schools operated by the Department of Defense for minor dependents of military members or DoD civilians assigned to duty in foreign countries, as defined in DoD Directive 1400.13.

(l) *DoD-operated or -sponsored activity*. A contracted entity authorized by appropriate DoD officials to perform child care, education, treatment, or supervisory functions on DoD-controlled property. Examples include but are not limited to CDPs, FCC Programs, Medical Treatment Facilities, DoDDS, DoD Section 6 Schools, and Youth Programs.

(m) *DoD Section 6 Schools*. The educational arrangements made for the provision of education to eligible dependent children by the Department of Defense under Public Law 81–874, section 6, as defined in 32 CFR part 68, in the Continental United States, Alaska, Hawaii, Puerto Rico, Wake Island,

Guam, American Samoa, the Northern Mariana Islands, and the Virgin Islands.

(n) *Family Child Care (FCC)*. Quarters-based child care provided in Government-owned or -leased quarters, in which care is provided on a regular basis for compensation, usually for more than 10 hours a week per child, to one or more (up to six) children, including the provider's own children under 8 years of age, as defined in DoD Instruction 6060.2

(o) *Foreign National Employees Overseas*. Non-U.S. citizens hired by the Department of Defense for employment on an overseas installation.

(p) *Foster care*. A voluntary or court-mandated program that provides 24-hour care and supportive services in a family home or group facility for children who cannot be properly cared for by their own family.

(q) *Government-contracted care providers*. An individual or a group of individuals hired under a Government contract to provide instruction, child care services, healthcare, or youth services. FCC providers are not considered contracted Government employees for this part.

(r) *Healthcare personnel*. Personnel involved in the delivery of healthcare to children under the age of 18 on a frequent and regular basis. See ASD(HA) memorandum dated April 20, 1992.

(1) *Medical and dental care staff*. Physicians, dentists, nurse practitioners, clinical social workers, clinical psychologists, physicians' assistants, physical therapists, and speech pathologists.

(2) *Clinical support staff*. Clinical providers not granted defined clinical privileges to include residents, registered nurses, licensed practical nurses, nursing assistants, play therapists, and technicians, and defined in DoD Directive 6025.11.

(s) *Installation Records Check (IRC)*. An investigation conducted through the records of all installations of an individual's identified residences for the preceding 2 years before the date of the application. This record check shall include, at a minimum, police (base and/or military police, security office, or criminal investigators or local law enforcement) local files check, Drug and Alcohol Program, Family Housing, Medical Treatment Facility for Family Advocacy Program to include Service Central Registry records and mental health records, and any other record checks as appropriate, to the extent permitted by law.

(t) *National Agency Check (NAC)*. As defined in 32 CFR part 154.

(u) *National Agency Check and Inquiries (NACI)*. As defined in the FPM, Chapters 731 and 736.

(v) *Nonappropriated Fund Instrumentalities (NAFI) Employees*. Personnel hired by the DoD Components, compensated from NAFI funds as defined in DoD Directive 1015.1. This includes temporary employees, 18 years old or older, who work with children.

(w) *Private Organizations on DoD Installations*. A nongovernmental entity authorized by the Department of Defense to perform child care services, education, or supervisory functions with children on DoD-controlled property, as defined in 32 CFR part 212. Examples include religious groups and associations, such as scouts.

(x) *Respite care*. Provides short-term child care and supportive services in a family home or group facility for children to relieve stress, prevent child abuse, and promote family unity for a parent, foster parent, guardian, or family member.

(y) *Regular contact*. Responsible for a child or with access to children on a frequent basis as defined by the Component.

(z) *Specified volunteer position*. A position, designated by the DoD Component Head or designee, such as installation commander, requiring an installation record check because of the nature of the volunteer work in child care services.

(aa) *State Criminal History Repository (SCHR)*. The State's central record of investigative files. State information, including addresses, phone numbers, costs and remarks, is listed in appendix C to this part.

(bb) *Supervision*. Refers to having temporary responsibility for children in child care services, and temporary or permanent authority to exercise direction and control by an individual over an individual whose required

background checks have been initiated but not completed.

(cc) *Temporary employees*. This category includes nonstatus appointments to a competitive service position for a specified period, not to exceed a year. This includes summer hires, student interns, and NAFI flexible category employees.

(dd) *Volunteer activities*. Activities where individuals offer assistance on an unpaid basis in child and youth programs or other activities on DoD installations. Examples include sports programs, religious programs, scouting programs, and preschools sponsored by private parent cooperatives or other associations conducted on the installation.

(ee) *Volunteers*. Individuals who offer program assistance on an unpaid basis.

(ff) *Youth programs*. DoD-sponsored activities, events, services, opportunities, information, and individual assistance responsive to the recreational, developmental, social, psychological, and cultural needs of eligible children and youth. Includes before and after school programs as well as holiday and summer camps.

### § 86.4 Policy.

It is Department of Defense policy to:

(a) Establish a standardized and comprehensive process for screening applicants for positions involving child care services on DoD installations and in DoD activities.

(b) Provide fair, impartial, and equitable treatment before an individual may be deemed suitable to serve as an employee, a certified care provider, a specified volunteer position, or as an individual employed under contract in activities covered by this part, 32 CFR part 310, Federal Personnel Manual (FPM), 32 CFR part 154, DoD Directive 6400.1, DoD Instruction 6060.2, DoD Instruction 6400.2, DoD Directive 1400.13, 32 CFR part 68, DoD Directive 6025.11, DoD Directive 1015.1, and 32 CFR part 212 by conducting a thorough review of all appropriate records as described in this part.

(c) Protect children by denying or removing from employment, contract, or volunteer status any applicant or current employee who is determined unsuitable to provide child care services because derogatory information is contained in a suitability investigation.

(d) Ensure than an individual is advised of proposed disciplinary action, decertification, or refusal to hire by the hiring authority or designee if disqualifying derogatory information is contained in a suitability investigation. The individual is given the opportunity to challenge the accuracy and completeness of reported information.

(e) Foster cooperation among the DoD Components, other Federal Agencies, State and county agencies, and other civilian authorities in conducting criminal history background checks.

### § 86.5 Responsibilities.

(a) The *Assistant Secretary of Defense for Personnel and Readiness* shall: (1) Develop policy for conducting criminal history background checks on individuals seeking positions involving child care services.

(2) Monitor compliance with this part.

(3) Coordinate oversight of criminal history background checks as specified under this part.

(b) The *Heads of the DoD Components* shall: (1) Develop procedures to ensure compliance with the requirements of this part, in accordance with appendix A to this part.

(2) Provide oversight of process and procedures to conduct criminal history background checks to include assignment of proponency.

(3) Provide technical support and resources as required.

(4) Coordinate participation of specific organizations within the DoD Component involved in the conduct of the checks.

(5) Ensure that applicants and employees are made aware of their rights under 32 CFR part 310 including the right to challenge accuracy of records.

(6) Maintain the records of all individuals hired, certified, or employed under contract for positions that involve child care services for 2 years following termination of their service.

(7) Establish a mechanism to evaluate all adverse information resulting from criminal history background checks, using the criteria in appendix

B to this part. Final suitability decisions are made by the DoD Component Head or designee.

### § 86.6 Procedures.

The records of all existing employees and applicants for positions in child care services are reviewed by the Component designee according to the procedures prescribed in appendix A to this part.

## APPENDIX A TO PART 86—CRIMINAL HISTORY BACKGROUND CHECK PROCEDURES

This appendix establishes the procedures for conducting criminal history background checks on existing and newly hired individuals required by Public Law 101–647, section 231 and Public Law 102–190, section 1094. Background checks are required for all civilian providers involved in child care services who have regular contact with children. The categories of providers include current and prospective individuals hired with APF and NAFI funds for education, treatment or healthcare, child care or youth activities, and individuals employed under contract involved in the provision of child care services. In addition to the mandates of Public Law 102–190, section 1094, the Department of Defense requires that military members (except healthcare personnel), foster or respite care providers, FCC providers and family members, and specified volunteers shall have checks specified in this part.

### *A. Conducting Checks*

Component designees shall notify existing and newly hired individuals and contractors of the requirement for a review of personnel and security records to include an FBI fingerprint check and SCHR checks of residences listed on employment and security applications.

1. *Fingerprint Check.* Law enforcement personnel shall forward completed forms through channels to the Office of Personnel Management (OPM) or Defense Investigative Service (DIS) for processing of FBI fingerprint forms.

2. *State Criminal History Repository (SCHR) Check.* DoD Installation-level personnel offices, in collaboration with law enforcement and security personnel, shall process State criminal history background checks for employment and shall ordinarily communicate in writing with each State identified in appendix B to part 86, providing full identifying information on each applicant and request confirmation that the individual has not been convicted in that State of a sex crime, an offense involving a child victim, a drug felony, or a violent crime. The DoD Component Heads may establish alternate procedures for conducting SCHR checks; e.g., a computerized, written, or telephonic check. The DoD Components are not required to wait longer than 60 days from the date of the request for a response from the SCHR personnel before taking action on a particular application. Authorities will depend on FBI fingerprint check validation if States do not respond.

3. *Installation Record Checks (IRC).* Consists of a local record check on an individual for a minimum of 2 years before the date of the application. This record check shall include, at a minimum, police (base and/or military police, security office, criminal investigators, or local law enforcement) local files checks, Drug and Alcohol Program, Family Housing, Medical Treatment Facility for Family Advocacy Program Service Central Registry records and mental health records, and any other record checks as appropriate to the extent permitted by law. A Service DCII may be conducted. The IRC shall be conducted by DoD Component personnel at the installation level. An IRC will be completed on individuals with a DoD affiliation such as living or working on an installation or is active duty member or family member. Individuals without DoD affiliation have no installation system of records to check and an IRC is not completed. Upon favorable completion of the IRC, an individual may be selected and provide child care services under line of sight supervision until the required background checks are completed.

### *B. Applicants*

#### *1. Appropriated Fund (APF) Applicants*

a. Except as otherwise provided in this subsection, the DoD Components shall process APF applicants using currently established procedures for completing background checks described in 32 CFR part 310. APF applicants must complete a SF–171, ''Application for Federal Employment,'' and attach an SF–87, ''Fingerprint Chart,'' completed by a law enforcement officer; and an SF–85P, ''Questionnaire for Public Trust Positions'' (Annotate Block ''B'' with code 03), for conduct of a NACI. The package shall be forwarded to the OPM.

b. The DoD Components shall assign responsibility for conducting the criminal history background checks through the SCHR to personnel offices working with law enforcement or investigative agencies. They shall conduct checks in all States that an employee or prospective employee lists as current and former residences in an employment or security application. It is deemed unnecessary to conduct checks before 18 years of age because juvenile records are unavailable. If no response is received from the State(s) within 60 days, determinations

based upon the FBI report may be made. Responses received after this determination has been made must be provided to the determining authority.

c. Under Public Law 102–190, section 1094, the DoD Components may employ an individual pending completion of successful background checks described in Public Law 101–647, section 231. If an individual is so employed, at all times while children are in the care of that individual, he or she must be within sight and under the supervision of an individual whose background checks have been completed, with no derogatory reports.

d. Once it is clear that no derogatory information exists, line of sight supervision is terminated by the designee. If a derogatory report exists, Component personnel procedures shall prescribe appropriate action consistent with the criteria contained in this part.

*2. Nonappropriated Fund Instrumentalities (NAFI) Applicants*

a. Except as otherwise provided in this subsection, the DoD Components shall process NAFI applicants following established procedures for completing background checks. NAFI applicants must complete a DD Form 398–2 ''Department of Defense National Agency Questionnaire,'' with reason for request identified as OTHER and annotated as CHILD CARE, and FD Form 258, ''FBI Applicant Fingerprint Card.'' Fingerprints shall be taken by the local law enforcement organization personnel and together with the DD Form 398–2 shall be forwarded to: Defense Investigative Service, Personnel Investigations Center, P.O. Box 1083, Baltimore, MD 21203–1083.

b. The DoD Components shall follow the procedures in the FPM, Chapter 731 and 736 and in paragraph B.1.b.,c., and d. of this appendix to obtain fingerprints for the FBI, conduct criminal history background checks through the SCHR, and maintain employment of individuals pending the successful completion of the background checks.

*3. Foreign National Employees Overseas*

Foreigh national employees overseas, while not expressly included within the law, are subject to the following record checks or those equivalent in scope to checks conducted on U.S. citizens:

a. Host-government law enforcement and security agency checks at the city, State (province), and national level, whenever permissible by the laws of the host government.

b. Defense Central Investigative Index (DCII).

c. FBI checks (when information exists regarding residence by the individual in the United States for 1 year or more since age 18).

d. When permissible by the laws of the host government, host-government checks are requested directly by the employing Service or agency. As an alternative, the DoD Components may request that overseas Military Service investigative elements obtain appropriate host-government checks. Where host-nations' arrangements preclude comparable criminal history checks, foreign nationals will not be eligible for employment in child care services.

*4. Temporary Employees*

This category includes summer hires, student interns, and NAFI flexible category employees. Background checks for these individuals are processed according to funding source; i.e., for APF employees (to OPM) or NAFI employees (to DIS). Installation designated points of contact shall notify applicants of report disposition.

*5. Healthcare Personnel*

This category includes civilian personnel involved in the delivery of healthcare. Within the context of such medical care, line of sight supervision must be viewed through the prism of existing medical quality assurance, clinical privileging, and licensure directives, which require pre-employment screens, enhanced surveillance of new employees, and ongoing monitoring of the performance of all healthcare providers. These programs are inherent to both quality medical care and patient safety and are adequate and equivalent mechanisms for the sight and supervision requirements in paragraph B.1.c. and d. of this appendix. It should be noted that these quality assurance programs are not sufficient in and of themselves under Public Law 101–647, section 231. Therefore, the required FBI fingerprint check and the SCHR check must be completed as expeditiously as possible.

*C. Current Employees*

All currently employed individuals covered by this part shall have the FBI fingerprint and criminal history background check as described in Public Law 101–647, section 231. If the results of such checks, to include the SCHR, cannot be confirmed through an examination of available local records, action shall be initiated in accordance with paragraph B.1. of this appendix for APF employees and paragraph B.2. of this appendix for NAFI employees, and with paragraph D. of this appendix for individuals employed under contract. The SCHR checks are conducted in all cases in accordance with paragraph A.2. of this appendix. For the purposes of this part, no IRC is required for individuals employed before June 1991.

*D. Government Contract Employees*

1. Sponsoring activities are responsible for ensuring that the requirements in this part are included in the statement of work for all child care programs to be contracted. The contracting officer is responsible for performing any action necessary to verify that services provided by the contractor conform to contract quality requirements. Component designees for requiring activities shall ensure that the statement of work, at a minimum:

a. States that the contractor must ensure its employees have proper criminal history background checks as outlined in this part.

b. States that actual checks are performed by the Government.

c. Includes procedures that the contractor must follow to obtain checks for its employees; for example, identify the office where employees report for processing, identify proper forms to be completed, etc. Also, identify the DoD Component for billing purposes, and identify the appropriate security point of contact or installation commander as the authorized recipient of background check results.

d. States that employees may be permitted to work before completion of background checks, provided the employee is within sight of an individual who has successfully completed a background check.

e. States that employees have the right to obtain a copy of the background check report, whom they should contact for the copy and whom to contact for procedures to challenge the accuracy and completeness of the information in the report.

f. Requires that contractor employees who have previously received a background check must provide proof of the check or obtain a new one.

2. Requirements for child care services must be submitted to the contracting officer sufficiently in advance of the required performance start date to provide time for obtaining background checks. Sponsoring activities' designees shall coordinate with the contracting officer as soon as possible after a requirement for child care services becomes known.

3. Procedures for obtaining responses for background checks are the same as those for NAFI employees and response to derogatory information will occur through the appropriate designee and contractor. An IRC will be performed if the individual is a military member or family member, or has worked or lived on a military installation within 5 years.

*E. Other Providers*

Criminal history background checks with the FBI and the States are not required. Duplication of previous background checks are not required for personnel where official records demonstrate that an adequate check has already been conducted. This category includes the following:

1. *Military Members*. These are active duty individuals (other than healthcare personnel) who seek to provide child care services as part of a normal duty assignment or are involved during off-duty hours. For these members an IRC and a current security clearance meet the requirements of this part. In the absence of a current security clearance, a name check of the DCII must be conducted. When military members are employed in an APF or a NAFI position they will abide by background check requirements listed in paragraphs B.1. and B.2. of this appendix.

2. *Foster and Respite Care Providers and Family Members*. These are individuals who seek to provide foster care or respite child care within Government-owned or -leased quarters. The care provider, all other adults, and each child, age 12 and older, residing within the applicant's household must receive an IRC. In addition, the Component designee must also obtain a name check of the DCII on all adults.

*FCC Providers and Family Members*. These are individuals who seek licensing to provide child care within government-owned or -leased quarters. The care provider, all other adults, and each child, age 12 and older, residing within the applicant's household receive an IRC. In addition, the Component designee must obtain a name check of the DCII on all adults.

4. *Specified Volunteers*. Installation commanders shall designate those positions that are determined to be ''specified.'' Individuals working in specified volunteer positions will have an IRC check because of the nature of their work in child care services. The opportunity for contact may be extensive, frequent, or over a period of time. They include, but are not limited to, positions involving extensive interaction alone, extended travel, and/or overnight activities with children. An IRC is required for volunteers who are active-duty, a family member, or a DoD civilian overseas. A volunteer is allowed to work upon completion of a favorable IRC. Background checks are not required for volunteers whose services will be of shorter duration than is required to perform the background checks and who are under line of sight supervision by an individual who has successfully completed a background check. The Components are required to provide additional implementing guidance.

*F. Employment Application Requirement*

Public Law 101–647, section 231 requires that each application for employment shall include a question asking whether the individual has ever been arrested for or charged with a crime involving a child, and, if so, requires a description of the disposition of the

arrest or charge. The forms identified in paragraphs B.1.a. and B.2.a. of this appendix are signed by the applicant under penalty of perjury, with the applicable Federal punishment for perjury stated on the respective forms.

1. An applicant's signature indicates an understanding of the employer's obligation to require a record check as a condition of employment. Information on background checks shall be maintained in accordance with applicable Component implementing regulations.

2. Payment for the conduct of any criminal history background check is the responsibility of the requesting Service or agency.

3. The results of the background check are forwarded to the Component designee at the sending installation for appropriate action. A derogatory report would include, but not be limited to, the following applicable crimes: Any charge or conviction for a sex crime, an offense involving a child victim, a substance abuse felony, or a violent crime.

4. The hiring authority or designee is responsible for notifying the individual of a derogatory report. The individual may obtain a copy of the criminal history report and has the right to challenge the accuracy and completeness of any information contained in the report through the Privacy Program described in 32 CFR part 310. The individual may provide information concerning positive mitigating factors for any adverse information presented.

5. Employees whose criminal history background checks result in nonselection for employment or service shall be informed by the Component designee of the right to an administrative appeal under 32 CFR part 310. The individual may appeal with a specific request such as amendments to the records or request to file statement disagreeing with information in the record. If the employee's request for record information is refused, the individual is informed of his or her right to an administrative appeal. As appropriate, Component designees shall inform individuals of other avenues available to resolve matters of concern such as an administrative or negotiated grievance procedures. If the employee remains dissatisfied, he or she may seek a review. The Department of Defense recognizes the privacy interests and rights of all applicants and employees, and its own responsibility in ensuring a safe and secure environment for children within DoD activities or private organizations on DoD installations.

*G. Record Re-Verification*

This procedure consists of an IRC and a DCII name check and is required by the Component designee at a minimum every 5 years for all employees providing child care services and covers the time period since the completion of the last background check. NAFI employees who change duty stations will complete a new investigation when considered for employment. A new investigation is required by the Department of Defense if a break in service results in a time-lapse of more than 2 years. FCC, foster care and respite care providers, and their family members will complete an IRC annually.

*H. Supervision*

Refers to temporary responsibility for children in child care services, and relates to oversight for temporary or permanent authority to exercise direction and control by an individual over an individual whose required background checks have been initiated but not completed. Use of video equipment is acceptable provided it is monitored by an individual who has successfully completed a background check. Supervision procedures pending completion of background checks for healthcare personnel suggest that the Surgeons General shall require close clinical supervision and full compliance with existing DoD Directives, Instructions, and other guidance (issued by the Department of Defense and the Military Department concerned) on quality assurance, risk management, licensure, employee orientation, and credentials certification. These policies rely on process and judgment, and meet the intent of the ''direct sight supervision'' provision, affording local commanders a flexible and reasonable alternative.

I. *Programs.* Requirements cover all DoD-operated activities and private organizations on DoD installations and include, but are not limited to:

1. Child Development Programs.
   a. Child development centers, part-day preschools, and enrichment programs.
   b. Family child care.
   c. Contracted Services, whether personal or non-personal services.
2. Youth Programs.
3. Dependents Schools operated by the Department of Defense.
4. Medical treatment facilities.
5. Other contracted services.
6. Private organizations on DoD installations.
7. Volunteer activities.

*J. Background Check Matrix*

This identifies the requirements of this part for background checks by category of personnel. These checks are initiated through the personnel offices in collaboration with law enforcement and security personnel. (Reminder: An IRC may only be completed on an individual who is a military member or family member, or who lives or works on a military installation.)

1. Appropriated Fund (APF) Employees. FBI, SCHR, and IRC. (SF–171, SF–87, and SF–85P).

2. Non-appropriated Fund Instrumentalities (NAFI) Employees. FBI, SCHR, and IRC. (DD Form 398–2 and FD Form 258).

3. Foreign National Employees Overseas. IRC and local government check.

4. Temporary Employees. FBI, SCHR, and IRC.

5. Current Employees. FBI and SCHR.

6. Government Contract Employees. FBI, SCHR, and IRC.

7. Other Providers.

a. Military Members. Military members will have an IRC and, if no current security clearance exists, a name check of the DCII. Checks are not required for military healthcare personnel.

b. Foster and Respite Care Providers and Family Members (age 12 and older). IRC and Service DCII (for adults).

c. Family Child Care Providers and Family Members (age 12 and older). IRC and Service DCII (for adults).

d. Specified Volunteers. IRC.

## APPENDIX B TO PART 86—CRITERIA FOR CRIMINAL HISTORY BACKGROUND CHECK DISQUALIFICATION

The ultimate decision to determine how to use information obtained from the criminal history background checks in selection for positions involving the care, treatment, supervision, or education of children must incorporate a common sense decision based upon all known facts. Adverse information is evaluated by the DoD Component Head or designee who is qualified at the appropriate level of command in interpreting criminal history background checks. All information of record both favorable and unfavorable will be assessed in terms of its relevance, recentness, and seriousness. Likewise, positive mitigating factors should be considered. Final suitability decisions shall be made by that commander or designee. Criteria that will result in disqualification of an applicant require careful screening of the data and include, but are not limited to, the following:

### *A. Mandatory Disqualifying Criteria*

Any conviction for a sexual offense, a drug felony, a violent crime, or a criminal offense involving a child or children.

### *B. Discretionary Criteria*

1. Acts that may tend to indicate poor judgment, unreliability, or untrustworthiness in working with children.

2. Any behavior; illness; or mental, physical, or emotional condition that in the opinion of a competent medical authority may cause a defect in judgment or reliability.

3. Offenses involving assault, battery, or other abuse of a victim, regardless of age of the victim.

4. Evidence or documentation of substance abuse dependency.

5. Illegal or improper use, possession, or addiction to any controlled or psychoactive substances, narcotic, cannibas, or other dangerous drug.

6. Sexual acts, conduct, or behavior that, because of the circumstances in which they occur, may indicate untrustworthiness, unreliability, lack of judgment, or irresponsibility in working with children.

7. A wide range of offenses such as arson, homicide, robbery, fraud, or any offense involving possession or use of a firearm.

8. Evidence that the individual is a fugitive from justice.

9. Evidence that the individual is an illegal alien who is not entitled to accept gainful employment for a position.

10. A finding of negligence in a mishap causing death or serious injury to a child or dependent person entrusted to their care.

### *C. Suitability Considerations*

In making a determination of suitability, the evaluator shall consider the following additional factors to the extent that these examples are considered pertinent to the individual case:

1. The kind of position for which the individual is applying or employed.

2. The nature and seriousness of the conduct.

3. The recentness of the conduct.

4. The age of the individual at the time of the conduct.

5. The circumstances surrounding the conduct.

6. Contributing social or environmental conditions.

7. The absence or presence of rehabilitation or efforts toward rehabilitation.

8. The nexus of the arrests in regard to the job to be performed.

### *D. Questions*

1. All applications, for each of the categories of individuals identified in §86.3, will include the following questions: ''Have you ever been arrested for or charged with a crime involving a child? Have you ever been asked to resign because of or been decertified for a sexual offense? And, if so, ''provide a description of the case disposition.'' For FCC, foster care, and respite care providers, this question is asked of the applicant regarding all adults, and all children 12 years and older, who reside in the household.

2. All applications shall state that the form is being signed under penalty of perjury. In addition, a false statement rendered by an employee may result in adverse action up to and including removal from Federal service.

3. Evaluation of criminal history background checks is made and monitored by

qualified personnel at the appropriate level designated by the Component. Final suitability decisions are made by the designee.

## APPENDIX C TO PART 86—STATE INFORMATION

All SCHR checks should be accompanied by the following: 1. State form, if required. If no State form is required, the request should be on letterhead, beginning with the statement that the check is in accordance with Public Law 101–647. The request must include full identifying information, such as: Name, date of birth, social security number, complete addresses, etc.

2. Fingerprint set if required. Some State laws require a fingerprint set either on a State form or forms used by the agency.

3. Release statement signed by the applicant or employee. If required by the State, the release must be notarized.

4. Payment for the SCHR check.

5. Self-addressed, stamped envelope.

The following is an updated listing of State addresses, fees, and other information:

| Address | Fee | Remarks |
|---|---|---|
| State of Alabama, Alabama Dept. of Public Safety, Attn: ABI Division, 5002 Washington Ave., Montgomery, AL 36130. | $25 | Name check, COMM: 205–242–4372. |
| State of Alaska, Alaska Dept, of Public Safety, Information Systems Section, 5700 Tudor Road, Anchorage, AK 99507. | 20 | Fingerprints required, reason for request required (comply with Pub. L.), name and address authorized request and receive SCHRC, COMM: 907–269–5511. |
| State of Arizona, Arizona Criminal Justice, Dept. of Public Safety, Information Systems Division, PO Box 6638, Phoenix, AZ 80550. | No check | Limited release, call/write, write for information. COMM: 602–223–2229. |
| State of Arkansas, Arkansas State Police, PO Box 5901, Little Rock, AR 72215. | No fee | Name check, written consent required, COMM: 501–221–8233. |
| State of California, Dept. of Justice, Bureau of Criminal Justice, Identification and Information Bureau, PO Box 903417, Sacramento, CA 94203–4170. | 27 | Fingerprints required, COMM: 916–739–2786. |
| State of Colorado, Crime Information Center, Colorado Bureau of Investigation, 690 Kipling Street, #3000, Lakewood, CO 80215. | 4.50 | Write/call for form, name check, COMM: 303–239–4222/4229. |
| State of Connecticut, Dept. of State Police, Bureau of Investigation, Building 4, 294 Colony Street, Meriden, CT 06450. | No fee | Name check, written consent required, copy of Pub. L. required, COMM: 203–238–6155. |
| State of Delaware, Delaware State Police-SBI, State Bureau of Investigation, PO Box 430, Dover, DE 19903. | 25 | Fingerprints required, COMM: 302–739–5871. |
| Washington, DC, Identification and Records Division, Metropolitan Police Dept., Room 2076, 300 Indiana Avenue, NW., Washington, DC 20001. | No fee | Name check, wittten request required, COMM: 202–727–4245. |
| State of Florida, Florida Dept. of Law Enforcement, PO Box 1489, Tallahassee, FL 32302. | 10 | Name check, check to: Dept. of Law Enforcement, COMM: 904–488–6236. |
| State of Georgia, Georgia Criminal Information Center, PO Box 370748, Decatur, GA 30037–0748. | 15 | Write or call for form, notary and fingerprints required, COMM: 404–244–2644. |
| State of Hawaii, Criminal Justice Data Center, 465 South King Street, Room 101, Honolulu, HI 96813. | No fee | Name check, COMM: 808–587–3100. |
| State of Idaho, Idaho Dept. of Law Enforcement, Criminal Identification Bureau, 6064 Corporal Lane, Boise, ID 83704. | 5 | Name check, written consent required, payment to: Dept. of Law Enforcement, COMM: 208–327–7130. |
| State of Illinois, Bureau of Identification, 260 North Chicago Street, Joliet, IL 60431–1060. | 14 | Write or call for form, name check, COMM: 815–740–5184. |
| State of Indiana, Indiana State Police, 100 North Senate Avenue, Room 312, Indianapolis, IN 46204. | 7 | Write or call for form, name check, COMM: 317–232–8266. |
| State of Iowa, Commissioner Paul H. Wieck II, Iowa Dept. of Public Safety, Wallace State Office Building, Des Moines, IA 50319. | 6 | Release within State, COMM: 515–281–5138. |
| State of Kansas, Kansas Bureau of Investigation, 1620 Southwest Tyler, Topeka, KS 66612. | 10 | Write or call for form, name check, $5 per name, over two names, COMM: 913–232–6000. |
| State of Kentucky, Kentucky State Police Records, State Office Building, 1250 Louisville Road, Frankfort, KY 40601. | 4 | Write or call for form, name check, COMM: 502–227–8700x214. |
| State of Louisiana, Louisiana State Police, Department of Public Safety, PO Box 66614, Baton Rouge, LA 70896. | 13 | Write or call for form, fingerprints required, COMM: 502–925–6095. |
| State of Maine, State Bureau of Investigation, Department of Public Safety, Maine State Police, 36 Hospital Street, Augusta, ME 04333. | No fee | Name check, reason for check required; i.e., comply with Pub. L., COMM: 207–624–7009. |
| State of Maryland, Criminal Justice Information Service, Central Repository, Building G4, 1201 Reistertown Road, Pikesville, MD 21208. | 18 | Write or call for form, name check, COMM: 410–764–4501. |
| State of Massachusetts, Executive Office of Public Safety, Criminal History Systems Board, 1010 Commonwealth Avenue, Boston, MA 02215. | No fee | Write or call for form, name check, COMM: 617–727–0090x12. |
| State of Michigan, Michigan State Police, FOI Unit, 7150 Harris Drive, Lansing, MI 48913. | No check | No release, COMM: 517–322–5531. |

| Address | Fee | Remarks |
|---|---|---|
| State of Minnesota, Criminal Justice Information Systems, Bureau of Criminal Apprehension, Minnesota Dept. of Public Safety, 1246 University Avenue, St. Paul, MN 55104. | 8 | Name check, written consent required, COMM: 612–642–0670. |
| State of Mississippi, Department of Public Safety, ATTN: Identification Bureau, PO Box 958, Jackson, MS 39225. | No fee | Write or call for form, name check, COMM: 607–987–1212. |
| State of Missouri, Criminal Records Division, State Highway Patrol, Department of Public Safety, PO Box 568, Jefferson City, MO 65102. | 5 | Write or call for form, name check COMM: 314–751–3313. |
| State of Montana, Identification Bureau, Department of Justice, 303 North Roberts, Helena, MT 59620–1418. | 5 | Name check, COMM: 406–444–3625. |
| State of Nebraska, Nebraska State Patrol, PO Box 94907, State House Station, ATTN: CID, Lincoln, NE 68509–4907. | 10 | Name check, COMM: 402–471–4545. |
| State of Nevada, Nevada Highway Patrol, 555 Wright Way, Carson City, NV 89711. | 15 | Write or call for form, fingerprints required, COMM: 702–687–5300. |
| State of New Hampshire, New Hampshire State Policy HQ, Criminal Records, 10 Hazen Drive, Concord, NH 03305. | 10 | Write or call for form, name check, COMM: 603–271–2538. |
| State of New Jersey, Division of State Police, Records and ID Section, PO Box 7068, West Trenton, NJ 08625–0068. | 12 | Copy of Pub. L. required, name check, COMM: 609–882–2000. |
| State of New Mexico, Department of Public Safety, Records Bureau, PO Box 1628, Sante Fe, NM 87504–1628. | 5 | Write or call for form, name check, notary required, COMM: 505–827–9181. |
| State of New York, Division of Criminal Justice Services, Executive Park Tower, Stuyvesant Plaza, Albany, NY 12203. | No check | No release at current time, state requires an agreement with agency to process, COMM: 518–485–7685. |
| State of North Carolina, Division of Criminal Information, Bureau of Investigation, 407 North Blount Street, Raleigh, NC 27601–1009. | 14 | Fingerprint form required, copy of Pub. L. required, call/write for form, COMM: 919–662–4500. |
| State of North Dakota, Bureau of Criminal Information, PO Box 1054, Bismark, ND 58502. | 20 | Name check, written consent required, COMM: 702–221–6180. |
| State of Ohio, Bureau of Criminal Information, PO Box 365, London, OH 43140. | 15 | Write or call for form, written consent required, fingerprints required, COMM: 614–852–2556. |
| State of Oklahoma, Oklahoma Law Enforcement, Criminal History Information, ATTN: Criminal History, PO 11497, Oklahoma City, OK 73136. | 10 | Write or call for form, name check, COMM: 405–848–6724. |
| State of Oregon, Criminal ID, State Police, 155 Cottage Street, NE, Salem, OR 97310. | 10 | Name check, COMM: 503–378–3070. |
| State of Pennsylvania, Records and ID Division, Pennsylvania State Police, Dept. HQ, 1800 Elmerton Avenue, Harrisburg, PA 17110. | 10 | Write or call for form, name check, 10 COMM: 717–783–5592. |
| State of Rhode Island, Rhode Island State Police, PO Box 185, North Scituate, RI 02857. | No fee | Name check, written consent required, COMM: 401–647–3311. |
| State of South Carolina, State Law Enforcement Division, ATTN: Criminal Records, PO Box 21398, Columbia, SC 29221–1398. | 10 | Name check, COMM: 803–737–4205, DSN: 734–1110. |
| State of South Dakota, Division Criminal Investigation, Attorney General's Office, East Highway 34, Pierre, SD 57501–5070. | 15 | Write or call for form, fingerprints required, COMM: 605–773–3334. |
| State of Tennessee, Tennessee Criminal Information Center, Tennessee Bureau of Investigation, PO Box 100940, Nashville, TN 37210. | 23 | Write or call for form, fingerprints required, COMM: 615–741–3241. |
| State of Texas, Texas Crime Records Division, Texas Dept. of Public Safety, PO Box 15999, Austin, TX 78761–5999. | 15 | Fingerprints required, written consent required, COMM: 512–465–2079. |
| State of Utah, Bureau of Criminal Identification, Utah Dept. of Public Safety, 4501 South 2700 West, Salt Lake City, UT 84119. | No fee | Write or call for form, name check, copy of law required, COMM: 801–965–4571. |
| State of Vermont, Vermont Criminal Information Center, Dept. of Public Safety, PO Box 189, Waterbury, VT 05676. | No fee | Name check, written consent required, COMM: 802–244–8786. |
| Commonwealth of Virginia, Virginia Records Management Div., Dept. of State Police, PO Box 850761, Richmond, VA 23261–5076. | 10 | Write or call for form, name check, COMM: 804–674–2024. |
| State of Washington, Washington, State Patrol, Identification Section, PO Box 42633, Olympia, WA 98504–2633. | 10 | Write or call for form, name check, COMM: 206–753–0230/7272. |
| West Virginia State Police, Dept. of Public Safety, 725 Jefferson Road, South Charleston, WV 25309. | 5 | Write or call for form, name check, COMM: 304–746–2180. |
| State of Wisconsin, Crime Information Bureau, Dept. of Justice, ATTN: Records Data Unit, PO Box 2718, Madison, WI 53701–2718. | 2 | Write or call for form, name check, COMM: 608–266–7314. |
| State of Wyoming, Division of Criminal Investigation, 316 West 22nd Street, Cheyenne, WY 82002. | 15 | Write or call for form, fingerprints required, written consent required, COMM: 307–777–7181. |

# PART 88—TRANSITION ASSISTANCE FOR MILITARY PERSONNEL

Sec.
88.1 Purpose.
88.2 Applicability and scope.
88.3 Definitions.
88.4 Policy.
88.5 Responsibilities.
88.6 Information requirements.

AUTHORITY: 10 U.S.C. chapter 58.

SOURCE: 59 FR 14559, Mar. 29, 1994, unless otherwise noted.

## § 88.1 Purpose.

(a) This part supersedes the Assistant Secretary of Defense For Force Management and Personnel memorandum,[1] ''Policy Changes For Transition Assistance Initiatives,'' June 7, 1991, establishes policy, and assigns responsibilities for transition assistance programs for active duty military personnel and their families.

(b) Implements transition assistance programs for DoD military personnel and their families as outlined in section 502, Public Law 101–510; section 661 and section 662, Public Law 102–190, and sections 4401–4501, Public Law 102–484.

## § 88.2 Applicability and scope.

This part applies to: (a) The Office of the Secretary of Defense, the Military Departments, the Chairman of the Joint Chiefs of Staff, the Unified Combatant Commands, and the Defense Agencies (hereafter referred to collectively as ''the DoD Components''). The term ''Military Services,'' as used herein, refers to the Army, the Navy, the Air Force, and the Marine Corps.

(b) All active duty Service members and their families.

## § 88.3 Definitions.

(a) *Involuntary separation*. A member of the Military Service shall be considered to be involuntarily separated if he or she was on active duty or full-time National Guard duty on September 30, 1990 and:

(1) In the case of a Regular officer (other than a retired officer), he or she was involuntarily discharged under other than adverse conditions, as characterized by the Secretary of the separating Service member's Military Department. Discharge under adverse conditions is determined by referring to the reason for separation as well as the officer's service, as outlined in Department of Defense Directive 1332.30.[2]

(2) In the case of a Reserve officer who is on the active duty list or, if not on the active duty list, is on full-time active duty (or in the case of a member of the National Guard, full time National Guard duty) for the purpose of organizing, administering, recruiting, instructing, or training the Reserve components, he or she is involuntarily discharged or released from active duty or full-time National Guard duty (other than a release from active duty or full-time National Guard duty incident to a transfer to retired status) under other than adverse conditions as characterized by the Secretary of the separating Service member's Military Department. Discharge under adverse conditions is determined by referring to the reason for separation as well as the officer's service, as outlined in Department of Defense Directive 1332.30.

(3) In the case of a Regular enlisted member serving on active duty, he or she is denied reenlistment or involuntarily discharged under other than adverse conditions, as characterized by the Secretary of the separating Service member's Military Department. Discharge under adverse conditions is determined by referring to the reason for separation as well as the enlisted member's service, as outlined in Department of Defense Directive 1332.14.[3]

(4) In the case of a Reserve enlisted member who is on full-time active duty (or in the case of a member of the National Guard, full-time National Guard duty) for the purpose of organizing, administering, recruiting, instructing, or training the Reserve components, he or she is denied reenlistment or is involuntarily discharged or released from

[1] Copies may be obtained, at cost, from the Directorate of Transition Support and Services, Office of the Assistant Secretary of Defense for Personnel and Readiness, 4000 Defense Pentagon, Washington, DC 20301–4000.

[2] Copies may be obtained, at cost, from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161.

[3] See footnote 2 to section 88.3(a)(1).

active duty (or full-time National Guard duty) under other than adverse conditions as determined by referring to the reason for separation as well as the enlisted member's service, as outlined in Department of Defense Directive 1332.14.

(b) *Separation entitlements.* Benefits provided to Service members being involuntarily separated on or before September 30, 1995 as defined in paragraphs (a)(1) through (a)(4) of this section, and their families. Benefits provided to Service members being separated under the Special Separation Benefit or Voluntary Separation Incentive on or before September 30, 1995, as defined in paragraph (c) of this section and their families. These benefits include: Training opportunities under the Job Training Partnership Act as described in section 4465 of Public Law 102–484; priority affiliation with the National Guard and Reserve, as described in section 502(a)(1) of Public Law 101–510, as amended; enrolled in the All-Volunteer Force Educational Assistance Program (''Montgomery G.I. Bill''), as described in section 4404 of Public Law 102–484; extended medical and dental care, as described in section 502(a)(1) of Public Law 101–510, as amended, and sections 4407 and 4408 of Public Law 102–484; continued use of military family housing as described in section 502 (a)(1) of Public Law 101–510, as amended (subject to Status of Forces Agreements overseas); extended and commissary privileges as detailed in section 502(a)(1) of Public Law 101–510, as amended (subject to Status of Forces Agreements overseas); travel and transportation allowances, as detailed in section 503 of Public Law No. 101–510, as amended; continuation of enrollment in Department of Defense Dependents Schools as detailed in section 504 of Public Law 101–510, as amended (subject to Status of Forces Agreements overseas.)

(c) *Special separation benefit* and *voluntary separation incentive.* Voluntary separation programs established in section 661 and section 662 of Public Law 102–190, as amended. Service members separated under these programs are eligible for both transition services and separation entitlements outlined in paragraphs (b) and (d) of this section.

(d) *Transition services.* Preseparation counseling, individual transition planning, employment assistance, excess leave and permissive temporary duty, and relocation assistance for personnel overseas as described in section 502 (a)(1) of Public Law 101–510, as amended.

## § 88.4 Policy.

It is DoD policy that: (a) Transition assistance programs prepare separating Service members and their families with the skills, tools, and self-confidence necessary to ensure successful reentry into the Nation's civilian work force.

(b) Transition assistance programs be designed to complete the military personnel ''life cycle.'' This cycle begins with the Service member's recruitment from the civilian sector, continues with training and sustainment throughout a Service members's active service in the Armed Forces, and ends when the Service member returns to the civilian sector.

(c) Transition assistance programs include: (1) Transition service as defined in )88.3 (d) to be provided to Service members and their families for up to 90 days after separation, space and work load permitting.

(2) Separation entitlements as defined in § 88.3 (b) for Service members who are involuntarily separating as defined in § 99.3 (a) or separating under the Voluntary Separation Incentive or Special Separation Benefit Programs as defined in § 88.3 (c).

(d) Service members from one Service shall not restricted from participating in another Service's transition assistance program unless workload or other unusual circumstances dictate. Every effort will be made to accommodate all eligible personnel, especially if referral to another transition site will require the Service member to travel a long distance and incur significant expense.

(e) [Reserved]

(f) When being discharged, released from active duty, or retiring (hereafter referred to as ''separating Service members''), Service members and their families bear primary responsibility for their successful transition into the civilian sector.

(g) Spouses shall be encouraged to participate in transition planning and counseling to the maximum extent possible.

(h) Enhanced transition programs shall be established for Service members and their families who are overseas to help alleviate the special difficulties overseas personnel encounter when job and house hunting.

(i) Installations in the United States shall give priority transition assistance to personnel who recently returned from overseas.

**§ 88.5 Responsibilities.**

(a) The Assistant Secretary of Defense for Personnel and Readiness shall; (1) Issue guidance on transition assistance programs for Service members and their families, as necessary.

(2) Coordinate, as necessary, within the Department of Defense to ensure the availability of high quality, equitable, and cost-effective transition programs among the Military Services.

(3) Coordinate with and seek the assistance of the Departments of Labor and Veterans Affairs, and other Federal Agencies to facilitate delivery of high quality transition assistance programs to separating Service members.

(4) Evaluate the level of resources needed to deliver quality transition programs and facilitate efforts to obtain these resources.

(5) Monitor and evaluate the overall effectiveness of transition assistance programs.

(6) Coordinate with theater commanders, though the Chairman of the Joint Chiefs of Staff, on transition assistance programs (job fairs and training conferences, for example) impacting overseas Unified Combatant Commands.

(7) Establish the Department of Defense Service Member Transition Assistance Coordinating Committee, consisting of representatives from the Military Services and Assistant Secretary of Defense for Personnel and Readiness. The purpose of this committee is to provide DoD-level direction and coordination for transition assistance programs.

(8) Collect data to determine systematically the degree to which transition assistance programs satisfy the needs of transitioning Service members and their families.

(9) Review, modify, and reissue policy guidance, as required.

(b) The Assistant Secretary of Defense for Reserve Affairs shall establish and publish guidance on transition assistance programs for Reserve personnel and their families.

(c) The Assistant Secretary of Defense for Health Affairs shall establish guidance on transitional medical and dental care, including health insurance and preexisting conditions coverage, for Service members and their families.

(d) The Secretaries of the Military Departments shall ensure compliance with the criteria in Public Law 101–510, 102–190, and 102–484, as amended, and the following provisions:

(1) Preparation counseling shall be available no later than 90 days before separation to all separating Service members.

(2) High quality transition counseling and employment assistance programs are established on military facilities with more than 500 Service members permanently assigned or serving at that installation.

(3) The participation of separating Service members in transition assistance programs shall be coordinated with mission requirements.

(4) Transition assistance programs are allocated the resources necessary to delivery quality transition assistance programs.

(5) The Military Services are represented on the Department of Defense Service Member Transition Assistance Coordinating Committee. Each of the Military Services may invite an installations-level transition manager to participate.

(6) Quarterly reports on the status of transition programs are submitted to the Assistant Secretary of Defense for Personnel and Readiness beginning the second quarter after this publication is published, and continuing each quarter until cancellation of this part.

(7) The Inspector General of each Military Service shall review and report compliance with § 88.5(d)(1) through (d)(6) to the Service Secretary, on an annual basis, due no later than January 31 of the next calendar year.

### § 88.6 Information requirements.

The quarterly report requirement in § 88.5(d)(6) has been assigned Report Control Symbol DD-P&R(Q) 1927.

## PART 93—ACCEPTANCE OF SERVICE OF PROCESS; RELEASE OF OFFICIAL INFORMATION IN LITIGATION; AND TESTIMONY BY NSA PERSONNEL AS WITNESSES

Sec.
93.1 References.
93.2 Purpose and applicability.
93.3 Definitions.
93.4 Policy.
93.5 Procedures.
93.6 Fees.
93.7 Responsibilities.

AUTHORITY: E.O. 12333, 3 CFR, 1981 Comp., p. 200; 50 U.S.C. apps. 401, 402.

SOURCE: 56 FR 51328, Oct. 11, 1991, unless otherwise noted.

### § 93.1 References.

(a) DoD Directive 5405.2,[1] ''Release of Official Information in Litigation and Testimony by DoD Personnel as Witnesses,'' July 23, 1985, reprinted in 32 CFR part 97.

(b) E.O. 12333, United States Intelligence Activities, 3 CFR, 1981 Comp., p. 200, reprinted in 50 U.S.C. app. 401.

(c) The National Security Agency Act of 1959, Public Law No. 86–36, as amended, 50 U.S.C. app. 402.

(d) Rule 4, Federal Rules of Civil Procedure.

(e) DoD Instruction 7230.7,[2] ''User Charges'', January 29, 1985.

(f) 28 CFR 50.15.

### § 93.2 Purpose and applicability.

(a) This part implements § 93.1(a) in the National Security Agency/Central Security Service including all field sites (hereinafter referred to collectively as NSA). The procedures herein are also promulgated pursuant to the NSA's independent authority, under § 1.12(b)(10) of E.O. 12333 referenced under § 93.1(b), to protect the security of its activities, information and employees. This part establishes policy, assigns responsibilities, and prescribes mandatory procedures for service of process at NSA and for the release of official information in litigation by NSA personnel, through testimony or otherwise.

(b) This part is intended only to provide guidance for the internal operation of the NSA and does not create any right or benefit, substantive or procedural, enforceable at law against the United States, the Department of Defense, or NSA. This part does not override the statutory privilege against the disclosure of the organization or any function of the NSA, of any information with respect to the activities thereof, or of the names, titles, salaries, or numbers of the persons employed by the NSA. See section 6(a) of the DoD Directive referenced under § 93.1(a).

### § 93.3 Definitions.

(a) *Service of process*. Refers to the delivery of a summons and complaint, or other document the purpose of which is to give notice of a proceeding or to establish the jurisdiction of a court or administrative proceeding, in the manner prescribed by § 93.1(d), to an officer or agency of the United States named in court or administrative proceedings.

(b) *Demand*. Refers to the delivery of a subpoena, order, or other directive of a court of competent jurisdiction, or other specific authority, for the production, disclosure, or release of official information, or for the appearance and testimony of NSA personnel as witnesses.

(c) *NSA personnel*. (or NSA person) Includes present and former civilian employees of NSA (including non-appropriated fund activity employees), and present and former military personnel assigned to NSA. NSA personnel also includes non-U.S. nationals who perform services overseas for NSA under the provisions of status of forces or other agreements, and specific individuals hired through contractual agreements by or on behalf of NSA.

(d) *Litigation*. Refers to all pretrial, trial, and post-trial stages of all existing or reasonably anticipated judicial or administrative actions, hearings, investigations, or similar proceedings before civilian courts, commissions,

[1] Copies may be obtained, at cost, from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161.

[2] See footnote 1 to § 93.1(a).

boards, or other tribunals, foreign and domestic. It includes responses to discovery requests, depositions, and other pretrial proceedings, as well as responses to formal or informal requests by attorneys or others in situations involving litigation.

(e) *Official information*. Is information of any kind, in any storage medium, whether or not classified or protected from disclosure by §93.l(c) that:

(1) Is in the custody and control of NSA; or

(2) Relates to information in the custody and control of NSA; or

(3) Was acquired by NSA personnel as part of their official duties or because of their official status within NSA.

(f) *General Counsel*. Refers to the NSA General Counsel (GC), or in the GC's absence, the NSA Deputy GC, or in both of their absences, the NSA Assistant GC (Administration/Litigation).

(g) *NSA attorney*. Refers to an attorney in the NSA Office of General Counsel (OGC).

### §93.4 Policy.

Official information that is not classified, privileged, or otherwise protected from public disclosure, should generally be made reasonably available for use in Federal and State courts and by other governmental bodies.

### §93.5 Procedures.

(a) *Release of official information in litigation*. NSA personnel shall not produce, disclose, release, comment upon, or testify concerning any official information during litigation without the prior written approval of the GC. In exigent circumstances, the GC may issue oral approval, but a record of such approval will be made and retained in the OGC. NSA personnel shall not provide, with or without compensation, opinion or expert testimony concerning official NSA information, subjects, or activities, except on behalf of the United States or a party represented by the Department of Justice (DoJ). Upon a showing by the requester of exceptional need or unique circumstances and that the anticipated testimony will not be adverse to the interests of the NSA or the United States, the GC may, in writing, grant special authorization for NSA personnel to appear and testify at no expense to the United States. Official information may be released in litigation only in compliance with the following procedures.

(1) If official information is sought, through testimony or otherwise, by a litigation demand, the individual seeking such release or testimony must set forth, in writing and with as much specificity as possible, the nature and relevance of the official information sought. Subject to paragraph (a)(5) of this section, NSA personnel may only produce, disclose, release, comment upon or testify concerning those matters that were specified in writing and approved by the GC.

(2) Whenever a litigation demand is made upon NSA personnel for official information or for testimony concerning such information, the person upon whom the demand was made shall immediately notify the OGC. After consultation and coordination with the DoJ, if required, the GC shall determine whether the individual is required to comply with the demand and shall notify the requester or the court or other authority of that determination.

(3) If a litigation demand requires a response before instructions from the GC are received, the GC shall furnish the requester or the court or other authority with a copy of §93.1(a) and this part 93. The GC shall also inform the requester or the court or other authority that the demand is being reviewed, and seek a stay of the demand pending a final determination.

(4) If a court or other authority declines to stay the demand in response to action taken pursuant to paragraph 3 of this section, or if such court or other authority orders that the demand must be complied with notwithstanding the final decision of the GC, the NSA personnel upon whom the demand was made shall notify the GC of such ruling or order. If the GC determines that no further legal review of or challenge to the ruling or order will be sought, the affected NSA personnel shall comply with the demand or order. If directed by the GC, however, the affected NSA personnel must decline to

provide the information.[3] The NSA personnel shall state the following to the Court:

''I must respectfully advise the Court that under instructions given to me by the General Counsel of the National Security Agency, in accordance with Department of Defense Directive 5405.2 and NSA Regulation 10–62, I must respectfully decline to [produce/disclose] that information.''

(5) In the event NSA personnel receive a litigation demand for official information originated by another U.S. Government component, the GC shall forward the appropriate portions of the request to the other component. The GC shall notify the requester, court, or other authority of the transfer, unless such notice would itself disclose classified information.

(b) *Acceptance of service of process.* The following are mandatory procedures for accepting service of process for NSA personnel sued or summoned in their official capacities, and for attempting service of process on NSA premises.

(1) *Service on NSA or on NSA personnel in their official capacities.* § 93.1(d) requires service of process on the NSA or NSA personnel sued or summoned in their official capacity to be made by serving the United States Attorney for the district in which the action is brought, and by sending copies of the summons and complaint by registered or certified mail to the Attorney General of the United States and to the NSA or such NSA personnel. Only the GC or an NSA attorney is authorized to accept the copies of the summons and complaint sent to the NSA or NSA personnel pursuant to § 93.1(d). Acceptance of the copies of the summons and complaint by the GC or an NSA attorney does not constitute an admission or waiver with respect to the validity of the service of process or of the jurisdiction of the court or other body. Such copies shall be sent by registered or certified mail to: General Counsel, National Security Agency, 9800 Savage Road, Fort George G. Meade, MD 20755–6000. The envelope shall be conspicuously marked ''Copy of Summons and Complaint Enclosed.'' Except as provided in paragraph (b)(3) of this section, no other person may accept the copies of the summons and complaint for NSA or NSA personnel sued or summoned in their official capacities, including the sued or summoned NSA personnel, without the prior express authorization of the GC.

(i) Parties who wish to deliver, instead of sending by registered or certified mail, the copies of the service of process to NSA or to NSA personnel sued or summoned in their official capacities, will comply with the procedures for service of process on NSA premises in paragraph (b) of this section.

(ii) Litigants may attempt to serve process upon NSA personnel in their official capacities at their residences or other places. Because NSA personnel are not authorized to accept such service of process, such service is not effective under § 93.1(d). NSA personnel should refuse to accept service. However, NSA personnel may find it difficult to determine whether they are being sued or summoned in their private or official capacity. Therefore, NSA personnel shall notify the OGC as soon as possible if they receive any summons or complaint that appears to relate to actions in connection with their official duties so that the GC can determine the scope of service.

(2) *Service upon NSA personnel in their individual capacities on NSA premises.* Service of process is not a function of NSA. An NSA attorney will not accept service of process for NSA personnel sued or summoned in their individual capacities, nor will NSA personnel be required to accept service of process on NSA premises. Acceptance of such service of process in a person's individual capacity is the individual's responsibility. NSA does, however, encourage cooperation with the courts and with judicial officials.

(i) When the NSA person works at NSA Headquarters at Fort George G. Meade, Maryland, the process server should first telephone the OGC on (301) 688–6054, and attempt to schedule a time for the NSA person to accept

[3] *See* United States ex rel. *Touhy* v. *Ragen*, 340 U.S. 462 (1951) wherein the Supreme Court held that a government employee could not be held in contempt for following an agency regulation requiring agency approval before producing government information in response to a court order.

process. If the NSA person's affiliation with NSA is not classified, the NSA attorney will communicate with the NSA person and serve as the contact point for the person and the process server. If the person consents to accept service of process, the NSA attorney will arrange a convenient time for the process server to come to NSA, and will notify the Security Duty Officer of the arrangement.

(ii) A process server who arrives at NSA during duty hours without first having contacted the OGC, will be referred to the Visitor Control Center (VCC) at Operations Building 2A. The VCC will contact the OGC. If an NSA attorney is not available, the process server will be referred to the Security Duty Officer, who will act in accordance with Office of Security (M5) procedures approved by the GC. Service of process will not be accepted during non-duty hours unless prior arrangements have been made by the OGC. For purposes of this part, duty hours at NSA Headquarters are 0800 to 1700, Monday through Friday, excluding legal holidays. A process server who arrives at NSA during non-duty hours without having made arrangements through the OGC to do so will be told to call the OGC during duty hours to arrange to serve process.

(iii) Upon being notified that a process server is at the VCC, an NSA attorney will review the service of process and determine whether the NSA person is being sued or summoned in his official or individual capacity. (If the person is being sued or summoned in his or her official capacity, the NSA attorney will accept service of process by noting on the return of service form that ''service is accepted in official capacity only.'') If the person is being sued or summoned in his or her individual capacity, the NSA attorney will contact that person to see if that person will consent to accept service.

(3) *Procedures at field activities.* Chiefs of NSA field activities may accept copies of service of process for themselves or NSA personnel assigned to their field component who are sued or summoned in their official capacities. Field Chiefs or their designees will accept by noting on the return of service form that ''service is accepted in official capacity only.'' The matter will then immediately be referred to the GC. Additionally, Field Chiefs will establish procedures at the field site, including a provision for liaison with local judge advocates, to ensure that service of process on persons in their individual capacities is accomplished in accordance with local law, relevant treaties, and Status of Forces Agreements. Such procedures must be approved by the GC. Field Chiefs will designate a point of contact to conduct liaison with the OGC.

(4) No individual will confirm or deny that the person sued or summoned is affiliated with NSA until a NSA attorney or the Field Chief has ascertained that the individual's relationship with NSA is not classified. If the NSA person's association with NSA is classified, service of process will not be accepted. In such a case, the GC must be immediately informed. The GC will then contact the DoJ for guidance.

(5) *Suits in Foreign Courts.* If any NSA person is sued or summoned in a foreign court, that person, or the cognizant Field Chief, will immediately telefax a copy of the service of process to the OGC. Such person will not complete any return of service forms unless advised otherwise by an NSA attorney. OGC will coordinate with the DoJ to determine whether service is effective and whether the NSA person is entitled to be represented at Government expense pursuant to §93.1(f).

### §93.6 Fees.

Consistent with the guidelines in §93.1(e), NSA may charge reasonable fees to parties seeking, by request or demand, official information not otherwise available under the Freedom of Information Act, 5 U.S.C. 552. Such fees are calculated to reimburse the Government for the expense of providing such information, and may include:

(a) The costs of time expended by NSA employees to process and respond to the request or demand;

(b) Attorney time for reviewing the request or demand and any information located in response thereto, and for related legal work in connection with the request or demand; and

(c) Expenses generated by materials and equipment used to search for,

produce, and copy the responsive information.

### § 93.7 Responsibilities.

(a) *The General Counsel.* The GC is responsible for overseeing NSA compliance with § 93.1(a) and this part 93, and for consulting with DoJ when appropriate. In response to a litigation demand requesting official information or the testimony of NSA personnel as witnesses, the GC will coordinate NSA action to determine whether official information may be released and whether NSA personnel may be interviewed, contacted, or used as witnesses. The GC will determine what, if any, conditions will be imposed upon such release, interview, contact, or testimony. In most cases, an NSA attorney will be present when NSA personnel are interviewed or testify concerning official information. The GC may delegate these authorities.

(b) *The Deputy Director for Plans and Policy (DDPP).* The DDPP will assit the GC, upon request, in identifying and coordinating with NSA components that have cognizance over official information requested in a litigation demand. Additionally, the DDPP will advise the GC on the classified status of official information, and, when necessary, assist in declassifying, redacting, substituting, or summarizing official information for use in litigation. The DDPP may require the assistance of other Key Component Chiefs.

(c) *Chiefs of Key Components and Field Activities.* Chiefs of Key Components and Field Activities shall ensure that their personnel are informed of the contents of this part 93, particularly of the requirements to consult with the OGC prior to responding to any litigation demand, and to inform the OGC whenever they receive service of process that is not clearly in their individual capacities. Field Chiefs will notify the OGC of the persons they designate under § 93.5(b)(3).

(d) *The Deputy Director for Administration (DDA).* Within 60 days of the date of this part, the DDA shall submit to the GC for approval procedures for the attempted delivery of service of process during duty hours when an attorney of the OGC is not available.

## PART 94—NATURALIZATION OF ALIENS SERVING IN THE ARMED FORCES OF THE UNITED STATES AND OF ALIEN SPOUSES AND/OR ALIEN ADOPTED CHILDREN OF MILITARY AND CIVILIAN PERSONNEL ORDERED OVERSEAS

Sec.
94.1 Purpose.
94.2 Applicability.
94.3 Definitions.
94.4 Policy and procedures.
94.5 Forms required.

AUTHORITY: Sec. 301, 80 Stat. 379; 5 U.S.C. 301.

SOURCE: 35 FR 17540, Nov. 14, 1970, unless otherwise noted.

### § 94.1 Purpose.

This part prescribes uniform procedures acceptable to the Immigration and Naturalization Service of the Department of Justice, to (a) facilitate the naturalization of aliens who have served honorably in the Armed Forces of the United States and to (b) militarily certify alien dependents seeking naturalization under the provisions of Immigration and Nationality Act of 1952, as amended, sections 319(b) and 323(c) (8 U.S.C. 1430(b) and 1434(c)); and furnishes policy guidance to the Secretaries of the Military Departments governing discharge or release from active duty in the Armed Forces of the United States of permanent-residence aliens who desire to be naturalized as U.S. citizens under the provisions of Act of June 27, 1952, section 328 (66 Stat. 249); 8 U.S.C. 1439.

### § 94.2 Applicability.

The provisions of this part apply to the Military Departments.

### § 94.3 Definitions.

(a) *Permanent-residence alien* is an alien admitted into the United States under an immigration visa for permanent residence; or an alien, who, after admission without an immigrant visa, has had his status adjusted to that of an alien lawfully admitted for permanent residence.

(b) *Armed Forces of the United States* denotes collectively all components of

the Army, Navy, Air Force, Marine Corps, and Coast Guard.

**§94.4 Policy and procedures.**

(a) *Naturalization of an alien who has served honorably in the Armed Forces of the United States at any time.* (1) Under the provisions of Act of June 27, 1952, section 328 (66 Stat. 249); 8 U.S.C. 1439, an alien who has served in the Armed Forces of the United States for a period(s) totaling three (3) years may be naturalized if he:

(i) Has been lawfully admitted to the United States for permanent residence;

(ii) Was separated from the military service under honorable conditions;

(iii) Files a petition while still in the military service, or within six (6) months after the termination of such service; and

(iv) Can comply in all other respects with the Immigration and Nationality Act of 1952, except that (*a*) no period of residence or specified period of physical presence in the United States or the State in which the petition for naturalization is filed is required, and (*b*) residence within the jurisdiction of the court is not required.

(2) The prescribed 3-year period may be satisfied by a combination of active duty and inactive duty in a reserve status.

(3) An alien member desiring to fulfill naturalization requirements through military service shall not be separated prior to completion of three (3) full years of active duty unless:

(i) His performance or conduct does not justify retention, in which case he shall be separated in accordance with the provisions of part 41 of this subchapter and chapter 47, title 10, United States Code (Uniform Code of Military Justice), as appropriate; or

(ii) He is to be transferred to inactive duty in a reserve component in order to:

(*a*) Complete a reserve obligation under the provisions of part 50 of this subchapter, or

(*b*) Attend a recognized institution of learning under the early release program, as provided in DoD Instruction 1332.15, ''Early Release of Military Enlisted Personnel for College or Vocational/Technical School Enrollment,'' January 26, 1970.[1]

(4) Caution shall be exercised to ensure that an alien's affiliation with the Armed Forces of the United States, whether on active duty or on inactive duty in a reserve status, is not terminated even for a few days short of the 3-year statutory period, since failure to comply with the exact 3-year requirement of Act of June 27, 1952, section 328 (66 Stat. 249); 8 U.S.C. 1439 will automatically preclude a favorable determination by the Immigration and Naturalization Service on any petition for naturalization based on an alien's military service.

(5) During a period of hostilities, as designated by the President of the United States, the expeditious naturalization provisions outlined in paragraph (b) of this section, will take precedence over the foregoing.

(b) *Naturalization of an alien who has served in the Armed Forces of the United States during a period of hostilities as designated by the President of the United States.* (1) Under the provisions of Immigration and Nationality Act of 1952, as amended, section 329 (8 U.S.C. 1440), an alien who serves honorably on active duty in the Armed Forces of the United States during the period beginning February 28, 1961, and ending on a date designated by the President, by Executive order, as the date of termination of the Vietnam hostilities, or during any future period which President, by Executive order, shall designate as a period in which the Armed Forces of the United States are or were engaged in military operations involving armed conflict with a hostile foreign force, and who is otherwise eligible, may be naturalized whether or not he has been lawfully admitted to the United States for permanent residence, if the member was inducted, enlisted, or reenlisted in the United States (inclusive of Puerto Rico, Guam, Virgin Islands, Canal Zone, American Samoa, or Swains Island).

(i) The induction, enlistment, or reenlistment in the United States or its

[1] Filed as part of original. Copies available from the U.S. Naval Publications and Forms Center, 5801 Tabor Avenue, Philadelphia, PA. 19120, Attention: Code 300.

stated possessions must actually be in these land areas, in ports, harbors, bays, enclosed sea areas along their routes, or within a marginal belt of the sea extending from the coastline outward three (3) geographical miles.

(ii) Enlistment or reenlistment aboard a ship on the high seas or in foreign waters does not meet the requirements of Immigration and Nationality Act of 1952, as amended, section 329 (8 U.S.C. 1440). In such instances, the provisions of paragraph (a) of this section may apply.

(2) Each Military Department will establish procedures containing the provisions outlined in paragraphs (b)(2) (i) and (ii) of this section. In addition, each qualifying alien shall be advised of the liberalized naturalization provisions of the Immigration and Nationality Act of 1952, as amended, section 329 (8 U.S.C. 1440), i.e., that the usual naturalization requirements concerning age, residence, physical presence, court jurisdiction and waiting periods are not applicable, and will be given appropriate assistance in processing his naturalization application in consonance with procedures contained in ''Naturalization Requirements and General Information,'' published by the U.S. Department of Justice (Form N–17).

(i) Military basic training and orientation programs will include advice and assistance to interested aliens in completing and submitting the application and other forms required to initiate naturalization proceedings.

(ii) In addition, applicants should be advised that:

(*a*) Under the laws of certain foreign countries, military service in the Armed Forces of the United States may result in the loss of their native country citizenship but this same service may make them eligible for U.S. citizenship.

(*b*) Their eligibility for naturalization, based upon the honorable service in an active duty status prescribed in the Immigration and Nationality Act of 1952, as amended, section 329 (8 U.S.C. 1440) will be retained, even though they apply for naturalization after their return to the United States following the termination or completion of their overseas assignment, or after their honorable discharge from the Armed Forces of the United States.

(*c*) If they are stationed at a base in the continental United States, Alaska, Hawaii, Puerto Rico, Guam, or the Virgin Islands, they should apply for citizenship only if they expect to be stationed at the base for at least 60 days following application. Unless the Immigration and Naturalization Service has at least 60 days in which to complete the case, there is no assurance that it can be completed before the applicant is transferred, since the processing procedures outlined below take time and are not entirely within the control of the Immigration and Naturalization Service.

(*1*) Every naturalization application must be processed when received by the Immigration and Naturalization Service. Special arrangements have been made to expedite the processing of petitions of alien members of the Armed Forces.

(*2*) After processing, the alien applicant and two citizen witnesses must personally appear for examination by an officer of the Immigration and Naturalization Service in connection with the filing of a petition for naturalization in court.

(*3*) Finally, the applicant must appear in person before the naturalization court on a date set by the court so that he may be admitted to citizenship.

(*d*) If the alien member is scheduled for overseas assignment where naturalization courts are not available, he should apply for naturalization on the earliest possible date but no later than 60 days before departure for overseas assignment. No assurance that processing will be completed before the applicant's departure for overseas will be given by the Immigration and Naturalization Service unless it has 60 days to complete the matter.

(*1*) An alien serviceman who is serving overseas and has submitted or submits the required naturalization application and forms to the Immigration and Naturalization Service may not be granted ordinary leave, or Rest and Recuperation (R&R) leave (where authorized in overseas areas) for naturalization purposes, unless a written notification from the Immigration and Naturalization Service has been received by

the serviceman informing him that the processing of his application has been completed, and requesting him to appear with two U.S. citizen witnesses before a representative of the Immigration and Naturalization Service at a designated location for the purpose of completing the naturalization.

(*2*) If possible, an applicant granted leave for such purposes should advise the Immigration and Naturalization Service when he expects to arrive in the leave area and, in any event, should contact the Immigration and Naturalization Service office immediately upon arrival in the area. Every effort will be made to complete the naturalization within the leave period.

(c) *Naturalization of alien spouses and/or alien adopted children of military and civilian personnel ordered overseas.* Alien spouses and/or alien adopted children of military and civilian personnel of the Department of Defense who are authorized to accompany or join their sponsors overseas and who wish to obtain U.S. citizenship prior to departure will be given maximum assistance by commanders of military installations.

(1) DD Form 1278, ''Certificate of Overseas Assignment to Support Application to File Petition for Naturalization,''[2] will be issued to alien dependents by military commanders at the times indicated below in order that the alien may file such certificate with the nearest Immigration and Naturalization Service Office to initiate naturalization proceedings. Only DD Form 1278 will be accepted by the Immigration and Naturalization Service. Military commanders will not issue memoranda or letters of any kind in lieu thereof.

(i) When dependents are authorized automatic concurrent travel, DD Form 1278 will be issued not earlier than 90 days prior to the dependents' schedule date of travel.

(ii) When advance application for concurrent travel is required, DD Form 1278 will be issued after approval is received and not earlier than 90 days prior to the dependents' scheduled date of departure.

(iii) When concurrent travel is not authorized, DD Form 1278 will be issued after authorization for dependents' movement is received and not earlier than 90 days prior to the dependents' scheduled date of travel.

(2) Upon receipt of DD Form 1278, the alien will file this form, together with the application for petition for naturalization, Immigration and Naturalization Form N–400 (adult) or N–402 (child) as appropriate, if not previously filed, with the nearest office of the Immigration and Naturalization Service. The application must be accompanied by:

(i) Three identical photographs.

(ii) Form FD–358, Applicant Fingerprint Card, and

(iii) Form G–325, Biographic Information.

(3) Further processing of the application for citizenship is as prescribed by the Immigration and Naturalization Service.

(4) Upon completion of the naturalization process, immediate application for passport should be made, in order that it can be issued prior to scheduled departure of the dependent for overseas.

### §94.5 Forms required.

The following forms required for naturalization purposes may be obtained from any office of the Immigration and Naturalization Service:

(a) N–400 Application to File a Petition for Naturalization (Adult) (Submit original form only).

(b) N–402 Application to File a Petition for Naturalization (Child) (Submit original form only).

(c) G–325 Biographic Information (Submit original and duplicate of multileaf form).

(d) G–325B Biographic Information (Submit original form only).

(e) FD–258 Applicant Fingerprint Card (Submit one completed card).

(f) N–426 Certificate of Military or Naval Service (Submit in triplicate). (Should be handled on a priority basis so as to avoid prejudicing the early completion of the naturalization process, particularly for an alien who may receive an overseas assignment.)

(g) ''Naturalization Requirements and General Information,'' published

[2] Filed as part of original. Copies may be obtained from Departments of the Army, Navy, and Air Force.

by the U.S. Department of Justice (Form N–17) describes the naturalization requirements and lists Immigration and Naturalization offices which process applications.

# PART 96—ACQUISITION AND USE OF CRIMINAL HISTORY RECORD INFORMATION BY THE MILITARY SERVICES

Sec.
96.1 Purpose.
96.2 Applicability.
96.3 Definitions.
96.4 Policy.
96.5 Responsibilities.
96.6 Procedures.

AUTHORITY: 10 U.S.C. 503, 504, 505, and 520a.

SOURCE: 49 FR 23042, June 4, 1984, unless otherwise noted.

## § 96.1 Purpose.

Under title 10 U.S. Code, sections 503, 504, 505 and 520a, this part establishes policy guidance concerning the acquisition of criminal history record information for use in determining an enlistment applicant's suitability for entry and for participation in special programs that require a determination of trustworthiness (part 156 of this title), assigns responsibilities, and prescribes procedures.

## § 96.2 Applicability.

This part applies to the Office of the Secretary of Defense, the Military Departments, and the Defense Investigative Service (DIS). The term ''Military Services,'' as used herein, refers to the Army, Navy, Air Force, and Marine Corps.

## § 96.3 Definitions.

(a) *Criminal history record information* (with respect to any juvenile or adult arrest, citation, or conviction). The offense involved; age of the person involved; dates of arrest, citation, or conviction, if any; place of the alleged offense; place of arrest and assigned court; and disposition of the case.

(b) *Criminal justice system.* State, county, and local government law enforcement agencies; courts and clerks of courts; and other government agencies authorized to collect, maintain, and disseminate criminal history record information.

(c) *Special programs.* Military Services' programs that, because of their sensitivity or access to classified information, require the DIS to perform the investigations specified in chapter III of DoD 5200.2–R.

## § 96.4 Policy.

Section 503 of title 10 U.S. Code requires the Secretaries of the Military Departments to conduct intensive recruiting campaigns to obtain enlistments. It is the policy of the Department of Defense that the Military Services review the background of applicants for enlistment and for participation in special programs to identify:

(a) Those whose backgrounds pose serious questions as to fitness for service (10 U.S.C. 504 and 505) or suitability for participation in special programs (part 156 of this title).

(b) Those who may not be enlisted in the Military Services unless a waiver is granted (section 504 of title 10, United States Code).

(c) Those who may try to enlist fraudulently.

## § 96.5 Responsibilities.

(a) *The Assistant Secretary of Defense (Manpower, Installations, and Logistics)* shall submit the implementing Military Service regulations to the Senate and House Committees on Armed Services, in accordance with section 520a of title 10 U.S. Code.

(b) *The Secretaries of the Military Departments* shall develop and prepare uniform implementing regulations concerning acquisition, review, and safeguarding of criminal history record information by recruiting elements to conform with section 520a of title 10 U.S. Code, policies stated herein and shall include in the regulations procedures on obtaining and reviewing criminal history record information for recruitment purposes and for assignment of personnel to special programs.

(c) *The Director, Defense Investigative Service,* shall ensure that the acquisition of all available criminal history record information, or criminal history record information provided to the DIS by other government agencies, is safeguarded in accordance with existing

laws or DoD regulatory documents to ensure protection of the privacy of the enlistment applicant on whom the record exists.

### §96.6 Procedures.

(a) Under section 520a of title 10 U.S. Code, recruiters are authorized to request and receive criminal history record information from the criminal justice system.

(b) The Military Services shall obtain criminal history record information on enlistment applicants from the criminal justice system and from the DIS and shall review this information to determine whether applicants are acceptable for enlistment and for assignment to special programs. Recruiters shall request such information in each instance by addressing their requests to the criminal justice system not later than 90 days after each application for enlistment is made.

(c) The Military Services shall ensure the confidentiality of criminal history record information obtained for recruiting purposes. Personnel who have access to this information may not disclose it except for the purposes for which obtained (10 U.S.C. 520a).

(d) The DIS shall provide additional background information to the Military Services as needed to determine the suitability of applicants for enlistment and for participation in special programs. This additional background information shall be provided by Entrance National Agency Checks (ENTNACs) and other investigations as directed by DoD 5200.2–R.

## PART 97—RELEASE OF OFFICIAL INFORMATION IN LITIGATION AND TESTIMONY BY DoD PERSONNEL AS WITNESSES

Sec.

97.1 Purpose.
97.2 Applicability and scope.
97.3 Definitions.
97.4 Policy.
97.5 Responsibilities.
97.6 Procedures.

AUTHORITY: 5 U.S.C. 301; 10 U.S.C. 133.

SOURCE: 50 FR 32056, Aug. 8, 1985, unless otherwise noted.

### §97.1 Purpose.

This directive establishes policy, assigns responsibilities, and prescribes procedures for the release of official DoD information in litigation and for testimony by DoD personnel as witnesses during litigation.

### §97.2 Applicability and scope.

(a) This directive applies to the Office of the Secretary of Defense (OSD), the Military Departments, the Organization of the Joint Chiefs of Staff (OJCS), the Unified and Specified Commands, and the Defense Agencies (hereafter referred to as ''DoD Components''), and to all personnel of such DoD Components.

(b) This directive does not apply to the release of official information or testimony by DoD personnel in the following situations:

(1) Before courts-martial convened by the authority of the Military Departments or in administrative proceedings conducted by or on behalf of a DoD Component;

(2) Pursuant to administrative proceedings conducted by or on behalf of the Equal Employment Opportunity Commission (EEOC) or the Merit Systems Protection Board (MSPB), or pursuant to a negotiated grievance procedure under a collective bargaining agreement to which the Government is a party;

(3) In response to requests by Federal Government counsel in litigation conducted on behalf of the United States;

(4) As part of the assistance required pursuant to DoD Directive 5220.6, ''Industrial Personnel Security Clearance Program,'' December 20 1976; or,

(5) Pursuant to disclosure of information to Federal, State, and local prosecuting and law enforcement authorities, in conjunction with an investigation conducted by a DoD criminal investigative organization.

(c) This Directive does not supersede or modify existing laws or DoD program governing the testimony of DoD personnel or the release of official DoD information during grand jury proceedings, the release of official information not involved in litigation, or the release of official information pursuant to the Freedom of Information Act, 5 U.S.C. 552, or the Privacy Act, 5

U.S.C. 552a, nor does this Directive preclude treating any written request for agency records that is not in the nature of legal process as a request under the Freedom of Information or Privacy Acts.

(d) This Directive is not intended to infringe upon or displace the responsibilities committed to the Department of Justice in conducting litigation on behalf of the United States in appropriate cases.

(e) This Directive does not preclude official comment on matters in litigation in appropriate cases.

(f) This Directive is intended only to provide guidance for the internal operation of the Department of Defense and is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law against the United States or the Department of Defense.

### § 97.3 Definitions.

(a) *Demand*. Subpoena, order, or other demand of a court of competent jurisdiction, or other specific authority, for the production, disclosure, or release of official DoD information or for the appearance and testimony of DoD personnel as witnesses.

(b) *DoD personnel*. Present and former U.S. military personnel; Service Academy cadets and midshipmen; and present and former civilian employees of any Component of the Department of Defense, including nonappropriated fund activity employees; non-U.S. nationals who perform services overseas, under the provisions of status of forces agreements, for the U.S. Armed Forces; and other specific individuals hired through contractual agreements by or on behalf of the Department of Defense.

(c) *Litigation*. All pretrial, trial, and post-trial stages of all existing or reasonably anticipated judicial or administrative actions, hearings, investigations, or similar proceedings before civilian courts, commissions, boards (including the Armed Services Board of Contract Appeals), or other tribunals, foreign and domestic. This term includes responses to discovery requests, depositions, and other pretrial proceedings, as well as responses to formal or informal requests by attorneys or others in situations involving litigation.

(d) *Official information*. All information of any kind, however stored, that is in the custody and control of the Department of Defense, relates to information in the custody and control of the Department, or was acquired by DoD personnel as part of their official duties or because of their official status within the Department while such personnel were employed by or on behalf of the Department or on active duty with the U.S. Armed Forces.

### § 97.4 Policy.

It is DoD policy that official information should generally be made reasonably available for use in Federal and State courts and by other governmental bodies unless the information is classified, privileged, or otherwise protected from public disclosure.

### § 97.5 Responsibilities.

(a) The *General Counsel, Department of Defense*, shall provide general policy and procedural guidance by the issuance of supplemental instructions or specific orders concerning the release of official DoD information in litigation and the testimony of DoD personnel as witnesses during litigation.

(b) The *Heads of DoD Components* shall issue appropriate regulations to implement this Directive and to identify official information that is involved in litigation.

### § 97.6 Procedures.

(a) *Authority to act*. (1) In response to a litigation request or demand for official DoD information or the testimony of DoD personnel as witnesses, the General Counsels of DoD, Navy, and the Defense Agencies; the Judge Advocates General of the Military Departments; and the Chief Legal Advisors to the JCS and the Unified and Specified Commands, with regard to their respective Components, are authorized—after consulting and coordinating with the appropriate Department of Justice litigation attorneys, as required—to determine whether official information may be released in litigation; whether DoD personnel assigned to or affiliated with the Component may be interviewed,

contacted, or used as witnesses concerning official DoD information or as expert witnesses; and what, if any, conditions will be imposed upon such release, interview, contact, or testimony. Delegation of this authority, to include the authority to invoke appropriate claims of privilege before any tribunal, is permitted.

(2) In the event that a DoD Component receives a litigation request or demand for official information originated by another Component, the receiving Component shall forward the appropriate portions of the request or demand to the originating Component for action in accordance with this Directive. The receiving Component shall also notify the requestor, court, or other authority of its transfer of the request or demand.

(3) Notwithstanding the provisions of paragraph (a) (1) and (2) of this section, the General Counsel, DoD, in litigation involving terrorism, espionage, nuclear weapons, intelligence means or sources, or otherwise as deemed necessary, may notify Components that General Counsel, DoD, will assume primary responsibility for coordinating all litigation requests and demands for official DoD information or testimony of DoD personnel, or both; consulting with the Department of Justice, as required; and taking final action on such requests and demands.

(b) *Factors to consider*. In deciding whether to authorize the release of official DoD information or the testimony of DoD personnel concerning official information (hereafter referred to as ''the disclosure'') pursuant to paragraph (a), DoD officials should consider the following types of factors:

(1) Whether the request or demand is unduly burdensome or otherwise inappropriate under the applicable court rules;

(2) Whether the disclosure, including release *in camera*, is appropriate under the rules of procedure governing the case or matter in which the request or demand arose;

(3) Whether the disclosure would violate a statute, executive order, regulation, or directive;

(4) Whether the disclosure, including release *in camera*, is appropriate or necessary under the relevant substantive law concerning privilege;

(5) Whether the disclosure, except when *in camera* and necessary to assert a claim of privilege, would reveal information properly classified pursuant to DoD 5200.1–R, ''Information Security Program Regulation,'' August 1982; unclassified technical data withheld from public release pursuant to DoD Directive 5230.25, ''Withholding of Unclassified Technical Data from Public Disclosure,'' November 6, 1984; or other matters exempt from unrestricted disclosure; and,

(6) Whether disclosure would interfere with ongoing enforcement proceedings, compromise constitutional rights, reveal the identity of an intelligence source or confidential informant, disclose trade secrets or similarly confidential commercial or financial information, or otherwise be inappropriate under the circumstances.

(c) *Decisions on litigation requests and demands*. (1) Subject to paragraph (c)(5) of this section, DoD personnel shall not, in response to a litigation request or demand, produce, disclose, release, comment upon, or testify concerning any official DoD information without the prior written approval of the appropriate DoD official designated in §97.6(a). Oral approval may be granted, but a record of such approval will be made and retained in accordance with the applicable implementing regulations.

(2) If official DoD information is sought, through testimony or otherwise, by a litigation request or demand, the individual seeking such release or testimony must set forth, in writing and with as much specificity as possible, the nature and relevance of the official information sought. Subject to paragraph (c)(5), DoD personnel may only produce, disclose, release, comment upon, or testify concerning those matters that were specified in writing and properly approved by the appropriate DoD official designated in paragraph (a) of this section. *See United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462 (1951).

(3) Whenever a litigation request or demand is made upon DoD personnel for official DoD information or for testimony concerning such information,

the personnel upon whom the request or demand was made shall immediately notify the appropriate DoD official designated in § 97.6(a) for the Component to which the individual contacted is or, for former personnel, was last assigned. In appropriate cases, the responsible DoD official shall thereupon notify the Department of Justice of the request or demand. After due consultation and coordination with the Department of Justice, as required, the DoD official shall determine whether the individual is required to comply with the request or demand and shall notify the requestor or the court or other authority of the determination reached.

(4) If, after DoD personnel have received a litigation request or demand and have in turn notified the appropriate DoD official in accordance with paragraph (c)(3) of this section , a response to the request or demand is required before instructions from the responsible official are received, the responsible official designated in paragraph (a) shall furnish the requestor or the court or other authority with a copy of this directive and applicable implementing regulations, inform the requestor or the court or other authority that the request or demand is being reviewed, and seek a stay of the request or demand pending a final determination by the Component concerned.

(5) If a court of competent jurisdiction or other appropriate authority declines to stay the effect of the request or demand in response to action taken pursuant to § 97.6(c)(4), or if such court or other authority orders that the request or demand must be complied with notwithstanding the final decision of the appropriate DoD official, the DoD personnel upon whom the request or demand was made shall notify the responsible DoD official of such ruling or order. If the DoD official determines that no further legal review of or challenge to the court's order or ruling will be sought, the affected DoD personnel shall comply with the request, demand, or order. If directed by the appropriate DoD official, however, the affected DoD personnel shall respectfully decline to comply with the demand. *See United States ex rel. Touhy* v. *Ragen,* 340 U.S. 462 (1951).

(d) *Fees.* Consistent with the guidelines in DoD Instruction 7230.7, ''User Charges,'' January 29, 1985, the appropriate officials designated in § 97.6(a) are authorized to charge reasonable fees, as established by regulation and to the extent not prohibited by law, to parties seeking, by request or demand, official DoD information not otherwise available under DoD 5400.7–R, ''DoD Freedom of Information Act Program,'' March 24, 1980. Such fees, in amounts calculated to reimburse the government for the expense of providing such information, may include the costs of time expended by DoD employees to process and respond to the request or demand; attorney time for reviewing the requst or demand and any information located in response thereto and for related legal work in connection with the request or demand; and expenses generated by materials and equipment used to search for, produce, and copy the responsive information. *See Oppenheimer Fund, Inc.* v. *Sanders,* 437 U.S. 340 (1978).

(e) *Expert or opinion testimony.* DoD personnel shall not provide, with or without compensation, opinion or expert testimony concerning official DoD information, subjects, or activities, except on behalf of the United States or a party represented by the Department of Justice. Upon a showing by the requestor of exceptional need or unique circumstances and that the anticipated testimony will not be adverse to the interests of the Department of Defense or the United States, the appropriate DoD official designated in paragraph (a) of this section may, in writing, grant special authorization for DoD personnel to appear and testify at no expense to the United States. If, despite the final determination of the responsible DoD official, a court of competent jurisdiction or other appropriate authority, orders the appearance and expert or opinion testimony of DoD personnel, the personnel shall notify the responsible DoD official of such order. If the DoD official determines that no further legal review of or challenge to the court's order will be sought, the affected DoD personnel shall comply with the order. If directed by the appropriate DoD official, however, the affected DoD personnel shall respectfully

decline to comply with the demand. *See United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462 (1951).

# PART 99—PROCEDURES FOR STATES AND LOCALITIES TO REQUEST INDEMNIFICATION

Sec.
99.1 Scope and purpose.
99.3 General definitions.
99.5 Eligibility for indemnification.
99.7 Procedures for requesting an indemnification agreement.
99.9 Terms of indemnification.
APPENDIX TO PART 99—ADDRESSES OF RELEVANT U.S. GOVERNMENT AGENCIES

AUTHORITY: Access to Criminal History Records for National Security Purposes, of The Intelligence Authorization Act for Fiscal Year 1986, Pub. L. No. 99–169, secs. 801–803, 99 Stat. 1002, 1008–1011 (1985) (codified in part at 5 U.S.C. 9101).

SOURCE: 51 FR 42555, Nov. 25, 1986, unless otherwise noted.

## §99.1 Scope and purpose.

(a) The Department of Defense (DoD), Office of Personnel Management (OPM), or Central Intelligence Agency (CIA) has the right to criminal history information of States and local criminal justice agencies in order to determine whether a person may:

(1) Be eligible for access to classified information;

(2) Be assigned to sensitive national security duties; or

(3) Continue to be assigned to national security duties.

(b) This part sets out the conditions under which the DoD, OPM, or CIA may sign an agreement to indemnify and hold harmless a State or locality against claims for damages, costs, and other monetary loss caused by disclosure or use of criminal history record information by one of these agencies.

(c) The procedures set forth in this part do not apply to situations where a Federal agency seeks access to the criminal history records of another Federal agency.

(d) By law these provisions implementing 5 U.S.C. 9101 (b)(3) shall expire December 4, 1988, unless the duration of said section is extended or limited by Congress.

## §99.3 General definitions.

For the purposes of §§99.1 through 99.9 of this part:

*Criminal history record information:* information collected by criminal justice agencies on individuals consisting of identifiable descriptions and notations of arrests, indictments, information, or other formal criminal charges and any disposition arising therefrom, sentencing, correction supervision, and release. The term does not include identification information such as fingerprint records to the extent that such information does not indicate involvement of the individual in the criminal justice system. The term does not include those records of a State or locality sealed pursuant to law from access by State and local criminal justice agencies of that State or locality.

*Criminal justice agency:* Federal, State, and local agencies including (a) courts, or (b) a government agency or any subunit thereof which performs the administration of criminal justice pursuant to a statute or executive order, and which allocates a substantial part of its annual budget to the administration of criminal justice.

*Department of Defense:* the Defense Investigative Service, National Security Agency, Naval Investigative Service, Air Force Office of Special Investigations, and Army Intelligence and Security Command.

*Federal agency:* the Department of Defense, the Office of Personnel Management, or the Central Intelligence Agency, or any other Federal agency subsequently authorized by Congress to obtain access to criminal history records information.

*Locality:* any local government authority or agency or component thereof within a State having jurisdiction over matters at a county, municipal or other local government level.

*State:* any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Northern Mariana Islands, Guam, the Virgin Islands, American Samoa, the Trust Territory of Pacific Islands, and any other territory or possession of the United States.

### § 99.5 Eligibility for indemnification.

As provided for under 5 U.S.C. 9101(b)(3), a State or locality may request an indemnification agreement.

(a) To be eligible for an indemnification agreement a State or locality must have had a law in effect on December 4, 1985 that prohibited or had the effect of prohibiting the disclosure of criminal history record information to the DoD, OPM, or CIA.

(b) A State or locality is also eligible for an indemnification agreement if it meets the conditions of paragraph (a) of this section, but nevertheless provided criminal history record information to the DoD, OPM, or CIA on or before December 4, 1985.

### § 99.7 Procedures for requesting an indemnification agreement.

When requesting an indemnification agreement, the State or locality must notify each Federal agency as appropriate, at the address listed in the appendix to this part, of its eligibility of an indemnification agreement. It must also:

(a) Certify that on December 4, 1985, the State or locality had in effect a law which prohibited or had the effect of prohibiting the disclosure of criminal history record information to the DoD, OPM, or CIA; and

(b) Append to the request for an indemnification agreement a copy of such law.

### § 99.9 Terms of indemnification.

The terms of the Uniform Federal Agency Indemnification Agreement (UFAIA), must conform to the following provisions:

(a) *Eligibility:* The State or locality must certify that its law prohibits or has the effect of prohibiting the disclosure of criminal history record information to the DoD, OPM, or CIA for the purposes described in section 910.101(a) and that such law was in effect on December 4, 1985.

(b) *Liability:* (1) The Federal agency agrees to indemnify and hold harmless the State or locality from any claim for damages, costs and other monetary loss arising from the disclosure or negligent use by the DoD, OPM, or CIA of criminal history record information obtained from that State or locality pursuant to 5 U.S.C. 9101(b). The indemnification will include the officers, employees, and agents of the State or locality.

(2) The indemnification agreement will not extend to any act or omission prior to the transmittal of the criminal history record information to the Federal agency.

(3) The indemnification agreement will not extend to any negligent acts on the part of the State or locality in compiling, transcribing or failing to delete or purge any of the information transmitted.

(c) *Consent and access requirements:*

(1) The Federal agency when requesting criminal history record information from the State or locality for the release of such information will attest that it has obtained the written consent of the individual under investigation after advising him or her of the purposes for which that information is intended to be used.

(2) The Federal agency will attest that it has advised that individual of the right to access that information.

(d) *Purpose requirements:* The Federal agency will use the criminal history record information only for the purposes stated in § 910.101(a).

(e) *Notice, litigation and settlement procedures:* (1) The State or locality must give notice of any claim against it on or before the 10th day after the day on which claim against it is received, or it has notice of such a claim.

(2) The notice must be given to the Attorney General and to the U.S. Attorney of the district embracing the place wherein the claim is made.

(3) The Attorney General shall make all determinations regarding the settlement or defense of such claims.

## APPENDIX TO PART 99—ADDRESSES OF RELEVANT U.S. GOVERNMENT AGENCIES

Department of Defense, Office of the General Counsel, Room 3E988, Washington, DC 20301–1600

Office of Personnel Management, Office of Federal Investigations, P.O. Box 886, Washington, DC 20044

Central Intelligence Agency, Attention: Office of General Counsel, Washington, DC 20505

# PART 100—UNSATISFACTORY PERFORMANCE OF READY RESERVE OBLIGATION

Sec.
100.1 Reissuance and purpose.
100.2 Applicability.
100.3 Policy.
100.4 Responsibility.
100.5 Procedures.
100.6 Definitions.
ENCLOSURE TO PART 100—SUGGESTED FORMAT, AFFIDAVIT OF SERVICE BY MAIL

AUTHORITY: 10 U.S.C. 510, 511, 593, 597, or 651, and 32 U.S.C. 302.

SOURCE: 44 FR 51568, Sept. 4, 1979, unless otherwise noted.

## § 100.1 Reissuance and purpose.

This part is reissued to update DoD policy on actions to be taken in regard to members of the Ready Reserve whose performance of duty or participation in Reserve training is unsatisfactory; and provides greater flexibility to the Military Departments when dealing with unsatisfactory performance.

## § 100.2 Applicability.

The provisions of this part apply to the Office of the Secretary of Defense and the Military Departments.

## § 100.3 Policy.

Persons who are enlisted or appointed in, or transferred to a Reserve component of the Armed Forces of the United States, under the provisions of 10 U.S.C. 510, 511, 593, 597, or 651 and 32 U.S.C. 302 are expected to participate and perform satisfactorily as members of the Ready Reserve to fulfill their obligation or service agreement. This policy is also in accordance with the standards prescribed by 32 CFR parts 102 and 101 and the Military Departments concerned.

## § 100.4 Responsibility.

The Secretaries of the Military Departments shall ensure that:

(a) Ready Reserve applicants understand their obligations for satisfactory participation in the Ready Reserve before their enlistment or appointment.

(b) Members of the Ready Reserve continue to understand their obligations for satisfactory participation in the Ready Reserve after their enlistment or appointment in accordance with 32 CFR part 44.

## § 100.5 Procedures.

(a) *Unsatisfactory participation in the Ready Reserve.* (1) Members of the Selected Reserve who have not fulfilled their statutory military service obligation under 10 U.S.C. 651 and whose participation has not been satisfactory *may* be:

(i) Ordered to active duty, *if they have not served on active duty or active duty for training for a total period of 24 months,* for such period of time as may be deemed necessary by the Secretary of the Military Department concerned under the provisions of 10 U.S.C. 673a (such individuals may be required to serve on active duty until their total service on active duty or active duty for training equals 24 months); or

(ii) Ordered to active duty for training, *regardless of the length of prior active duty or active duty for training,* for a period of not more than 45 days under provisions of 10 U.S.C. 270; or

(iii) Transferred to the Individual Ready Reserve (IRR) for the balance of their statutory military service obligation with a tentative characterization of service, normally under other than honorable conditions, when the Military Department concerned has determined that the individuals still possesses the potential for useful service under conditions of full mobilization; or

(iv) Discharged for unsatisfactory participation under the provisions of 32 CFR part 41, when the Military Department concerned has determined that the individual has *no* potential for useful service under conditions of full mobilization.

(2) Members of the Selected Reserve who have fulfilled their statutory military service obligation under 10 U.S.C. 651 or who did not incur such obligation,[2] and whose participation has not been satisfactory *may* be:

[2]This includes women whose current enlistment or appointment was effected before February 1, 1978.

(i) Transferred to the IRR for the balance of their current enlistment contract or service agreement with a tentative characterization of service, normally under other than honorable conditions, when the Military Department concerned has determined that the individual still has a potential for useful service under conditions of full mobilization; or

(ii) Discharged for unsatisfactory performance under 32 CFR part 41 when the Military Department concerned has determined that the individual has no further potential for useful service under conditions of full mobilization.

(3) When a member of the Selected Reserve is identified as an unsatisfactory participant and considered a possible candidate for involuntary transfer to the IRR or for discharge, a board of officers shall be convened, as required by 10 U.S.C. 1163 to consider the circumstances and recommend appropriate action.

(4) When an individual is transferred to the IRR as a result of an approved board recommendation, no further board action shall be required before discharge if the individual fails to take affirmative action in an effort to upgrade the tentative characterization of service.

(5) Members of the IRR who have not fulfilled their statutory military service obligation under 10 U.S.C. 651 were enlisted or appointed under any program that provided that the obligation could be fulfilled by service in the IRR only, and whose participation in such a program has not been satisfactory *may* be:

(i) Retained in the IRR for the duration of their statutory military service obligation with a tentative characterization of service, normally under other than honorable conditions, when the Military Department concerned has determined that the individual still possesses the potential for useful service under conditions of full mobilization; or

(ii) Discharged for unsatisfactory performance under 32 CFR part 41, when the Military Department concerned has determined that the individual has no potential for useful service under conditions of full mobilization.

(6) When a member of the IRR, whose enlistment or appointment provided that the service concerned could be performed entirely in the IRR (as opposed to the Selected Reserve), is identified as an unsatisfactory participant, a board of officers shall be convened as required by 10 U.S.C. 1163 to consider the circumstances and recommend appropriate action. When an individual is retained as a result of an approved board action, no further board action shall be required before discharge if the individual fails to take affirmative action in an effort to upgrade the tentative characterization of service.

(7) Individuals assigned to the Selected Reserve who are ordered to active duty under 10 U.S.C. 673a or to active duty for training under the provisions of 10 U.S.C. 270 may be returned to their previous unit of assignment or transferred to the IRR upon the completion of the active duty or active duty for training. When necessary, the individual's term of enlistment or service agreement may be extended to permit completion of the designated period of active duty or active duty for training in accordance with 10 U.S.C. 270(b) and 673(b).

(8) Individuals who are transferred or assigned to the IRR who have a tentative characterization of service of less than honorable because of unsatisfactory participation in the Ready Reserve shall be discharged at the end of their statutory military service obligation or their period of enlistment or service agreement, whichever is later with such characterization *unless* the individuals have taken affirmative action to upgrade the tentative characterization of service. Affirmative actions may include, but are not limited to, rejoining a unit of the Selected Reserve and participating satisfactorily for a period of 12 months, or volunteering for and completing a tour of active duty for training of not less than 45 days. When necessary, the individual's term of enlistment or service agreement may be extended to complete the affirmative action and qualify for a more favorable characterization of service.

(9) When members of the Selected Reserve are ordered to active duty, active duty for training, or transferred to the

IRR because of unsatisfactory participation, copies of their orders should be furnished to the individuals through personal contact by a member of the command and a written acknowledgment of receipt obtained. When such efforts are unsuccessful, the orders shall be mailed to the individual.

(i) Orders mailed to such members shall be sent by Certified Mail (Return Receipt Requested), and a Receipt for Certified Mail (PS Form 3800) obtained. In addition, the individual who mails the orders shall prepare a Sworn Affidavit of Service by Mail (format at enclosure) that shall be inserted, together with the PS Form 3800, in the member's personnel file.

(ii) Notification shall be made through the mailing of orders to the member's most recent mailing address.

(iii) Provided the orders were properly mailed to the most recent address furnished by the member, absence of proof of delivery does not change the fact that the member was properly ordered to report for active duty, active duty for training, or transferred to the IRR, as appropriate.

(iv) Individuals ordered to active duty who fail to report shall have their names entered into the National Crime Information Center of the Federal Bureau of Investigation within 30 days following their reporting date and appropriate screening by the Deserter Information Point concerned.

(10) Orders affecting members of the IRR that involve active duty for training required by the terms of their enlistment or service agreement may be handled by mail in the manner prescribed in paragraph (a)(9)(i) of this section.

(11) Each member of the IRR must keep the organization of assignment informed of:

(i) His/her accurate and current mailing address;

(ii) Any change of address, marital status, number of dependents, and civilian employment; and

(iii) Any change in physical condition that would prevent the member from meeting the physical or mental standards prescribed by 10 U.S.C. 652 and part 44 of this title.

(12) Individuals involuntarily ordered to active duty or active duty for training under provisions of this part may be delayed as prescribed by the Secretary of the Military Department concerned.

(13) Individuals whose involuntary order to active duty would result in extreme community or personal hardship may, upon their request, be transferred to the Standby Reserve, the Retired Reserve, or discharged, as appropriate, in accordance with 10 U.S.C. 673a(c) and part 44 of this title.

(b) *Exceptions.* As exceptions to the criteria in paragraph (a) of this section, members of the Ready Reserve who do not or are unable to participate for any of the following reasons shall be processed as indicated:

(1) Members of the Selected Reserve who are unable to participate in a unit of the Selected Reserve by reason of an action taken by the Military Department concerned, such as unit inactivation or relocation, to the effect that they now reside beyond a reasonable commuting distance (as defined in §100.6(e)) of a Reserve unit, shall be assigned to the IRR until they are able to join or be assigned to another unit, or complete their statutory military service obligation.

(2) Members of the Selected Reserve who change their residence:

(i) May lose their unit position. However, they will be transferred to another paid-drill unit with the same Reserve component if possible or be given 90 days after departing from their original unit to locate and join another unit. At the new unit, they will fill an existing vacancy or be assigned as a temporary overstrength within the congressionally authorized standard-years (defined in §100.6(f)) or funds under paragraph (b)(2)(iii) (A) and (B) of this section.

(ii) May locate position vacancies that require different specialties than the ones they now possess. Therefore, the Secretary of the Military Department concerned may provide for the retaining of these individuals (with their consent) by ordering them to active duty for training to acquire the necessary specialties.

(iii) Must be accepted in a Reserve unit by their parent Military Department regardless of vacancies, subject to the following conditions:

(A) The losing unit certifies that the reservist's performance of service has been satisfactory.

(B) The reservist's specialty is usable in the unit, the member can be retrained by on-the-job training, or the member is willing to be retrained as outlined in paragraph (b)(2)(ii) of this section.

(iv) Are authorized to transfer to another Reserve component under the provisions of DoD Directive 1205.51, ''Transfer of Persons Between Reserve Components of the Armed Forces,'' June 25, 1959, when the conditions outlined in paragraph (b)(2)(iii) apply.

(3) If members of the Selected Reserve who change their residents fail to join another unit within a period of 90 days, and at least 1 unit of their component is within a reasonable commuting distance, as such distance is defined in §100.6(e) they shall be processed in accordance with §100.5(a) unless they are considered eligible to be handled as ''exceptions'' under policies outlined in paragraph (b) (5) through (8) of this section.

(4) If members of the Selected Reserve who change their residences locate in an area where they reside beyond a reasonable commuting distance, as such distance is defined in §100.6(e) of a paid-drill unit of the same Reserve component, they shall be assigned to the IRR of their service until they are able to transfer to a paid-drill unit of another Reserve component; or complete their statutory military service obligation.

(5) Members of the Ready Reserve who are preparing for, or are engaged in, critical civilian occupations will be screened in accordance with 32 CFR part 44.

(6) Individuals who are preparing for the ministry in a recognized theological or divinity school may participate voluntarily in the Ready Reserve. However, under 10 U.S.C. 685, such individuals may not be required to do so. Members who do not wish to participate shall be transferred to the Standby Reserve. If such training is terminated before graduation, the member may be transferred back to the Ready Reserve. A member eligible for assignment to the Standby Reserve under the provisions of 10 U.S.C. 268(b), 270, 510, 511, 593, 597, 651, 652, 672, 673, 673a, 673b, 685, and 1163 who voluntarily remains assigned to the Selected Reserve and participates in the training required, waives any right to request delay to exemption from any later mobilization on the basis of preparation for the ministry.

(7) Individuals who are enrolled in a course of graduate study in one of the health professions shall be screened in accordance with DoD Directive 1200.141, ''Reservists Who Are Engaged in Graduate Study or Training in Certain Health Progressions,'' July 30, 1969.

(8) Individuals who incur a bona fide, temporary nonmilitary obligation requiring overseas residency outside the United States, or religious missionary obligation shall be processed in accordance with 32 CFR art 103.

(9) Nothing in this part shall be construed as limiting the right of the individual to voluntarily request transfer to the Standby Reserve or to the Retired Reserve, or discharge from the Reserve components when such action is authorized by regulations of the Military Department concerned.

(10) Nothing in this part shall be construed as precluding action against a member of the Ready Reserve, either by court-martial or review by a board of officers convened by an authority designated by the Secretary of the Military Department concerned, when such action might otherwise be warranted under 10 U.S.C. 268(b), 270, 510, 511, 593, 597, 651, 652, 672, 673, 673a, 673b, 685, and 1163 and the regulations of the Military Department concerned.

### §100.6 Definitions.

(a) *Ready Reserve*. Consists of the Selected Reserve and the Individual Ready Reserve. Members of both are subject to active duty as outlined in 10 U.S.C. 672 and 673.

(b) *Selected Reserve*. Members of the Ready Reserve in training/pay categories A, B, C, F, M and P. These reservists are either members of units who participate regularly in drills and annual active duty for training, in annual field training in the case of the National Guard, or are on initial active duty for training; or they are individuals who participate in regular drills and annual active duty on the same

basis as members of Reserve component units. *Excluded* from the Selected Reserve are Reserve component members who are:

(1) Participating in annual active duty for training and not paid for attendance at regular drills (pay categories D and E), or awaiting, in a nonpay status, their initial active duty for training (pay category L).

(2) Enrolled in officer training program (pay category J) members of the Individual Ready Reserve pool (pay category H), and reservists on extended active duty. (See 10 U.S.C. 268(b) 32 CFR part 102.)

(3) Members of the Inactive Army National Guard.

(c) *Individual Ready Reserve (IRR).* Members of the Ready Reserve not assigned to the Selected Reserve and not on active duty.

(d) *Unsatisfactory participation.* A member of the Ready Reserve who fails to fulfill his/her obligation or agreement as a member of a unit of the Ready Reserve described in 10 U.S.C. 268(b), 270, 510, 511, 593, 597, 651, 652, 672, 673, 673a, 673b, 685, and 1163. Or a member who fails to meet the standards as prescribed by the Military Departments concerned for attendance at training drills, attendance at active duty for training, training advancement, or performance of duty.

(e) *Reasonable commuting distance.* The maximum distance a member of a Reserve component may travel involuntarily between residence and drill training site, in accordance with §100.5(b)(1). This distance may be within:

(1) A 100-mile radius of the drill site that does not exceed a distance that can be traveled by automobile under average conditions of traffic, weather, and roads within 3 hours. This applies only to those units that normally conduct four drills on 2 consecutive days during the training year, if Government meals and quarters are provided at the base where the unit drills. (The provisions of this paragraph shall apply only to those individuals enlisting, reenlisting, or extending their enlistments after November 1, 1972.)

(2) A 50-mile radius of the drill site that does not exceed a distance that can be traveled by automobile under average conditions of traffic, weather, and roads within a period of 1½ hours.

(f) *Standard-year.* Personnel authorizations that describe the amount of work expected of one individual during a calendar or fiscal year.

(g) *Tentative characterization of service.* An interim description of the quality of performance during a period which is less than the time required to earn an administrative discharge. The quality of performance shall be described as honorable, under honorable conditions, or under other than honorable conditions. If the quality is described as under honorable conditions a General Discharge certificate shall be provided upon discharge. If the quality is described as under other than honorable conditions a Discharge Under Other Than Honorable Conditions certificate shall be provided upon discharge.

[44 FR 51568, Sept. 4, 1979, as amended at 45 FR 48618, July 21, 1980]

## ENCLOSURE—SUGGESTED FORMAT, AFFIDAVIT OF SERVICE BY MAIL

State of _____
County of _____
_____ (Name of individuals who mailed orders), being duly sworn, deposes and says:

I am the _____ (Job Title, e.g., Personnel Officer) of _____ (Unit) on the _____ day of _____ 19___, I mailed the original orders, a true copy of which is attached hereto, by Certified Mail (Return Receipt Requested) to _____ (Name and address of member of orders) that being the last known address given to _____ (Unit) as the one at which official mail would be received by or forwarded to the Reserve component member by depositing same in an official depository of the U.S. Postal Service at _____ (Location of Postal Facility) in a securely wrapped and sealed U.S. Government official postal envelope with a Return Receipt Card (PS Form 3811) attached and the envelope addressed to the member at the address provided. A Receipt for Certified Mail (PS Form 3800) attesting to such action is attached.

_____ (Signature and Rank of Affiant)
Sworn and subscribed before me this _____ day of _____ 19___.
_____ (Signature and Rank of Officer Administering Oath)

# PART 101—PARTICIPATION IN RESERVE TRAINING PROGRAMS

Sec.
101.1 Reissuance and purpose.
101.2 Applicability.
101.3 Definitions.
101.4 Responsibilities.
101.5 Requirements.
101.6 Criteria for satisfactory performance.
101.7 Compliance measures.
101.8 Reserve training in sovereign foreign nations.

AUTHORITY: 10 U.S.C. 270 (a), (b), (c), 511 (b), (d), and 673a, and 32 U.S.C. 502(a).

SOURCE: 44 FR 53160, Sept. 13, 1979, unless otherwise noted.

## § 101.1 Reissuance and purpose.

This part establishes: (a) The criteria and training requirements for satisfactory participation by members of the Reserve components of the U.S. Armed Forces who are subject to the provisions of 10 U.S.C. and 32 U.S.C., and (b) uniform DoD policy for training members of such Reserve components who may be temporarily residing in sovereign foreign nations.

## § 101.2 Applicability.

The provisions of this part apply to the Office of the Secretary of Defense and the Military Departments.

## § 101.3 Definitions.

For the purposes of administering 10 U.S.C. 270(a), the terms *enlisted* and *appointed* refer to initial entry into an armed force through enlistment or appointment.

## § 101.4 Responsibilities.

The Secretaries of the Military Departments will issue regulations prescribing criteria and training requirements for satisfactory participation in Reserve training programs by members of Reserve components of the U.S. Armed Forces and exceptions thereto, consistent with § 101.5.

## § 101.5 Requirements.

(a) *Reserve participation*—(1) *Training requirements under 10 U.S.C. 270(a).* (i) Each individual inducted, enlisted, or appointed in the U.S. Armed Forces after August 9, 1955, who becomes a member of the Ready Reserve (by means other than through membership in the Army National Guard of the United States (see § 101.5(a)(2)) during the required statutory period in the Ready Reserve, participate or serve as follows, except as provided in 32 CFR part 102.

(A) In at least 48 scheduled drills or training periods and not less than 14 days (exclusive of travel time) of active duty training during each year; or

(B) On active duty for training for no more than 30 days each year, unless otherwise specifically prescribed by the Secretary of Defense.

(ii) The provisions of § 101.5(a)(1) do not apply to graduates of the Federal and State Maritime Academies who are commissioned in the Naval Reserve.

(2) *Training requirements under 32 U.S.C. 502(a) apply to the Secretaries of the Army and Air Force only.* Members of the Army and Air National Guard shall:

(i) Assemble for drill and instruction at least 48 times a year, and

(ii) Participate in training encampments, maneuvers, or other exercises at least 15 days a year, unless excused by the Secretaries of the Army or Air Force.

(3) *Active duty.* Enlisted members who have served 2 years on active duty or who, under the policy and regulations of the Military Services concerned, were credited with having served 2 years of active duty will not be required to perform duty as described in paragraph (a)(1)(i) (A) and (B) of this section unless such members:

(i) Enlisted under the provisions of 10 U.S.C. 511(b) or (d) thereby incurring a statutory obligation to participate in the Ready Reserve in an active training status for a specified period of time after the 2 years of active duty described above.

(ii) Performed part or all of their 2 years of active duty as a result of being ordered to active duty under 10 U.S.C. 673a for not participating satisfactorily in a unit of the Ready Reserve. However, the Secretary concerned, or designee, may waive this requirement in those cases where involuntary retention would not be in the best interest of the Service.

(iii) Filled a vacancy in the Selected Reserve that otherwise cannot be

filled, following a diligent recruiting effort by the Secretary concerned.

(iv) Executed a separate written agreement incurring an obligation to participate in the Selected Reserve.

(4) *Active duty served in a combat zone.* (i) Except as specified in paragraph (a)(4)(ii), enlisted members who (A) have served on active duty in a combat zone for hostile fire pay (or other areas as prescribed by the Secretary of Defense) for a total of 30 days or more, or (B) are wounded while on active duty in hostile areas, will not be required to perform duty involuntarily (as described paragraph (a) (1)(i)(A) and (2) of this section. However, these members may be required to participate or serve on active duty for no more than 30 days each year, unless otherwise specifically prescribed by the Secretary of Defense.

(ii) Members, who enlisted under the provisions of 10 U.S.C. 511(b) or (d) and serve on active duty described in paragraph (a)(4)(i) are obligated to participate in the Ready Reserve in an active duty training status during the statutory period of service in the Ready Reserve.

(5) *Exclusion.* Notwithstanding the exclusion of the member enlisted under the provisions of 10 U.S.C. 511(b) or (d), from the policies set forth in paragraph (a) (3) and (4) of this section, the Secretaries of the Military Departments may, with the approval of the Secretary of Defense, establish criteria which may excuse certain enlistees from performing the duty described in § 101.5(a), depending upon the particular needs of the Military Department concerned.

### § 101.6 Criteria for satisfactory performance.

Within the general policy outlined in § 101.5(a), the minimum amount of annual training prescribed by the Secretaries of the Military Departments concerned will be no less than the training required to maintain the proficiency of the unit and the skill of the individual. In establishing annual training requirements under this policy, the Secretaries:

(a) May grant exceptions under circumstances outlined below for individuals who are subject to the training requirements set forth in § 101.5(a)(1) and (2):

(1) To the degree that it is consistent with military requirements, the personal circumstances of an individual may be considered in assigning him/her to a training category prescribed in 32 CFR part 102, except as otherwise provided by 32 CFR part 100.

(2) Members who have performed a minimum initial tour of extended active duty, as prescribed by the Military Departments concerned may be placed in Category I (no training) as defined in 32 CFR part 102, when the Secretary of the Military Department concerned determines that no training for mobilization requirement exists because of

(i) Changes in military skills required;

(ii) The degree of military skill held; or

(iii) Compatibility of the member's civilian occupation with his/her military skill.

(b) May grant exceptions regarding absences after considering the member's manner of performance of prescribed training duty under the provisions of § 101.5(a)(1) and provided that the absences not so excepted do not exceed 10% of scheduled drills or training periods.

(c) Shall require members to: (1) Meet the standards of satisfactory performance of training duty set forth in § 101.6(b); or (2) participate satisfactorily in an officer training program. The placement of such members in the Standby Reserve as a result of the screening process prescribed in 32 CFR part 44, will continue to constitute satisfactory performance of service.

### § 101.7 Compliance measures.

Under the provisions of 32 CFR part 100, members of the Ready Reserve who fail to meet the criteria for satisfactory performance, as set forth in § 101.6, may be:

(a) Ordered to active duty; or

(b) Ordered to active duty for training; or

(c) Transferred to, or retained in the Individual Ready Reserve with a tentative characterization of service, normally under other than honorable conditions; or

(d) Discharged for unsatisfactory participation under the provisions of 32 CFR part 41, when the Military Department concerned has determined that the individual has no potential for useful service under conditions of full mobilization.

### § 101.8 Reserve training in sovereign foreign nations.

(a) The Secretaries of the Military Departments may authorize the conduct of scheduled drills or training periods, correspondence courses, and such other active or inactive duty training as they consider appropriate for members of the Reserve components who may be temporarily residing in sovereign foreign nations which permit the United States to maintain troops of the Active Forces (other than Military Advisory Assistance Group or attached personnel) within their boundaries.

(b) Prior to authorizing such training, the Secretaries of the Military Departments will instruct the attaches representing their respective Departments to inform the U.S. Ambassador and the appropriate officials of the foreign government of the intent to conduct such training. If the foreign government objects, the Secretaries of the Military Departments will furnish all the facts and their recommendations to the Secretary of Defense.

(c) This policy does not prohibit the conduct of inactive duty training, such as correspondence courses, in those sovereign foreign countries in which the United States does not maintain Active Forces and where an agreement exists between the United States and the sovereign foreign nation concerned for the conduct of such training.

(d) This policy does not prohibit for a limited duration the augmentation of Defense Attache Offices by attache reservists (mobilization augmentees or mobilization designees) during periods of local emergencies or for short-term (less than 30 days) training periods, provided the provisions of paragraph (b) of this section are respected. Attache reservists who are available, possess the expertise required, and reside temporarily in foreign countries, shall be utilized to the maximum extent to augment Defense Attache Offices before the continental United States-based attache reservists are utilized.

## PART 104—CIVILIAN EMPLOYMENT AND REEMPLOYMENT RIGHTS OF APPLICANTS FOR, AND SERVICE MEMBERS AND FORMER SERVICE MEMBERS OF THE UNIFORMED SERVICES

Sec.
104.1 Purpose.
104.2 Applicability.
104.3 Definitions.
104.4 Policy.
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104.6 Procedures.

APPENDIX A TO PART 104—CIVILIAN EMPLOYMENT AND REEMPLOYMENT RIGHTS, BENEFITS AND OBLIGATIONS FOR APPLICANTS FOR, AND SERVICE MEMBERS AND FORMER SERVICE MEMBERS OF THE UNIFORMED SERVICES

APPENDIX B TO PART 104—SAMPLE EMPLOYER NOTIFICATION OF UNIFORMED SERVICE

AUTHORITY: 10 U.S.C. 1161.

SOURCE: 62 FR 3466, Jan. 23, 1998, unless otherwise noted.

### § 104.1 Purpose.

This part:

(a) Updates implementation policy, assigns responsibilities, and prescribes procedures for informing Service members who are covered by the provisions of 38 U.S.C chapter 43 and individuals who apply for uniformed service, of their civilian employment and reemployment rights, benefits and obligations.

(b) Implements 38 U.S.C. chapter 43, which updated, codified, and strengthened the civilian employment and reemployment rights and benefits of Service members and individuals who apply for uniformed service, and specifies the obligations of Service members and applicants for uniformed service.

### § 104.2 Applicability.

This part applies to the Office of the Secretary of Defense; the Military Departments, including the Coast Guard when it is not operating as a Military Service in the Department of the Navy by agreement with the Department of Transportation; the Chairman of the Joint Chiefs of Staff; and the Defense Agencies (referred to collectively in

this part as ''the DoD Components''). The term ''Military Departments,'' as used in this part, refers to the Departments of the Army, Navy, and Air Force. The term ''Secretary concerned'' refers to the Secretaries of the Military Departments and the Secretary of Transportation with respect to the Coast Guard when it is not operating as a Service in the Department of the Navy. The term ''Military Services'' refers to the Army, the Navy, the Air Force, the Marine Corps, and the Coast Guard.

**§ 104.3 Definitions.**

*Critical mission*. An operational mission that requires the skills or resources available in a Reserve component or components.

*Critical requirement*. A requirement in which the incumbent possesses unique knowledge, extensive experience, and specialty skill training to successfully fulfill the duties or responsibilities in support of the mission, operation or exercise. Also, a requirement in which the incumbent must gain the necessary experience to qualify for key senior leadership positions within his or her Reserve component.

*Escalator position*. This is established by the principle that the returning Service member is entitled to the position of civilian employment that he or she would have attained had he or she remained continuously employed by that civilian employer. This may be a position of greater or lesser responsibilities, to include a layoff status, when compared to the employees of the same seniority and status employed by the company.

*Impossible or unreasonable*. For the purpose of determining when providing advance notice of uniformed service to an employer is impossible or unreasonable, the unavailability of an employer or employer representative to whom notification can be given, an order by competent military authority to report for uniformed service within forty-eight hours of notification, or other circumstances that the Office of the Assistant Secretary of Defense for Reserve Affairs may determine are impossible or unreasonable are sufficient justification for not providing advance notice of pending uniformed service to an employer.

*Military necessity*. For the purpose of determining when providing advance notice of uniformed service is not required, a mission, operation, exercise or requirement that is classified, or a pending or ongoing mission, operation, exercise or requirement that may be compromised or otherwise adversely affected by public knowledge is sufficient justification for not providing advance notice to an employer.

*Non-career service*. The period of active uniformed service required to complete the initial uniformed service obligation; a period of active duty or full-time National Guard duty that is for a specified purpose and duration with no expressed or implied commitment for continued active duty; or participation in a Reserve component as a member of the Ready Reserve performing annual training, active duty for training or inactive duty training. Continuous or repeated active uniformed service or full-time National Guard duty that results in eligibility for a regular retirement from the Armed Forces is not considered non-career service.

*Officer*. For determining those Service officials authorized to provide advance notice to a civilian employer of pending uniformed service by a Service member or an individual who has applied for uniformed service, an officer shall include all commissioned officers, warrant officers, and non-commissioned officers authorized by the Secretary concerned to act in this capacity.

*Uniformed service*. Performance of duty on a voluntary or involuntary basis in the Army, the Navy, the Air Force, the Marine Corps or the Coast Guard, including their Reserve components, when the Service member is engaged in active duty, active duty for special work, active duty for training, initial active duty for training, inactive duty training, annual training or full-time National Guard duty, and, for purposes of this part, a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform such duty.

**§ 104.4 Policy.**

It is DoD policy to support non-career service by taking appropriate actions to inform and assist uniformed Service members and former Service members who are covered by the provisions of 38 U.S.C. chapter 43, and individuals who apply for uniformed service of their rights, benefits, and obligations under 38 U.S.C. Chapter 43. Such actions include:

(a) Advising non-career Service members and individuals who apply for uniformed service of their employment and reemployment rights and benefits provided in 38 U.S.C. chapter 43, as implemented by this part, and the obligations they must meet to exercise those rights.

(b) Providing assistance to Service members, former Service members and individuals who apply for uniformed service in exercising employment and reemployment rights and benefits.

(c) Providing assistance to civilian employers of non-career Service members in addressing issues involving uniformed service as it relates to civilian employment or reemployment.

(d) Considering requests from civilian employers of members of the National Guard and Reserve to adjust a Service member's scheduled absence from civilian employment because of uniformed service or make other accommodations to such requests, when it is reasonable to do so.

(e) Documenting periods of uniformed service that are exempt from a Service member's cumulative 5-year absence from civilian employment to perform uniformed service as provided in 38 U.S.C. chapter 43 and implemented by this part.

(f) Providing, at the Service member's request, necessary documentation concerning a period or periods of service, or providing a written statement that such documentation is not available, that will assist the Service member in establishing civilian reemployment rights, benefits and obligations.

**§ 104.5 Responsibilities.**

(a) The Assistant Secretary of Defense for Reserve Affairs, under the Under Secretary of Defense for Personnel and Readiness, shall:

(1) In conjunction with the Departments of Labor (DoL) and Veterans Affairs, the Office of Personnel Management (OPM), and other appropriate Departments and activities of the executive branch, determine actions necessary to establish procedures and provide information concerning civilian employment and reemployment rights, benefits and obligations.

(2) Establish procedures and provide guidance to the Secretaries concerned about civilian employment and reemployment rights, benefits and obligations of Service members who are covered by the provisions of 38 U.S.C. chapter 43 and individuals who apply for uniformed service as provided in 38 U.S.C. chapter 43. This responsibility shall be carried out in coordination with DoL, OPM, and the Federal Retirement Thrift Investment Board.

(3) Monitor compliance with 38 U.S.C. chapter 43 and this part.

(4) Publish in the FEDERAL REGISTER, DoD policies and procedures established to implement 38 U.S.C. chapter 43.

(b) The Secretaries of the Military Departments and the Commandant of the Coast Guard shall establish procedures to:

(1) Ensure compliance with this part.

(2) Inform Service members who are covered by the provisions of 38 U.S.C. chapter 43 and individuals who apply for uniformed service of the provisions of 38 U.S.C. chapter 43 as implemented by this part.

(3) Provide available documentation, upon request from a Service member or former Service member, that can be used to establish reemployment rights of the individual.

(4) Specify, as required, and document those periods of active duty that are exempt from the 5-year cumulative service limitation that a Service member may be absent from a position of civilian employment while retaining reemployment rights.

(5) Provide assistance to Service members and former Service members who are covered by the provisions of 38 U.S.C. chapter 43, and individuals who apply for uniformed service in exercising employment and reemployment rights.

(6) Provide assistance, as appropriate, to civilian employers of Service members who are covered by the provisions of 38 U.S.C. chapter 43 and individuals who apply for uniformed service.

(7) Cooperate with the DoL in discharging its responsibilities to assist persons with employment and reemployment rights and benefits.

(8) Cooperate with OPM in carrying out its placement responsibilities under 38 U.S.C. chapter 43.

**§ 104.6 Procedures.**

The Secretaries of the Military Departments and the Commandant of the Coast Guard shall:

(a) Inform individuals who apply for uniformed service and members of a Reserve component who perform or participate on a voluntary or involuntary basis in active duty, active duty for special work, initial active duty for training, active duty for training, inactive duty training, annual training and full-time National Guard duty, of their employment and reemployment rights, benefits, and obligations as provided under 38 U.S.C. chapter 43 and described in Appendix A of this part. Other appropriate materials may be used to supplement the information contained in Appendix A of this part.

(1) Persons who apply for uniformed service shall be advised that DoD strongly encourages applicants to provide advance notice in writing to their civilian employers of pending uniformed service or any absence for the purpose of an examination to determine the person's fitness to perform uniformed service. Providing written advance notice is preferable to verbal advance notice since it is easier to establish that this basic prerequisite to retaining reemployment rights was fulfilled. Regardless of the means of providing advance notice, whether verbal or written, it should be provided as early as practicable.

(2) Annually and whenever called to duty for a contingency operation, advise Service members who are participating in a Reserve component of:

(i) The requirement to provide advance written or verbal notice to their civilian employers for each period of military training, active and inactive duty, or full-time National Guard duty.

(A) Reserve component members shall be advised that DoD strongly encourages that they provide advance notice to their civilian employers in writing for each period of pending uniformed service. Providing written advance notice is preferable to verbal advance notice since it easily establishes that this prerequisite to retaining reemployment rights was fulfilled.

(B) Regardless of the means of providing advance notice, whether written or verbal, it should be provided as early as practicable. DoD strongly recommends that advance notice to civilian employers be provided at least 30 days prior to departure for uniformed service when it is feasible to do so.

(C) The advance notice requirement can be met by providing the employer with a copy of the unit annual training schedule or preparing a standardized letter. The sample employer notification letter in Appendix B of this part may be used for this purpose.

(ii) The 5-year cumulative limit on absences from their civilian employment due to uniformed service and exemptions to that limit.

(iii) The requirements for reporting or submitting application to return to their position of civilian employment.

(iv) Their general reemployment rights and benefits.

(v) The option for continuing employer provided health care, if the employer provides such a benefit.

(vi) The opportunity to use accrued leave in order to perform uniformed service.

(vii) Who they may contact to obtain assistance with employment and reemployment questions and problems.

(b) Inform Service members who are covered by the provisions of 38 U.S.C. Chapter 43, upon completion of an extended period of active duty and before separation from active duty of their employment and reemployment rights, benefits, and obligations as provided under 38 U.S.C. Chapter 43. This shall, as a minimum, include notification and reporting requirements for returning to employment with their civilian employer. While Appendix A of this part provides the necessary information to

satisfy this requirement, other appropriate materials may be used to supplement this information.

(c) Issue orders that span the entire period of service when ordering a member of the National Guard or Reserve to active duty for a mission or requirement. Order modifications shall be initiated, as required, to ensure continuous active duty should the period required to complete the mission or requirement change.

(d) Document the length of a Service member's initial period of military service obligation performed on active duty.

(e) Determine and certify in writing those additional training requirements not already exempt for the 5-year cumulative service limit which are necessary for the professional development, or skill training or retraining for members of the National Guard or Reserve. Once the Secretary concerned certifies those training requirements, performance of uniformed service to complete a certified training requirement is exempt from the 5-year cumulative service limit.

(f) Determine those periods of active duty when a Service member is ordered to, or retained on, active duty (other than for training) under any provision of law because of a war or national emergency declared by the President or Congress. If the purpose of the order to, or retention on, active duty is for the direct or indirect support of the war or national emergency, then the orders of the Service member should be so annotated, since that period of service is exempt from the 5-year cumulative service limit established in 38 U.S.C. Chapter 43.

(g) Determine those periods of active duty performed by a member of the National Guard or Reserve that are designated by the Secretary concerned as a critical mission or critical requirement, and for that reason are exempt form the 5-year cumulative service limit. The authority for determining what constitutes a critical mission or requirement shall not be delegated below the Assistant Secretary level or the Commandant of the Coast Guard. The designation of a critical requirement to gain the necessary experience to qualify for key senior leadership positions shall be used judiciously, and the necessary experience and projected key leadership positions fully documented. This authority shall not be used to grant exemptions to avoid the cumulative 5-year service limit established by 38 U.S.C. Chapter 43 or to extend individuals in repeated statutory tours. The Assistant Secretary of Defense for Reserve Affairs shall be notified in writing of all occasions in which a Service member is granted more than one exemption for a critical requirement when the additional exemption(s) extend the Service member beyond the 5-year cumulative service limit established in 38 U.S.C. Chapter 43.

(h) When appropriate, ensure that orders to active duty or orders retaining members on active duty specify the statutory or Secretarial authority for those orders when such authority meets one or more of the exemptions from the 5-year cumulative service limit provided in 38 U.S.C. Chapter 43. If circumstances arise that prevent placing this authority on the orders, the authority shall be included in a separation document and retained in the Service member's personnel file.

(i) Ensure that appropriate documents verifying any period of service exempt from the 5-year cumulative service limit are place in the Service member's personnel record or other appropriate record.

(j) Document those circumstances that prevent a Service member from providing advance notification of uniformed service to a civilian employer because of military necessity or when advance notification is otherwise impossible or unreasonable, as defined in §104.3.

(k) Designate those officers, as defined in §104.3, who are authorized by the Secretary concerned to provide advance notification of service to a civilian employer on behalf of a Service member or applicant for uniformed service.

(l) Provide documentation, upon request from a Service member or former Service member, that may be used to satisfy the Service member's entitlement to statutory reemployment rights and benefits. Appropriate documentation may include, as necessary:

(1) The inclusive dates of the initial period of military service obligation performed on active duty.

(2) Any period of service during which a Service member was required to serve because he or she was unable to obtain a release from active duty though no fault of the Service member.

(3) The cumulative length of all periods of active duty performed.

(4) The authority under which a Service member was ordered to active duty when such service was exempt from the 5-year cumulative service limit.

(5) The date the Service member was last released from active duty, active duty for special work, initial active duty for training, active duty for training, inactive duty training, annual training or full-time National Guard duty. This documentation establishes the timeliness of reporting to, or submitting application to return to, a position of civilian employment.

(6) Whether service requirements prevent providing a civilian employer with advance notification of pending service.

(7) That the Service member's entitlement to reemployment benefits has not been terminated because of the character of service as provided in 38 U.S.C. 4304.

(8) When appropriate, a statement that sufficient documentation does not exist.

(m) Establish a central point of contact at a headquarters or regional command who can render assistance to active duty Service members and applicants for uniformed service about employment and reemployment rights, benefits and obligations.

(n) Establish points of contact in each Reserve component headquarters or Reserve regional command, and each National Guard State headquarters who can render assistance to:

(1) Members of the National Guard or Reserve about employment and reemployment rights, benefits and obligations.

(2) Employers of National Guard and Reserve members about duty or training requirements arising from a member's uniformed service or service obligation.

(o) A designated Reserve component representative shall consider, and accommodate when it does not conflict with military requirements, a request from a civilian employer of a National Guard and Reserve member to adjust a Service member's absence from civilian employment due to uniformed service when such service has an adverse impact on the employer. The representative may make arrangements other than adjusting the period of absence to accommodate such a request when it serves the best interest of the military and is reasonable to do so.

## APPENDIX A TO PART 104—CIVILIAN EMPLOYMENT AND REEMPLOYMENT RIGHTS, BENEFITS AND OBLIGATIONS FOR APPLICANTS FOR, AND SERVICE MEMBERS AND FORMER SERVICE MEMBERS OF THE UNIFORMED SERVICES

### A. SCOPE OF COVERAGE

1. The Uniformed Services Employment and Reemployment Rights Act (USERRA) which is codified in 38 U.S.C. Chapter 43 provides protection to anyone absent from a position of civilian employment because of uniformed service if:

a. Advance written or verbal notice was given to the civilian employer.

(1) Advance notice is not required if precluded by military necessity, or is otherwise unreasonable or impossible.

(2) DoD strongly encourages Service members and or applicants for service to provide advance notice to their civilian employer in writing for each period of pending uniformed service. Providing written advance notice is preferable to verbal advance notice since it easily establishes that this prerequisite to retaining reemployment rights was fulfilled. Regardless of the means of providing advance notice, whether written or verbal, it should be provided as early as practicable. Also, DoD strongly recommends that Reserve component members provide advance notice to their civilian employers at least 30 days in advance when it is feasible to do so. The advance notice requirement can be met by providing the employer with a copy of the unit annual training schedule or preparing a standardized letter. The sample employer notification letter in Appendix B of this part may be used for this purpose;

b. The cumulative length of absences does not exceed 5 years;

c. The individual reports to, or submits an application for reemployment, within the specified period based on duration of services as described in section D of this Appendix; and,

d. The person's character of service was not disqualifying as described in paragraphs A.2.d. and e. of this appendix.

2. A civilian employer is not required to reemploy a person if:

a. The civilian employment was for a brief, non-recurrent period and there was no reasonable expectation that the employment would continue indefinitely or for a significant period.

b. The employer's circumstances have so changed as to make reemployment impossible or unreasonable.

c. The reemployment imposes an undue hardship on the employer in the case of an individual who:

(1) Has incurred a service connected disability; or,

(2) Is not qualified for the escalator position or the position last held, and cannot become qualified for any other position of lesser status and pay after a reasonable effort by the employer to qualify the person for such positions.

d. The Service member or former Service member was separated from a uniformed service with a dishonorable or bad conduct discharge, or separated from a uniformed service under other than honorable conditions.

e. An officer dismissed from any Armed Force or dropped from the rolls of any Armed Force as prescribed under 10 U.S.C. 1161.

f. The cumulative length of service exceeds five years and no portion of the cumulative five years of uniformed service falls within the exceptions described in section C. of this Appendix.

g. An employer asserting that he or she is not required to reemploy an individual because the employment was for a brief, nonrecurrent period, or reemployment is impossible or unreasonable, or reemployment imposes an undue hardship on the employer, that employer has the burden of proving his or her assertion.

3. Entitlement to protection under 38 U.S.C. Chapter 43 does not depend on the timing, frequency, and duration of training or uniformed service.

B. PROHIBITION AGAINST DISCRIMINATION AND ACTS OF REPRISAL

1. A person who is a member of, applies to be a member of, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any employment benefit by an employer on the basis of that membership, an application for membership, performance of service, or an obligation for service in the uniformed services.

2. A person, including a non-Service member, shall not be subject to employment discrimination or any adverse employment action because he or she has taken an action to enforce a protection afforded a Service member, has testified or made a statement in or in connection with any proceeding concerning employment and reemployment rights of a service member, has assisted or participated in an investigation, or has otherwise exercised any right provided by 38 U.S.C. Chapter 43.

3. An employer shall be considered to have engaged in an act of discrimination if an individual's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, performance of service, application for service or obligation.

C. EXCEPTIONS TO THE MAXIMUM PERIOD OF SERVICE FOR COVERAGE

In order to retain reemployment rights and benefits provided by 38 U.S.C. Chapter 43, the cumulative length of absences from the same employer cannot exceed 5 years. Not counted toward this limit is:

1. Service beyond 5 years if required to complete an initial service obligation;

2. Service during which an individual was unable to obtain release orders before the expiration of the 5-year cumulative service limit through no fault of his or her own;

3. Inactive duty training; annual training; ordered to active duty for unsatisfactory participation; active duty by National Guardsmen for encampments, maneuvers, field operations or coastal defense; or to fulfill additional training requirements, as determined by the Secretary concerned, for professional skill development, or to complete skill training or retraining;

4. Involuntary order or call to active duty, or retention on active duty;

5. Ordered to or retained on active duty during a war or national emergency declared by the President or Congress;

6. Ordered to active duty in support of an operational mission for which personnel have been involuntarily called to active duty;

7. Performing service in support of a critical mission or requirement, as determined by the Secretary concerned;

8. Performing service in the National Guard when ordered to active duty by the President to suppress an insurrection or rebellion, repel an invasion, or execute laws of the United States; and,

9. Voluntary recall to active duty of retired regular Coast Guard officers or retired enlisted Coast Guard members.

D. APPLICATIONS FOR REEMPLOYMENT

1. For service of 30 days or less, or for an absence for an examination to determine the individual's fitness to perform uniformed service, the Service member or applicant must report to work not later than the beginning of the first full regularly scheduled work period on the first full calendar day following the completion of service or the examination, after allowing for an eight hour rest period following safe transportation to his or her residence.

2. For service of 31 days or more but less that 181 days, the Service member must submit an application for reemployment not later than 14 days after completion of service, or by the next full calendar day when submitting an application within the 14 day limit was impossible or unreasonable through no fault of the Service member.

3. For service of 181 days or more, the Service member must submit an application for reemployment not later than 90 days after the completion of service.

4. If hospitalized or convalescing from an illness or injury incurred or aggravated during service, the Service member must, at the end of the period necessary for recovery, follow the same procedures, based on length of service, as described in sections D.1. through D.3. of this appendix. The period of hospitalization or convalescence may not normally exceed 2 years.

5. Anyone who fails to report or apply for reemployment within the specified period shall not automatically forfeit entitlement to reemployment rights and benefits, but is subject to the rules of conduct, established policies, general practices of the employer pertaining to explanations and discipline because of an absence from scheduled work.

E. DOCUMENTATION UPON RETURN

1. If service is for 31 days or more, a Service member must provide documentation, upon request from the employer, that establishes:

a. He or she made application to return to work within the prescribed time period;

b. He or she has not exceeded the 5-year cumulative service limit; and

c. His or her reemployment rights were not terminated because of character of service as described in paragraphs A.2.d. and e. of this appendix.

2. Failure to provide documentation cannot serve as a basis for denying reemployment to the Service member, former Service member, or applicant if documentation does not exist or is not readily available at the time of the employer's request. However, if after reemployment, documentation becomes available that establishes that the Service member or former Service member does not meet one or more of the requirements contained in section E.1. of this appendix, the employer may immediately terminate the employment.

F. POSITION TO WHICH ENTITLED UPON REEMPLOYMENT

1. Reemployment position for service of 90 days or less:

a. The position the person would have attained if continuously employed (the ''escalator'' position) and if qualified to perform the duties; or,

b. The position in which the person was employed in when he or she departed for uniformed service, but only if the person is not qualified to perform the duties of the escalator position, despite the employer's reasonable efforts to qualify the person for the escalator position.

2. Reemployment position for service of 91 days or more:

a. The escalator position, or a position of like seniority, status and pay, the duties of which the person is qualified to perform; or,

b. The position in which the person was employed in when he or she departed for uniformed service or a position of like seniority, status and pay, the duties of which the person is qualified to perform, but only if the person is not qualified to perform the duties of the escalator position after the employer has made a reasonable effort to qualify the person for the escalator position.

3. If a person cannot become qualified, after reasonable efforts by the employer to qualify the person, for either the escalator position or the position formerly occupied by the employee as provided in sections F.1. and F.2. of this appendix, for any reason (other than disability), the person must be employed in any other position of lesser status and pay that the person is qualified to perform, with full seniority.

G. POSITION TO WHICH ENTITLED IF DISABLED

If a person who is disabled because of service cannot (after reasonable efforts by the employer to accommodate the disability) be employed in the escalator position, he or she must be reemployed:

1. In any other position that is equivalent to the escalator position in terms of seniority, status, and pay that the person is qualified or can become qualified to perform with reasonable efforts by the employer; or,

2. In a position, consistent with the person's disability, that is the nearest approximation to the position in terms of seniority, status, and pay to the escalator or equivalent position.

H. REEMPLOYMENT BY THE FEDERAL GOVERNMENT

1. A person who was employed by a Federal Executive Agency when he or she departed for uniformed service must be reemployed

using the same order of priorities as prescribed in sections F. and G. of this appendix as appropriate. If the Director of OPM determines that the Federal Executive Agency that employed the person no longer exists and the functions have not been transferred to another Federal Executive Agency, or it is impossible or unreasonable for the agency to reemploy the person, the Director of OPM shall identify a position of like seniority, status, and pay at another Federal Executive Agency that satisfies the reemployment criteria established for private sector employers, sections F. and G. of this appendix, and for which the person is qualified and ensure that the person is offered such position.

2. If a person was employed by the Judicial Branch or the Legislative Branch of the Federal Government when he or she departed for uniformed service, and the employer determines that it is impossible or unreasonable to reemploy the person, the Director of OPM shall, upon application by the person, ensure that an offer of employment in a Federal Executive Agency is made.

3. If the Adjutant General of a State determines that it is impossible or unreasonable to reemploy a person who was employed as a National Guard technician, the Director of OPM shall, upon application by the person, ensure that an offer of employment in a Federal Executive Agency is made.

### I. Reemployment by Certain Federal Agencies

1. The heads of the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Imagery and Mapping Agency, the National Security Agency, and, as determined by the President, any Executive Agency or unit thereof, the principal function of which is to conduct foreign intelligence or counterintelligence activities, shall prescribe procedures for reemployment rights for their agency that are similar to those prescribed for private and other Federal agencies.

2. If an appropriate officer of an agency referred to in subsection I.1. of this appendix determines that reemployment of a person who was an employee of that agency when he or she departed for uniformed service is impossible or unreasonable, the agency shall notify the person and the Director of OPM. The Director of OPM shall, upon application by that person, ensure that the person is offered employment in a position in a Federal Executive Agency.

### J. General Rights and Benefits

1. A person who is reemployed under 38 U.S.C. Chapter 43 is entitled to the seniority, and other rights and benefits determined by seniority that the person had upon commencing uniformed service, and any additional seniority, and rights and benefits he or she would have attained if continuously employed.

2. A person who is absent by reason of uniformed service shall be deemed to be on furlough or leave of absence from his or her civilian employer and is entitled to such other rights and benefits not determined by seniority as generally provided by the employer to employees on furlough or leave of absence having similar seniority, status and pay who are also on furlough or leave of absence, as provided under a contract, policy, agreement, practice or plan in effect during the Service member's absence because of uniformed service.

3. The individual may be required to pay the employee cost, if any, of any funded benefit continued to the same extent other employees on furlough or leave of absence are required to pay.

### K. Loss of Rights and Benefits

If, after being advised by his or her employer of the specific rights and benefits to be lost, a Service member, former Service member or applicant of uniformed service knowingly provided written notice of intent not to seek reemployment after completion of uniformed service, he or she is no longer entitled to any non-seniority based rights and benefits. This includes all non-seniority based rights and benefits provided under any contract, plan, agreement, or policy in effect at the time of entry into uniformed service or established while performing such service, and are generally provided by the employer to employees having similar seniority, status and pay who are on furlough or leave of absence.

### L. Retention Rights

A person who is reemployed following uniformed service cannot be discharged from employment, except for cause:

1. Within 1 year after the date of reemployment if that person's service was 181 days or more; or,

2. Within 180 days after the date of reemployment if such service was 31 days or more but less than 181 days.

### M. Accrued Leave

During any period of uniformed service, a person may, upon request, use any vacation, annual leave, or similar leave with pay accrued before the commencement of that period of service.

### N. Health Plans

An employer who provides employee health plan coverage, including group health plans, must allow the Service member to elect to continue personal coverage, and coverage for his or her dependents under the following circumstances:

1. The maximum period of coverage of a person and the person's dependents under such an election shall be the lesser of:

a. The 18 month period beginning on the date on which the person's absence begins; or

b. The day after the date on which the person was required to apply for or return to a position or employment as specified in section D. of this appendix, and fails to do so.

2. A person who elects to continue health plan coverage may be required to pay up to 102 percent of the full premium under the plan, except a person on active duty for 30 days or less cannot be required to pay more than the employee's share, if any, for the coverage.

3. An exclusion or waiting period may not be imposed in connection with the reinstatement of coverage upon reemployment if one would not have been imposed had coverage not been terminated because of service. However, an exclusion or waiting period may be imposed for coverage of any illness or injury determined by the Secretary of Veterans Affairs to have been incurred in, or aggravated during, the performance of uniformed service.

O. EMPLOYEE PENSION BENEFIT PLANS

1. This section applies to individuals whose pension benefits are not provided by the Federal Employees' Retirement System (FERS) or the Civil Service Retirement System (CSRS), or a right provided under any Federal or State law governing pension benefits for governmental employees.

2. A person reemployed after uniformed service shall be treated as if no break in service occurred with the employer(s) maintaining the employee's pension benefit plan. Each period of uniformed service, upon reemployment, shall be deemed to constitute service with the employer(s) for the purpose of determining the nonforfeitability of accrued benefits and accrual of benefits.

3. An employer reemploying a Service member or former Service member under 38 U.S.C. Chapter 43 is liable to the plan for funding any obligation attributable to the employer of the employee's pension benefit plan that would have been paid to the plan on behalf of that employee but for his or her absence during a period of uniformed service.

4. Upon reemployment, a person has three times the period of military service, but not to exceed five years after reemployment, within which to contribute the amount he or she would have contributed to the pension benefit plan if he or she had not been absent for uniformed service. He or she is entitled to accrued benefits of the pension plan that are contingent on the making of, or are derived from, employee contributions or elective deferrals only to the extent the person makes payment to the plan.

P. FEDERAL EMPLOYEES' RETIREMENT SYSTEM (FERS)

1. Federal employees enrolled in FERS who are reemployed with the Government are allowed to make up contributions to the Thrift Savings Fund over a period specified by the employee. However, the makeup period may not be shorter than two times nor longer than four times the period of absence for uniformed service.

2. Employees covered by the FERS are entitled to have contributions made to the Thrift Savings Fund on their behalf by the employing agency for their period of absence in an amount equal to one percent of the employee's basic pay. If an employee covered by FERS makes contributions, the employing agency must make matching contributions on the employee's behalf.

3. The employee shall be credited with a period of civilian service equal to the period of uniformed service, and the employee may elect, for certain purposes, to have his or her separation treated as if it had never occurred.

4. This benefit applies to any employee whose release from uniformed service, discharge from hospitalization, or other similar event make him or her eligible to seek reemployment under 38 U.S.C. Chapter 43 on or after August 2, 1990.

5. Additional information about Thrift Saving Plan (TSP) benefits is available in TSP Bulletins 95–13 and 95–20. A fact sheet is included in TSP Bulletin 95–20 which describes benefits and procedures for eligible employees. Eligible employees should contact their personnel office for information and assistance.

Q. CIVIL SERVICE RETIREMENT SYSTEM (CSRS)

1. Employees covered by CSRS may make up contributions to the TSP, as in section P.1. of this appendix. However, no employer contributions are made to the TSP account of CSRS employees.

2. This benefit applies to any employee whose release from uniformed service, discharge from hospitalization, or other similar event makes him or her eligible to seek reemployment under 38 U.S.C. Chapter 43 on or after August 2, 1990.

3. Additional information about TSP benefits is available in TSP Bulletins 95–13 and 95–20. A fact sheet is included in TSP Bulletin 95–20 which describes benefits and procedures for eligible employees. Eligible employees should contact their personnel office for information and assistance.

R. INFORMATION AND ASSISTANCE

Information and informal assistance concerning civilian employment and reemployment is available through the National Committee for Employer Support of the Guard

and Reserve (NCESGR). NCESGR representatives can be contacted by calling 1–800–336–4590.

S. ASSISTANCE IN ASSERTING CLAIMS

1. A person may file a complaint with the Secretary of Labor if an employer, including any Federal Executive Agency or OPM, has failed or refused, or is about to fail or refuse, to comply with employment or reemployment rights and benefits. The complaint must be in writing, and include the name and address of the employer, and a summary of the allegation(s).

2. The Secretary of Labor shall investigate each complaint and, if it is determined that the allegation(s) occurred, make reasonable efforts to ensure compliance. If these efforts are unsuccessful, the Secretary of Labor shall notify the complainant of the results and advise the complainant of his or her entitlement to pursue enforcement.

3. The Secretary of Labor shall, upon request, provide technical assistance to a claimant and, when appropriate, to the claimant's employer.

T. ENFORCEMENT

1. State or Private Employers.

a. A person may request that the Secretary of Labor refer a complaint to the Department of Justice. If the Department of Justice is reasonably satisfied that the person is entitled to the rights or benefits sought, the Department of Justice may appear on behalf of, and act as attorney for, the complainant, and commence an action for appropriate relief, or the individual may commence an action on his or her own behalf in the appropriate Federal district court.

b. The district court hearing the complaint can require the employer to:

(1) Comply with the law;

(2) Compensate the person for any loss of wages or benefits suffered; and

(3) If the court determines that the employer willfully failed to comply with the law, pay the person an amount equal to the amount of lost wages or benefits as liquidated damages.

c. A person may file a private suit against an employer without the Secretary of Labor's assistance if he or she:

(1) Has chosen not to seek the Secretary's assistance;

(2) Has chosen not to request that the Secretary refer the complaint to the Department of Justice; or

(3) Has refused the Department of Justice's representation of his or her complaint.

d. No fees or court costs shall be charged or taxed against any person filing a claim. The court may award the person who prevails reasonable attorney fees, expert witness fees, and other litigation expenses.

2. Federal Government as the Employer.

a. The same general enforcement procedures established for private employers are applied to Federal Executive Agencies as an employer; however, if unable to resolve the complaint, the Secretary of Labor shall refer the complaint to the Office of Special Counsel, which shall represent the individual in a hearing before the Merit Systems Protection Board if reasonably satisfied that the individual is entitled to the rights and benefits sought. The claimant also has the option of directly filing a complaint with the Merit Systems Protection Board on his or her own behalf.

b. A person who is adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may petition the United States Court of Appeals for the Federal Circuit to review the final order or decision.

3. Federal Intelligence Agency as the Employer. An individual employed by a Federal Intelligence Agency listed in subparagraph I.1. of this appendix, may submit a claim to the inspector general of the agency.

## APPENDIX B TO PART 104—SAMPLE EMPLOYER NOTIFICATION OF UNIFORMED SERVICE

This is to inform you that (insert applicant or Service member's name) must report for military training or duty on (insert date). My last period of work will be on (insert date), which will allow me sufficient time to report for military duty. I will be absent from my position of civilian employment for approximately (enter expected duration of duty as specified on your orders, and include the applicable period you have to return or submit notification of your return to work) while performing military training or duty unless extended by competent military authority or delayed by circumstances beyond my control. I otherwise expect to return to work on (insert date).

_____

Signature and date

_____

Employer acknowledgment and date

# PART 107—PERSONAL SERVICES AUTHORITY FOR DIRECT HEALTH CARE PROVIDERS

Sec.
107.1 Purpose.
107.2 Applicability and scope.
107.3 Definitions.
107.4 Policy.
107.5 Procedures.
107.6 Responsibilities.
ENCLOSURE 1 TO PART 107—TABLE OF AUTHORIZED COMPENSATION RATES

AUTHORITY: 10 U.S.C. 1091; Federal Acquisition Regulation (FAR), part 37.

SOURCE: 50 FR 11693, Mar. 25, 1985, unless otherwise noted.

### § 107.1 Purpose.

This part establishes policy under 10 U.S.C. 1091, ''Contracts For Direct Health Care Providers,'' and assigns responsibility for implementing the authority for personal services contracts for direct health care providers.

### § 107.2 Applicability and scope.

(a) This part applies to the Office of the Secretary of Defense (OSD) and the Military Departments.

(b) It applies only to personal services contracts awarded under 10 U.S.C. 1091 for direct health care providers.

### § 107.3 Definitions.

(a) *Personal Services Contract.* A contract that, by its express terms or as administered, makes the contractor personnel appear, in effect, to be government employees.

(b) *Direct Health Care Providers.* Health services personnel who participate in clinical patient care and services. This does not include personnel whose duties are primarily administrative or clerical, nor personnel who provide maintenance or security services.

### § 107.4 Policy.

(a) It is the policy of the Department of Defense that when in-house sources are insufficient to support the medical mission of the Military Departments, personal services contracts under 10 U.S.C. 1091 may be executed.

(b) It is the purpose of personal services contracts to facilitate mission accomplishment, maximize beneficiary access to military MTFs, maintain readiness capability, reduce use of the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS), and enhance quality of care by promoting the continuity of the patient/provider relationship.

(c) Personal services contractors shall be subject to the same quality assurance, credentialing processes, and other standards as those required of military health care providers. In addition, providers, other than para-professionals, must be licensed in accordance with State or host country requirements to perform the contract services.

(d) In establishing lines of authority and accountability, DoD supervisors may direct the activities of personal services contractors on the same basis as DoD employees. However, the rights, benefits, and compensation of personal services contractors shall be determined solely in accordance with the personal service contract.

(e) Requests for personal services contracts contemplating reimbursement at the maximum rate of basic pay and allowances under 10 U.S.C. 1091 shall be approved at the major command level. The 0–6 grade shall be used sparingly and subsequently will be subject to review.

### § 107.5 Procedures.

(a) Each contract under 10 U.S.C. 1091 with an individual or with an entity, such as a professional corporation or partnership, for the personal services of an individual must contain language specifically acknowledging the individual as a personal services contractor whose performance is subject to supervision and direction by designated officials of the Department of Defense.

(b) The appearance of an employer-employee relationship created by the DoD supervision of a personal services contractor will normally support a limited recognition of the contractor as equal in status to a DoD employee in disposing of personal injury claims arising out of the contractor's performance. Personal injury claims alleging negligence by the contractor within the scope of his or her contract performance, therefore, will be processed as claims alleging negligence by DoD military or civil service personnel.

(c) Compensation for personal services contractors under 10 U.S.C. 1091 shall be within the limits established in the Table of Authorized Compensation Rates (see enclosure 1). Prorated compensation based upon hourly, daily, or weekly rates may be awarded when a contractor's services are not required on a full-time basis. In all cases, however, a contractor may be compensated only for periods of time actually devoted to the delivery of services required by the contract.

(d) Contracts for personal services entered into shall be awarded and administered pursuant to the provisions of the Federal Acquisition Regulation (FAR), part 37 and DoD and departmental supplementary contracting provisions.

### § 107.6 Responsibilities.

(a) The Military Departments shall be responsible for the management of the direct health care provider contracting program, ensuring that effective means of obtaining adequate quality care is achieved in compliance with the FAR, part 37. The portion of the Military Department regulations ensuring that compensation provided for a particular type of service is based on objective criteria and is not susceptible to individual favoritism shall be stressed.

(b) The Office of the Assistant Secretary of Defense (Health Affairs) (OASD(HA)) shall be responsible for monitoring the personal services contracting program.

ENCLOSURE 1 TO PART 107—TABLE OF AUTHORIZED COMPENSATION RATES

| Occupation/specialty group | Compensation rate not to exceed | |
|---|---|---|
| | Pay grade | Years of service |
| I. Physicians and dentists | 0–6 | Over 26. |
| II. Other individuals, including nurse practitioners, nurse anesthetists, and nurse midwives, but excluding paraprofessionals. | 0–5 | Over 20 but less than 22. |
| III. All registered nurses, except those who are included in Group II. | 0–4 | Over 16 but less than 18. |
| IV. Paraprofessionals | 0–3 | Over 6 but less than 8. |

## PART 108—HEALTH CARE ELIGIBILITY UNDER THE SECRETARIAL DESIGNEE PROGRAM AND RELATED SPECIAL AUTHORITIES

Sec.
108.1 Purpose.
108.2 Applicability.
108.3 Definition.
108.4 Policy.
108.5 Eligible senior officials of the U.S. Government.
108.6 Responsibilities.

AUTHORITY: 10 U.S.C. 1074(c); 10 U.S.C. 2559.

SOURCE: 75 FR 72682, Nov. 26, 2010, unless otherwise noted.

### § 108.1 Purpose.

This part:

(a) Establishes policy and assigns responsibilities under 10 U.S.C. 1074(c) for health care eligibility under the Secretarial Designee Program.

(b) Implements the requirement of 10 U.S.C. 2559 that the United States receive reimbursement for inpatient health care provided in the United States to foreign military or diplomatic personnel or their dependents, except in certain cases covered by Reciprocal Health Care Agreements (RHCAs) between the Department of Defense and a foreign country.

### § 108.2 Applicability.

This part:

(a) 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 in the Department of Defense (hereafter referred to collectively as the ''DoD Components'').

(b) Does not apply to health care services provided to coalition forces in operational settings, or to allied forces in overseas training exercises and similar activities. Also, does not apply to health care services provided to foreign nationals overseas under DoD Instruction 3000.05,[1] DoD Instruction 2205.2,[2] or DoD Instruction 2310.08E.[3]

### § 108.3 Definition.

*Secretarial Designee Program.* The program established under section 1074(c) to create by regulation an eligibility for health care services in military medical treatment facilities (MTFs) as

[1] Copies available on the Internet at *http://www.dtic.mil/whs/directives/corres/pdf/300005p.pdf*.

[2] Copies available on the Internet at *http://www.dtic.mil/whs/directives/corres/pdf/220502p.pdf*.

[3] Copies available on the Internet at *http://www.dtic.mil/whs/directives/corres/pdf/231008p.pdf*.

well as dental treatment facilities for individuals who have no such eligibility under 10 U.S.C. chapter 55.

**§ 108.4 Policy.**

It is DoD policy that:

(a) *General Policy*. The use of regulatory authority to establish DoD health care eligibility for individuals without a specific statutory entitlement or eligibility shall be used very sparingly, and only when it serves a compelling DoD mission interest. When used, it shall be on a reimbursable basis, unless non-reimbursable care is authorized by this part or reimbursement is waived by the Under Secretary of Defense (Personnel & Readiness) (USD(P&R)) or the Secretaries of the Military Departments when they are the approving authority.

(b) *Foreign Military Personnel and Their Dependents*. (1) *MTF Care in the United States*. Foreign military personnel in the United States under the sponsorship or invitation of the Department of Defense, and their dependents approved by the Department of Defense to accompany them, are eligible for space-available care as provided in DoD Instruction 1000.13.[4] Consistent with 10 U.S.C. 2559, in cases in which reimbursement is required by DoD Instruction 1000.13, a RHCA may provide a waiver of reimbursement for inpatient and/or outpatient care in the United States in a military medical treatment facility for military personnel from a foreign country and their dependents, if comparable care is made available to at least a comparable number of U.S. military personnel and their dependents in that foreign country. A disparity of 25 percent or less in the number of foreign personnel and dependents above U.S. personnel and dependents shall be considered within the range of comparable numbers.

(2) *Non-MTF Care in the United States*. Foreign military personnel in the United States under the sponsorship or invitation of the Department of Defense, and their dependents approved by the Department of Defense to accompany them, are not eligible for DoD payment for outpatient or inpatient care received from non-DoD providers, except for such personnel covered by the North Atlantic Treaty Organization Status of Forces Agreement (SOFA) or the Partnership for Peace SOFA and authorized care under the TRICARE Standard program according to § 199.3 of title 32, Code of Federal Regulations, outpatient care may be provided as specified therein.

(c) *Foreign Diplomatic or Other Senior Foreign Officials*. Foreign diplomatic or other senior foreign officials and the dependents of such officials may be provided inpatient or outpatient services in MTFs only in compelling circumstances, including both medical circumstances and mission interests, and through case-by-case approval.

(1) In the United States, the approval authority is the USD(P&R). The authority to waive reimbursement for care provided in the United States, to the extent allowed by law, is the USD(P&R) or the Secretaries of the Military Departments when they are the approving authority.

(2) Requests from the State Department or other agency of the U.S. Government will be considered on a reimbursable basis.

(3) Under 10 U.S.C. 2559, reimbursement to the United States for care provided in the United States on an inpatient basis to foreign diplomatic personnel or their dependents is required.

(d) *Other Foreign Nationals*. Other foreign nationals (other than those described in paragraphs (b) and (c) of this section) may be designated as eligible for space-available care in MTFs only in extraordinary circumstances.

(1) The authority to waive reimbursement for care provided in the United States, to the extent allowed by law, is the USD(P&R) or the Secretaries of the Military Departments when they are the approving authority. Waiver requests will only be considered based on a direct and compelling relationship to a priority DoD mission objective.

(2) Requests from the State Department or other agency of the U.S. Government will be considered on a reimbursable basis. Such requests must be supported by the U.S. Ambassador to the country involved and the Geographical Combatant Commander for

[4] Copies available on the Internet at *http://www.dtic.mil/whs/directives/corres/pdf/100013p.pdf*.

that area of responsibility and must be premised on critically important interests of the United States.

(e) *Invited Persons Accompanying the Overseas Force*. The Secretaries of the Military Departments and the USD(P&R) may designate as eligible for space-available care from the Military Health System outside the United States those persons invited by the Department of Defense to accompany or visit the military force in overseas locations or invited to participate in DoD-sponsored morale, welfare, and recreation activities. This authority is limited to health care needs arising in the course of the invited activities. Separate approval is needed to continue health care initiated under this paragraph in MTFs in the United States.

(1) In the case of employees or affiliates of news organizations, all care provided under the authority of introductory paragraph (e) of this section is reimbursable. For other individuals designated as eligible under this paragraph (e), the designation may provide, to the extent allowed by law, for outpatient care on a non-reimbursable basis, and establish a case-by-case authority for waiver of reimbursement for inpatient care.

(2) This paragraph (e) does not apply to employees of the Executive Branch of the United States or personnel affiliated with contractors of the United States.

(f) *U.S. Nationals Overseas*. Health care for U.S. nationals overseas is not authorized, except as otherwise provided in this part.

(g) *U.S. Government Civilian Employees and Contractor Personnel*. (1) Civilian employees of the Department of Defense and other government agencies, and employees of DoD contractors, and the dependents of such personnel are eligible for MTF care to the extent provided in DoD Instruction 1000.13.

(2) Occupational health care services provided to DoD employees under 5 U.S.C. 7901, authorities cited in DoD Instruction 6055.1,[5] or under other authorities except 10 U.S.C. 1074(c) are not affected by this Instruction. The Secretaries of the Military Departments and the USD(P&R) may designate DoD civilian employees, applicants for employment, and personnel performing services for the Department of Defense under Federal contracts as eligible for occupational health care services required by the Department of Defense as a condition of employment or involvement in any particular assignment, duty, or undertaking.

(3) Any health care services provided by the Military Health System to employees of DoD non-appropriated fund instrumentalities shall be on a reimbursable basis.

(4) In the case of DoD civilian employees forward deployed in support of U.S. military personnel engaged in hostilities, eligibility for MTF care (in addition to all eligibility for programs administered by the Department of Labor Office of Workers' Compensation Programs (OWCP)) is as follows:

(i) Consistent with Policy Guidance for Provision of Medical Care to DoD Civilian Employees Injured or Wounded While Forward Deployed in Support of Hostilities,[6] DoD civilian employees who become ill, contract diseases, or are injured or wounded while so deployed are eligible for medical evacuation or health care treatment and services in MTFs at the same level and scope provided to military personnel, all on a non-reimbursable basis, until returned to the United States.

(ii) DoD civilian employees who, subsequent to such deployment, and have been determined to have OWCP-compensable conditions are eligible for MTF care for such conditions, all on a non-reimbursable basis.

(iii) USD(P&R) may, under compelling circumstances, approve additional eligibility for care in MTFs for other U.S. Government civilian employees who become ill or injured while so deployed, or other DoD civilian employees overseas.

(5) *Contractor Personnel Authorized to Accompany U.S. Armed Forces*. In the case of contractor personnel authorized

[5] Copies available on the Internet at *http://www.dtic.mil/whs/directives/corres/pdf/605501p.pdf*.

[6] Copies available at OASD (Health Affairs/TMA FHP&RP), 1200 Defense Pentagon, Room 3E1073, Washington, DC 20301–1200.

to accompany U.S. Armed Forces in deployed settings under DoD Instruction 3020.41,[7] MTF care may be provided as stated in DoD Instruction 3020.41.

(h) *Emergency Health Care*. The Secretaries of the Military Departments and the USD(P&R) may designate emergency patients as eligible for emergency health care from MTFs in the United States pursuant to arrangements with local health authorities or in other appropriate circumstances. Such care shall be on a reimbursable basis, unless waived by the USD(P&R) or the Secretaries of the Military Departments when they are the approving authority.

(i) *Research Subject Volunteers*. Research subjects are eligible for health care services from MTFs to the extent DoD Components are required by DoD Directive 3216.02[8] to establish procedures to protect subjects from medical expenses that are a direct result of participation in the research. Such care is on a non-reimbursable basis and limited to research injuries (unless the volunteer is otherwise an eligible health care beneficiary). Care is authorized during the pendency of the volunteer's involvement in the research, and may be extended further upon the approval of the USD(P&R).

(j) *Continuity of Care Extensions of Eligibility*. The Secretaries of the Military Departments and the USD(P&R) may establish temporary eligibility on a space-available basis for former members and former dependents of members of the seven Uniformed Services for a limited period of time, not to exceed 6 months, or in the case of pregnancy the completion of the pregnancy, after statutory eligibility expires when appropriate to allow completion or appropriate transition of a course of treatment begun prior to such expiration. In the case of a pregnancy covered by this paragraph, the designation of eligibility may include initial health care for the newborn infant. Care under this paragraph is authorized on a non-reimbursable basis for the former member or former dependent of member. Care under this paragraph for the newborn of those former members or former dependents is authorized but on a full reimbursable basis unless the Secretary of the Military Department elect to use Secretarial Designee status for the newborn.

(k) *Members of the Armed Forces*. The Secretaries of the Military Departments and the USD(P&R) may establish eligibility not specifically provided by statute for critical mission-related health care services for designated members of the Armed Forces, such as Reserve Component members not in a present duty status. This authority includes payment for health care services in private facilities to the extent authorized by 10 U.S.C. 1074(c). Care under this paragraph is non-reimbursable.

(l) *Certain Senior Officials of the U.S. Government*. The officials and others listed in §108.5 of this part are designated as eligible for space-available inpatient and outpatient health care services from the Military Health System on a reimbursable basis.

(m) *Nonmedical Attendants*. The Secretaries of the Military Departments and the USD(P&R) may designate as eligible for space available MTF care persons designated as nonmedical attendants as defined by 37 U.S.C. 411k(b). Costs of medical care rendered are reimbursable unless reimbursement is waived by the Secretary of the Military Department concerned or USD(P&R). This authority is limited to health care needs arising while designated as a nonmedical attendant.

(n) *Patient Movement*. Provisions of this Instruction concerning inpatient care shall also apply to requests for patient movement through the medical evacuation system under DoD Instruction 6000.11.[9] Aeromedical evacuation transportation assets are reserved for those individuals designated as Secretarial Designees who need transportation to attain necessary health care.

(o) *Other Individuals Entitled to DoD Identification (ID) Card*. Other individuals entitled to a DoD ID card under

[7] Copies available on the Internet at *http://www.dtic.mil/whs/directives/corres/pdf/302041p.pdf*.

[8] Copies available on the Internet at *http://www.dtic.mil/whs/directives/corres/pdf/321602p.pdf*.

[9] Copies available on the Internet at *http://www.dtic.mil/whs/directives/corres/pdf/600011p.pdf*.

DoD Instruction 1000.13 are eligible for space-available MTF health care to the extent provided in DoD Instruction 1000.13.

(p) *Reciprocity Among Military Departments.* Subject to the capabilities of the professional staff, the availability of space and facilities, and any other limitation imposed by the approving authority, all Services will provide medical treatment to individuals who have been granted Secretarial designee status by any of the Secretaries of the Military Departments. Each agreement must identify the specific MTF or geographical region in which medical care is requested, requiring close coordination among service program managers.

### § 108.5 Eligible senior officials of the U.S. government.

(a) The following individuals are Secretarial Designees for space-available care in MTFs on a reimbursable basis, unless specified otherwise by a Service Secretary:

(1) The President and Vice President, and their spouses and minor children.

(2) Members of Congress.

(3) Members of the Cabinet.

(4) Officials of the Department of Defense appointed by the President and confirmed by the Senate.

(5) Article III Federal Judges. (Article III courts are: The Supreme Court of the United States, U.S. Courts of Appeal, U.S. District Courts, U.S. Court of International Trade, United States Foreign Intelligence Surveillance Court, United States Foreign Intelligence Surveillance Court of Review.)

(6) Judges of the U.S. Court of Appeals for the Armed Forces.

(7) Assistants to the President.

(8) Director of the White House Military Office.

(9) Former Presidents of the United States and their spouses, widows, and minor children.

(b) [Reserved]

### § 108.6 Responsibilities.

(a) The USD(P&R) shall:

(1) Evaluate requests for and where appropriate, grant exceptions to policy established by this part and DoD Directive 5124.02,[10] including waiver of reimbursement, to the extent allowed by law.

(2) Following approval of the USD(P) and in coordination with USD(P) and the GC, DoD, and in accordance with DoD Directive 5530.3,[11] begin negotiations, negotiate, and have the authority to sign RHCAs.

(b) The USD(P) shall evaluate requests and determine DoD mission interest for Secretarial Designee Status and RHCAs to identify those agreements that would be in the best interest of the Department of Defense and approve negotiations of RHCAs by the USD(P&R).

(c) The USD(C) shall in coordination with USD(P&R), establish appropriate reimbursement rates, including appropriate interagency rates and rates applicable to students in International Military Education and Training programs.

(d) The Under Secretary of Defense for Acquisition, Technology, and Logistics shall evaluate requests for Exception to the Transportation Policy. The authority to grant such a exception is by USD(P&R) or the Secretary of the Military Department concerned.

(e) The Secretaries of the Military Departments shall:

(1) Issue, revise or modify as appropriate, regulations to comply with this part.

(2) Appoint a Military Department representative who will administer the Secretarial Designee Program within the Military Department and coordinate with other DoD Components in its effective operation.

(3) Where and when appropriate, the Military Department concerned shall coordinate with U.S. Transportation Command/Global Patient Movement Requirements Center.

(4) Identify Secretarial Designees treated at MTFs.

[10] Copies available on the Internet at *http://www.dtic.mil/whs/directives/corres/pdf/512402p.pdf*.

[11] Copies available on the Internet at *http://www.dtic.mil/whs/directives/corres/pdf/553003p.pdf*.

(5) Provide an annual consolidated list reflecting the number of Secretarial Designees within their departments, reasons for such designation, location where designee is receiving treatment, the costs and sources of funding, nature and duration of treatment and expiration date of designee status to USD(P&R) and USD(C). The annual report is due 30 days after the start of the fiscal year reflecting the prior fiscal year's information.

(i) In cases where the USD(P&R) designates an individual as a Secretarial Designee, the Military Department concerned shall include this individual on any lists provided to USD(P&R) and USD(C) for reporting purposes.

(ii) Annually consolidate Secretarial Designee patient costs and forward those data to USD(P&R) and OSD(C), along with a report of collection for reimbursable costs.

(f) The Commanders of the Geographic Combatant Commands (GCCs) shall:

(1) Refer requests to waive reimbursement through the Chairman of the Joint Chiefs of Staff to the USD(P&R).

(2) Refer requests for Secretarial Designee status for medical care in the United States through the Chairman of the Joint Chiefs of Staff to USD(P&R).

(3) Through the Chairman of the Joint Chiefs of Staff, provide written annual reports to the USD(P&R) and USD(C) reflecting the number of individuals designated as Secretarial Designees within their geographic area of responsibility, the reasons for such designation, the expected duration of such designation, the costs and sources of funding authorizing the support of such designee status for each designee.

(4) Identify Secretarial Designees treated at MTFs within their geographic area of responsibility.

(5) Provide for an accounting and collection system for reimbursement of medical costs within their geographic area of responsibility.

(g) The Commander, United States Transportation Command shall:

(1) Coordinate patient movement with all concerned Military Departments.

(2) Upon request of the Military Department concerned or Commanders of the GCCs, determine availability of DoD transportation assets, or when cost effective, coordinate with civilian ambulance authorities, to effect transportation of Secretarial Designee as appropriate.

(3) Ensure the Global Patient Movement Requirements Center, as the regulating agency, will consistently serve as the single point of contact for patient movement for Secretarial Designee patients using DoD assets upon request.

(4) Annually consolidate Secretarial Designee patient listing who utilized the DoD patient movement system and forward to USD(P&R) and USD(C).

# PART 110—STANDARDIZED RATES OF SUBSISTENCE ALLOWANCE AND COMMUTATION INSTEAD OF UNIFORMS FOR MEMBERS OF THE SENIOR RESERVE OFFICERS' TRAINING CORPS

Sec.
110.1 Reissuance and purpose.
110.2 Applicability.
110.3 Policy.
110.4 Responsibilities.
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APPENDIX A TO PART 110—CLIMATIC ZONES USED TO DETERMINE RATES OF COMMUTATION ALLOWANCE
APPENDIX B TO PART 110—FORMULA FOR ROTC COMMUTATION RATES
APPENDIX C TO PART 110—APPLICATION OF BASIC COURSE FORMULA (MALE AND FEMALE MEMBERS) (SAMPLE)
APPENDIX D TO PART 110—APPLICATION OF ADVANCED COURSE FORMULA (MALE AND FEMALE MEMBERS) (SAMPLE)
APPENDIX E TO PART 110—APPLICATION OF 4-WEEK SUMMER FIELD TRAINING FORMULA (SAMPLE)

AUTHORITY: 10 U.S.C. 2101–2111, 37 U.S.C. 209, 50 App. U.S.C. 456(a).

SOURCE: 51 FR 26886, July 28, 1986, unless otherwise noted.

## § 110.1 Reissuance and purpose.

This part reissues 32 CFR part 110 implementing Pub. L. 88–647, 92–171, and 98–94 and updates policy, assigns responsibilities, and prescribes procedures for determining commutation rates for Reserve Officers' Training Corps (ROTC) detachments offered

commutation funds instead of uniforms.

### § 110.2 Applicability.

This part applies to the Office of the Secretary of Defense (OSD), the Military Departments, and the Defense Logistics Agency (DLA) (hereafter referred to collectively as ''DoD Components''). The term ''Military Services,'' as used herein, refers to the Army, Navy, Air Force, and Marine Corps.

### § 110.3 Policy.

It is DoD policy to provide subsistence allowance in accordance with Pub. L. 92–171 and to eligible participants of senior ROTC programs and commutation funds instead of uniforms (section 2110, Pub. L. 88–647) for members of senior ROTC programs at eligible schools.

### § 110.4 Responsibilities.

(a) The *Assistant Secretary of Defense (Force Management and Personnel)* (ADS(FM&P)), or designee, shall:

(1) Administer the overall DoD ROTC program.

(2) Maintain liaison with the Military Departments regarding the functioning of the ROTC program.

(3) Announce the standard rates of commutation instead of uniforms to the Military Departments not later than August 1 each year.

(b) The *Director, Defense Logistics Agency* (DLA), shall provide the Military Departments during December of each year the current unit price list of uniform items to be used the following fiscal year.

(c) The *Secretaries of the Military Departments* shall:

(1) Prescribe the standard uniform items for each climatic zone, sex, and course (basic and advanced) in quantities authorized to be provided.

(2) Develop the communication rates, based on the standard Military Service uniforms, and establish procedures for rate review on an annual basis.

(3) Submit to the ASD(FM&P) an estimate of the rates of commutation, based on the latest DLA clothing rate, for climatic zones by sex and course not later than July 1 of each year.

(4) Classify educational institutions as Military Colleges (MC), Civilian Colleges (CC), or Military Junior Colleges (MJC), hereafter also called schools.

(5) Conduct inspections to ensure that the schools meet the requirements for the respective classifications and that those receiving commutation funds provide quality uniforms in sufficient quantities.

(6) Program and budget for subsistence allowance and commutation, instead of uniforms, for members of the senior ROTC program.

### § 110.5 Procedures.

(a) *Classification of institutions hosting Senior ROTC Units*. Educational institutions hosting senior ROTC units maintained by the Military Departments shall be classified as essentially military or civilian colleges or universities.

(1) The classification MC shall be assigned to units established in:

(i) Essentially military colleges or universities that, for purposes of qualifying as an MC under 50 U.S.C. App. 456(a)(1):

(A) Confer baccalaureate or graduate degrees.

(B) Require a course in military training throughout the undergraduate course for all qualified undergraduate students.

(C) Organize their military students as a corps of cadets under constantly maintained military discipline.

(D) Require all members of the corps, including those nonmembers enrolled in the ROTC, to be habitually in uniform when on campus.

(E) Have as their objective the development of the military students' character by means of military training and the regulation of their conduct in accordance with the principles of military discipline.

(F) In general, meet military standards similar to those maintained at the Military Service academies.

(ii) The designation ''all qualified undergraduate students,'' under paragraph (a)(i)(B) of this section means all physically fit students except:

(A) Female students who waive their right to participate as provided by Pub. L. 95–485, section 809.

(B) Foreign nationals.

(C) Students who are not liable for induction by virtue of having honorably completed active training and service.

(D) Students who are pursuing special undergraduate courses beyond 4 years after completing the required military training.

(E) Certain categories of students who are excused specifically by administrative decision and approved by the ROTC unit commander.

(2) The classification CC shall be assigned when units are established at civilian colleges and universities that are not operated on an essentially military basis, but that confer baccalaureate or graduate degrees.

(3) The classification MJC shall be assigned when ROTC units are established at essentially military schools that provide junior college or junior college and high school instruction, but DO NOT confer baccalaureate degrees. Those units shall meet all other requirements of an MC. (See Pub. L. 88–647).

(b) *Qualifying for the special rate of commutation.* (1) To qualify for payment at the special rate of commutation instead of uniforms, an institution classified MC or CC shall meet in addition to paragraphs (a) (1), or (2), respectively the requirements below. An institution classified an MJC shall meet, in addition to paragraph (a)(1) (except paragraphs (a)(1)(i) (A) and (B)), the requirements below:

(i) Organize and maintain within their undergradute student bodies a self-contained corps of cadets.

(ii) Require all members of the corps of cadets to be in appropriate uniform at all times while on the campus.

(iii) House all members of the corps of cadets in barracks separate from nonmembers.

(iv) Require all members of the corps of cadets to be under constantly maintained military discipline on a 24-hours-per-day, 7-days-per-week basis.

(v) Require all physically qualified members of the above corps of cadets to be enrolled in the basic course of ROTC, except:

(A) Female students who waive their right to participate as provided by Pub. L. 95–485.

(B) Foreign nationals.

(C) Students who are not liable for induction by virtue of having completed honorably active training and service.

(D) Certain categories of students are excused specifically by administrative decisions.

(E) Other students whose enrollment is prevented by provisions or appropriate regulations of a Military Department.

(2) MCs, CCs, or MJCs may be paid the special rate of commutation only for those members of the corps of cadets meeting the requirements set forth in paragraph (b)(1), who are enrolled in ROTC. The requirements of paragraphs (b)(1) (iii) and (iv), may be waived for married students, graduate students, and day students who are not housed with the corps of cadets. Day students are those ROTC cadets who are authorized by university officials to reside off campus within a reasonable commuting distance to the university.

(3) Institutions designated as MCs may enroll into the ROTC, of the appropriate Military Service, those students who, for various reasons, are not required to be members of the corps of cadets. These institutions shall receive, for such student only, the standard commutation rate. The special rate shall be authorized for eligible females who elect to participate as enrolled senior ROTC cadets, provided that the requirements of paragraphs (b)(1) (ii), (iii), and (iv) are met or unless these requirements are waived under the provisions of paragraph (a)(1)(ii)(E).

(c) *Subsistence allowance and commutation rates*—(1) *Subsistence allowances.* Payment that is made by the Military Departments instead of rations to each contract cadet enrolled in the advanced course and for each scholarship cadet enrolled in the basic or advanced course.

Payments are as prescribed in the DoD Military Pay and Allowances Entitlements Manual, part 8, chapter 4. The following rates are established for payment of subsistence allowance:

(i) Except when on summer fiel training or practice cruises, when subsistence in kind is furnished, or when otherwise on active duty, the subsistence allowance for each enrolled member of

the advanced training program in the senior ROTC shall be $100 per month for not more than a total of 20 months.

(ii) Except when on summer field training or practice cruises, when subsistence in kind is furnished, the subsistence allowance for each cadet or midshipman appointed under the financial assistance program for specially selected members, under the provisions of Pub. L. 88–647, shall be $100 per month for not more than a total of 20 months during the basic course training program and $100 per month for not more than a total of 20 months during the advanced course training program unless the individual has been authorized extended entitlements under the provisions of Pub. L. 98–94. The $100 per month subsistence may be authorized for not more than a total of 30 months during the advanced course training program when an extended financial assistance entitlement is approved by the Military Service Secretary of the Military Department concerned.

(2) *Commutation instead of uniforms.* Commutation is payment made by the Military Departments to an institution instead of the issue of uniforms to ROTC cadets in accordance with Pub. L. 88–647. Certain MCs, CCs, and MJCs that maintain senior ROTC units may elect to receive commutation instead of Government clothing. In such instances, the commutation rate shall include not only the uniform, but the procurement, receipt, storage, maintenance, and issue of the uniform as outlined in paragraph (c)(2)(xi), and shown in Appendix B.

(i) The Military Departments shall develop the commutation rates and establish procedures for their review on an annual basis. The review shall be scheduled during May so that the current unit price list disseminated by the DLA during the previous December of each year can be used to develop the commutation rates and made available to institutions for use at the beginning of the fall term. The commutation payment shall be made to the institutions based on the number of students enrolled and in attendance for at least 60 consecutive days.

(ii) Commutation rates for uniforms shall be based on the latest approved items of clothing for each climatic zone and computed using the formulas listed in Appendix B. Appendices C, D, and E are examples of the application of the various formulas to determine the amounts that can be paid to qualifying institutions.

(iii) Standard commutation rates for the basic course (first 2 years) of the senior ROTC shall be payable in the indicated amount on an annual basis not to exceed 2 years to CCs that offer Military Science (MS) I and II or equivalent. The rates shall be paid after cadets have been enrolled 60 days.

(iv) Standard rates for the advanced course cover the 2-year period that each member is enrolled in advanced course training in the senior ROTC (Appendix D). These rates shall be paid after cadets have been enrolled for 60 days in the advanced course. Commutation funds for camp uniforms, if paid, shall be in addition to payments for the advanced course.

(v) Special rates of commutation shall be paid for students enrolled at MCs, CCs, or MJCs fulfilling the requirements of paragraph (b).

(vi) Special rates of commutation shall be identical for all the Military Services for those qualifying institutions defined in paragraph (b). These rates shall be three times the highest standard rate submitted by sex and course from the Military Departments for climatic zones 1 or 2. Each Military Department shall submit special rate estimates for zones 1 and 2 to the Assistant Secretary of Defense (ASD(FM&P), or designee, not later than July 1. The special rates shall be announced by the ASD(FM&P), or designee, not later than August 1 of each year.

(vii) Special rates of commutation for students enrolled in the basic course (MS I and II or equivalent) of MCs, CCs, and MJCs shall be paid on an annual basis not to exceed 2 years. Special rates for students enrolled in the advanced course (MS III and IV or equivalent) of MCs, CCs, or MJCs shall be paid for the 2-year period that each member is enrolled in the advanced course.

(viii) Commutation for the basic course and the advanced course shall be paid based on Appendices C and D, respectively.

(ix) One-half of the special commutation rate shall be paid to the institution for those students enrolled in the second year of the advanced course for whom the institution previously has not received commutation.

(x) The standard rates shown in Appendix E for summer field training are not subject to the special commutation rate adjustment.

(xi) Commutation of uniform funds may be expended to support ONLY the following activities:

(A) Procurement, receipt, storage, and issue expenses not to exceed 10 percent of the cost for standard uniform items in quantities as prescribed by the Secretary of the Military Department concerned, or distinctive uniforms and insignia as prescribed by those institutions that meet the requirements of paragraph (b). Marking up or raising the price of that paid by an institution when items are purchased from military inventories is not authorized.

(B) Alteration and maintenance of the uniform, which is defined as laundry, dry cleaning, renovation, alterations and sizing, not to exceed $10 per uniform.

(C) Salary payments to the property custodian for custody of uniforms purchased with commutation funds. Such custodial fees shall not exceed the specified percent of the commutation funds received against the actual enrollments in each course listed below for the immediate past academic year:

(*1*) 15 percent of basic course.

(*2*) 5 percent of advance course.

(*3*) 5 percent of field training (when applicable).

(D) Purchase of hazard insurance to protect uniform inventory against loss.

(xii) Unexpended commutation of uniform funds is the balance remaining after all commitments or obligations relating to the immediate past academic year and the amount of retained uniform commutation funds (see paragraph (c)(2)(xii)(A)) have been deducted. The unexpended balance shall be computed as of July 1 each year. Commitments or obligations relating to new year procurement, maintenance, or other allowable activities may not be charged against the unexpended balance. As an exception, the unexpended balance may be used for paying bills for procurements of past academic years that are submitted AFTER the cutoff date of the report required by paragraph (c)(2)(xii)(C).

(A) The amount of unexpended uniform commutation funds an institution may retain from 1 academic year to the next for continued financing of the uniform program is the greater of $3500 or 20 percent of the uniform entitlement for the immediate past academic year.

(B) Accumulated funds that exceed this limitation shall be returned to the Military Services.

(C) As of July 1 of each year, a uniform commutation report DD Form 2340, ''Annual Report on Uniform Commutation Fund'' shall be completed by the institution receiving commutation funds and submitted to the appropriate authority for each Military Service by July 31.

(*1*) The uniform commutation report shall include a detailed list of expenditures, total funds available for the immediate past academic year, including the unexpended balance from the last report, an explanation of any monetary adjustments and errors, the balance of funds on hand, and the amount being refunded to the appropriate Military Service as the unexpended balance, if any. The report shall be coordinated with ROTC unit commanders and signed by the appropriate institutional official who maintains records of the receipt of funds.

(*2*) All records on the receipt and expenditure of commutation funds shall be subject to periodic audit and inspection. Institution officials shall be responsive to recommendations made.

(d) *Inspection*. Inspections shall be conducted when an ROTC unit is initially established at an institution that does not already host another Military Service ROTC unit. Inspections shall ensure that only those institutions that meet the requirements of paragraphs (a)(1) or (3), are awarded the MC or MJC classification and only those awarded MC, CC, and MJC classifications that meet the additional requirements of paragraph (b) shall be authorized the special rate of commutation instead of uniforms. Inspections of established units at MCs, CCs, and MJCs shall be conducted on an exception basis.

(1) The Secretaries of Military Departments shall prescribe specific inspection procedures applicable to ROTC units of their respective Military Services.

(2) When discrepancies are noted at institutions, their classifications shall be subject to review for resolution or withdrawal by the Secretaries of the Military Department concerned. In the instance of withdrawal of classification, the appropriate Military Service's review of, and final notification to, the institution shall be within 30 days of the date the discrepancy was noted.

### § 110.6 Information requirement.

The reporting requirement for paragraph (c)(2)(xii)(C) is assigned OMB No. 0704–0200.

## APPENDIX A TO PART 110—CLIMATIC ZONES USED TO DETERMINE RATES OF COMMUTATION ALLOWANCE

*Zone I*

1. Alabama
2. Arizona, only 100 mile-wide belt along south border
3. Arkansas, southern two-thirds
4. California, except area north of 37°
5. Florida
6. Georgia
7. Guam
8. Hawaii
9. Kentucky, southeastern one-third
10. Louisiana
11. Mississippi
12. New Mexico, only 100 mile-wide belt along south border
13. North Carolina
14. Oklahoma, only southeastern portion
15. Puerto Rico
16. South Carolina
17. Tennessee, except northwest corner
18. Texas, except area border of 34° north

*Zone II*

1. Alaska
2. Arizona, except 100 mile-wide belt along south border
3. Arkansas, northern one-third
4. California, area south of 37° north
5. Colorado
6. Connecticut
7. Delaware
8. District of Columbia
9. Idaho
10. Illinois
11. Indiana
12. Iowa
13. Kansas
14. Kentucky, NW two-thirds
15. Maine
16. Maryland
17. Massachusetts
18. Michigan
19. Minnesota
20. Missouri
21. Montana
22. Nebraska
23. Nevada
24. New Hampshire
25. New Jersey
26. New Mexico, except a 100 mile-wide belt along south border
27. New York
28. North Dakota
29. Ohio
30. Oklahoma, except the southeast portion
31. Oregon
32. Pennsylvania
33. Rhode Island
34. South Dakota
35. Tennessee, only the northwest corner
36. Texas, only area north of 34° north
37. Utah
38. Vermont
39. Virginia
40. Washington
41. West Virginia
42. Wisconsin
43. Wyoming

The climate zones listed above are to be used as a guide to determine clothing requirements for a specific detachment. Wind chill equivalent temperatures can vary widely for areas within close proximity to each other due to variations in wind velocity and elevation. Detachment commanders may request a zone change by submitting evidence to the Major Command of the appropriate Military Service that the wind chill equivalent temperature for the coldest month has been within the limits of the requested zone classification for the past 3 consecutive years.

## ATTACHMENT TO APPENDIX A TO PART 110—CLIMATIC ZONES USED TO DETERMINE RATES OF COMMUTATION ALLOWANCE (FORMULA)

The Standard and special commutation rates are based on the latest approved items of clothing for each climatic zone. The zones are:

| Zone | Temperature range |
|---|---|
| 1 | 32 degrees Fahrenheit and above. |
| 2 | Below 32 degrees Fahrenheit. |

To determine the appropriate zone for each ROTC detachment, use the table below. Enter the appropriate dry bulb temperature at the top and read down. Find the wind velocity on the left and read across. The intersection of the two lines provides the equivalent temperature. For example, a combination of 20 degrees Fahrenheit and a 10 mile-per-hour wind has a wind chill equivalent

temperature of 3 degrees Fahrenheit. The wind chill equivalent temperature is based on the average monthly temperature and wind of the coldest month for each of the past 3 consecutive years.

### APPENDIX B TO PART 110—FORMULA FOR ROTC COMMUTATION RATES

*Basic Course (General Military Course)*

Total Pkg. Cost of Auth. Items+10% Procurement Cost=Adjusted Pkg. Cost—Amortized by: 2-Yr. Life Shoes & Socks; 2-Yr. Life Insignia; 5-Yr. Life Bal. of Pkg.
+15% Custodial Fees+$10.00 Uniform Alteration and Maint.=Net Rate Per Yr. (Rounded to nearest $)

*Advanced Course (Professional Officers Course)*

Total Pkg. Cost of Auth. Items – ½ Amt. of Insignia Cost (2-yr. Amortization)+5% Custodial Fees+$10.00 Uniform Alteration & Maint.=Net Rate 2-yr. period (Rounded to nearest $)

*Summer Camp (Field Training)*

Total Pkg. Cost of Auth. Items – Amortized by 2-yr. Life (Entire pkg., except shoes and socks)+5% Custodial Fees+$10.00 Uniform Alteration & Maint.=Net Rate 2-yr. period (Rounded to nearest $)

### APPENDIX C TO PART 110—APPLICATION OF BASIC COURSE FORMULA (MALE AND FEMALE MEMBERS) (SAMPLE)

| | Zone I | Zone II |
|---|---|---|
| Total package cost (authorized items) | $159.29 | $180.62 |
| Plus 10% procurement cost | 15.93 | 18.06 |
| Adjusted package cost | 175.22 | 198.68 |
| Amortization: | | |
| 2-years socks (50% of $1.28) | .64 | .64 |
| 2-years shoes (50% of 14.00) | 7.00 | 7.00 |
| 2-years insignia (50% of 15.00), if applicable | 7.50 | 7.50 |
| 5-years balance package (20% of $144.94, Zone I) (20% of $168.40, Zone II) | 28.99 | 33.68 |
| Amortized package cost | 44.13 | 48.82 |
| Add: | | |
| 15% custodial fees (15% of amortized package cost) | 6.62 | 7.32 |
| Uniform Alteration and Maintenance | 10.00 | 10.00 |
| Total | 16.62 | 17.32 |
| Net rate | 60.75 | 66.14 |
| Rounded for official standard rate (per year) | 61.00 | 66.00 |
| Special commutation rate (per year) (three times standard rate) | 183.00 | 198.00 |

### APPENDIX D TO PART 110—APPLICATION OF ADVANCED COURSE FORMULA (MALE AND FEMALE MEMBERS) (SAMPLE)

| | Zone I | Zone II |
|---|---|---|
| Total package cost (authorized items) | $159.29 | $180.62 |
| Less insignia amortization (50% of $15.00), if applicable | 7.50 | 7.50 |
| Adjusted package cost | 151.79 | 173.12 |
| Add: | | |
| 5% custodial fees (5% of adjusted package cost) | 7.59 | 8.66 |
| Uniform alteration and maintenance | 10.00 | 10.00 |
| | 17.59 | 18.66 |
| Net Rate | 169.38 | 191.78 |
| Rounded official standard rate (2 years) | 169.00 | 192.00 |
| Special commutation rate (2 years) (three times standard rate) | 507.00 | 576.00 |

### APPENDIX E TO PART 110—APPLICATION OF 4-WEEK SUMMER FIELD TRAINING FORMULA (SAMPLE)

| | Zone I | Zone II |
|---|---|---|
| Total package cost (authorized items) | $36.56 | $48.70 |
| Amortization Schedule: | | |
| Total package less $12.75 (boots and socks) (not reissued) | 23.81 | 35.95 |
| 50% amortization (2-year life) | 11.91 | 17.98 |
| Boots and socks added | 12.75 | 12.75 |
| Amortized package cost | 24.66 | 30.73 |
| Add: | | |
| 5% custodial fees | 1.23 | 1.54 |
| Uniform alteration and maintenance | 10.00 | 10.00 |
| Net rate | 35.89 | 42.27 |
| Rounded for official rate | 36.00 | 42.00 |

## PART 112—INDEBTEDNESS OF MILITARY PERSONNEL

Sec.
112.1 Purpose.
112.2 Applicability and scope.
112.3 Definitions.
112.4 Policy.
112.5 Processing of debt complaints.
112.6 Processing of involuntary allotments.
112.7 Responsibilities.

AUTHORITY: 5 U.S.C. 5520a(k) and 10 U.S.C. 113(d).

SOURCE: 73 FR 59502, Oct. 9, 2008, unless otherwise noted.

### § 112.1 Purpose.

This part:

(a) Updates DoD policies and assigns responsibilities governing delinquent

indebtedness of members of the Military Services and prescribes policy for processing involuntary allotments from the pay of military members to satisfy judgment indebtedness in accordance with 5 U.S.C. 5520a(k).

(b) Establishes responsibility for procedures implementing 5 U.S.C. 5520a(k), 15 U.S.C. 1601 note, 1601–1614, 1631–1646, 1661–1665a, 1666–1666j, and 1667–1667e (''Truth in Lending Act''), and 15 U.S.C. 1601 note, and 1692–1692o (''Fair Debt Collection Practices Act'').

### § 112.2 Applicability and scope.

(a) This part applies to the Office of the Secretary of Defense, the Military Departments (including the Coast Guard when it is not operating as a Service in the Navy, under agreement with the Department of Homeland Security), the Chairman of the Joint Chiefs of 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 in the Department of Defense (hereafter referred to collectively as the ''DoD Components'').

(b) This part does not apply to:

(1) Indebtedness of a member of the Military Services to the Federal Government.

(2) Processing of indebtedness claims to enforce judgments against military members for alimony or child support.

(3) Claims by State or municipal governments under the processing guidelines for complaints, including tax collection actions.

### § 112.3 Definitions.

(a) *Absence*. A member's lack of an ''appearance,'' at any stage of the judicial process, as evidenced by failing to physically attend court proceedings; failing to be represented at court proceedings by counsel of the member's choosing; or failing to timely respond to pleadings, orders, or motions.

(b) *Court*. A court of competent jurisdiction within any State, territory, or possession of the United States.

(c) *Debt Collector*. An agency or agent engaged in the collection of debts described under 15 U.S.C. 1601 note and 1692–1692o (''Fair Debt Collection Practices Act'').

(d) *Exigencies of Military Duty*. A military assignment or mission-essential duty that, because of its urgency, importance, duration, location, or isolation, necessitates the absence of a member of the Military Services from appearance at a judicial proceeding or prevents the member from being able to respond to a notice of application for an involuntary allotment. Exigency of military duty is normally presumed during periods of war, national emergency, or when the member is deployed.

(e) *Judgment*. A final judgment must be a valid, enforceable order or decree, by a court from which no appeal may be taken, or from which no appeal has been taken within the time allowed, or from which an appeal has been taken and finally decided. The judgment must award a sum certain amount and specify that the amount is to be paid by an individual who, at the time of application for the involuntary allotment, is a member of the Military Services.

(f) *Just Financial Obligation*. A legal debt acknowledged by the military member in which there is no reasonable dispute as to the facts or the law; or one reduced to judgment that conforms to Sections 501–591 of title 50 Appendix, United States Code (The Servicemembers Civil Relief Act, as amended), if applicable.

(g) *Member of the Military Services*. For the purposes of this part, any member of the Regular Army, Air Force, Navy, Marine Corps, or Coast Guard, and any member of a Reserve component of the Army, Air Force, Navy, Marine Corps, or Coast Guard (including the Army National Guard of the United States and the Air National Guard of the United States) on active duty pursuant to a call or order for a period in excess of 180 days at the time an application for involuntary allotment is received by the Director, DFAS, or Commanding Officer, Coast Guard Pay and Personnel Center. The following shall not be considered members:

(1) Retired personnel, including those placed on the temporary or permanent disabled retired list; and

(2) Personnel in a prisoner of war or missing in action status, as determined

by the Secretary of the Military Department concerned.

### § 112.4 Policy.

(a) Members of the Military Services are expected to pay their just financial obligations in a proper and timely manner. A Service member's failure to pay a just financial obligation may result in disciplinary action under the Uniform Code of Military Justice (10 U.S.C. 801–940) or a claim pursuant to Article 139 of the Uniform Code of Military Justice. Except as stated in this section, and in paragraphs (a)(1) and (a)(2) of this section, the DoD Components have no legal authority to require members to pay a private debt or to divert any part of their pay for satisfaction of a private debt.

(1) Legal process instituted in civil courts to enforce judgments against military personnel for the payment of alimony or child support shall be acted on pursuant to 42 U.S.C. 651–665, and Chapter 50, of Department of Defense Regulation 7000.14–R Volume 7A.[1]

(2) Involuntary allotments under 5 U.S.C. 5520a(k) shall be established in accordance with this part.

(b) Whenever possible, indebtedness disputes should be resolved through amicable means. Claimants may contact military members by having correspondence forwarded through the military locator services for an appropriate fee.

### § 112.5 Processing of debt complaints.

(a) Debt complaints meeting the requirements of this part and procedures established by the Under Secretary of Defense for Personnel and Readiness, as required by § 112.7(a)(1) shall receive prompt processing assistance from commanders.

(b) Assistance in indebtedness matters shall not be extended to those creditors:

(1) Who have not made a bona fide effort to collect the debt directly from the military member;

(2) Whose claims are patently false and misleading; or

(3) Whose claims are obviously exorbitant.

(c) Some States have enacted laws prohibiting creditors from contacting a debtor's employer about indebtedness or communicating facts on indebtedness to an employer unless certain conditions are met. The conditions that must be met to remove this prohibition are generally such things as reduction of a debt to judgment or obtaining written permission of the debtor.

(1) At DoD installations in States having such laws, the processing of debt complaints shall not be extended to those creditors who are in violation of the State law. Commanders may advise creditors that this rule has been established because it is the general policy of the Military Services to comply with State law when that law does not infringe upon significant military interests.

(2) The rule in paragraph (c)(1) of this section shall govern even though a creditor is not licensed to do business in the State where the debtor is located. A similar practice shall be started in any State enacting a similar law regarding debt collection.

(3) Pursuant to 15 U.S.C. 1601 note and 1692–1692o (''Fair Debt Collection Practices Act''), contact by a debt collector with third parties, such as commanding officers, for aiding debt collection is prohibited without a court order or the debtor's prior consent given directly to the debt collector. Creditors are generally exempt from this requirement, but only when they collect on their own behalf.

### § 112.6 Processing of involuntary allotments.

Pursuant to 5 U.S.C. 5520a(k): (a) In those cases in which the indebtedness of a military member has been reduced to a judgment, an application for an involuntary allotment from the member's pay may be made under procedures prescribed by the Under Secretary of Defense (Comptroller). Such procedures shall provide the exclusive remedy available.

(b) An involuntary allotment from a member's pay shall not be permitted in any indebtedness case in which:

(1) Exigencies of military duty caused the absence of the member from

[1] Copies may be obtained from the DoD Directives Web page at: *http://www.dtic.mil/whs/directives*.

the judicial proceeding at which the judgment was rendered; or

(2) There has not been compliance with the procedural requirements of the Servicemembers Civil Relief Act 50, U.S.C. Appendix, sections 501–591.

**§ 112.7 Responsibilities.**

(a) The Under Secretary of Defense for Personnel and Readiness shall:

(1) In consultation with the Under Secretary of Defense (Comptroller), establish procedures for the processing of debt complaints.

(2) Have policy oversight on the assistance to be provided by military authorities to creditors of military personnel who have legitimate debt complaints.

(b) The Under Secretary of Defense (Comptroller) shall:

(1) In consultation with the Under Secretary of Defense for Personnel and Readiness establish procedures for processing debt complaints, and administer and process involuntary allotments from the pay of members of the Military Services. This includes the authority to promulgate forms necessary for the efficient administration and processing of involuntary allotments.

(2) Ensure that the Director, Defense Finance and Accounting Service:

(i) Implements procedures established by the Under Secretary of Defense for Personnel and Readiness and the Under Secretary of Defense (Comptroller).

(ii) Considers whether Servicemembers Civil Relief Act 50 U.S.C. Appendix, sections 501–591 has been complied with pursuant to 5 U.S.C. 5520a(k) prior to establishing an involuntary allotment against the pay of a member of the Military Services.

(iii) Publishes, prints, stocks, redistributes, and revises DoD forms necessary to process involuntary allotments.

(c) The Heads of the DoD Components shall urge military personnel to meet their just financial obligations, since failure to do so damages their credit reputation and affects the public image of all DoD personnel. See DoD Directive 5500.7.[2]

[2] See footnote 1 to § 112.4(a)(1).

(d) The Secretaries of the Military Departments shall:

(1) Establish, as necessary, procedures to administer and process involuntary allotments from the pay of members of the Military Services. This includes designating those commanders, or other officials who may act in the absence of the commander, who shall be responsible for determining whether a member's absence from a judicial proceeding was caused by exigencies of military duty, and establishing appeal procedures regarding such determinations.

(2) Require commanders to counsel members to pay their just debts, including complying, as appropriate, with court orders and judgments for the payments of alimony or child support.

(3) Emphasize prompt command action to assist with the processing of involuntary allotment applications.

(e) The Chief, Office of Personnel and Training, for the Coast Guard shall:

(1) Establish, as necessary, procedures supplemental to those promulgated by the Under Secretary of Defense for Personnel and Readiness or the Under Secretary of Defense (Comptroller) to administer and process involuntary allotment from the pay of members of the Military Services; this includes the authority to promulgate forms necessary for the efficient administration and processing of involuntary allotments.

(2) Ensure that the Commanding Officer, Coast Guard Pay and Personnel Center:

(i) Implements procedures established by the Under Secretary of Defense for Personnel and Readiness, the Under Secretary of Defense (Comptroller), and Chief, Office of Personnel and Training.

(ii) Considers whether the Servicemembers Civil Relief Act, as amended (50 U.S.C. Appendix, sections 501–591) has been complied with pursuant to 5 U.S.C. 5520a(k) prior to establishing an involuntary allotment against the pay of a member of the Military Services.

(iii) Acts as the Coast Guard manager for forms necessary to process involuntary allotments.

# PART 113—INDEBTEDNESS PROCEDURES OF MILITARY PERSONNEL

Sec.
113.1 Purpose.
113.2 Applicability.
113.3 Definitions.
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113.6 Procedures.
APPENDIX A TO PART 113—CERTIFICATE OF COMPLIANCE
APPENDIX B TO PART 113—STANDARDS OF FAIRNESS
APPENDIX C TO PART 113—SAMPLE DD FORM 2653, ''INVOLUNTARY ALLOTMENT APPLICATION''
APPENDIX D TO PART 113—SAMPLE DD FORM 2654, ''INVOLUNTARY ALLOTMENT NOTICE AND PROCESSING''

AUTHORITY: 5 U.S.C. 5520a(k) and 10 U.S.C. 113(d).

SOURCE: 60 FR 1722, Jan. 5, 1995, unless otherwise noted.

## § 113.1 Purpose.

This part implements policy, assigns responsibilities, and prescribes procedures under 32 CFR part 112 governing delinquent indebtedness of members of the Military Services.

## § 113.2 Applicability.

This part applies to the Office of the Secretary of Defense, the Military Departments (including the Coast Guard when it is not operating as a Military Service in the Navy by agreement with the Department of Transportation), the Chairman of the Joint Chiefs of Staff, the Unified Combatant Commands, the Inspector General of the Department of Defense, the Defense Agencies, and the DoD Field Activities (hereafter referred to collectively as ''the DoD Components''). The term ''Military Services,'' as used herein, refers to the Army, the Navy, the Air Force, the Marine Corps, and the Coast Guard.

## § 113.3 Definitions.

(a) *Appearance*. The presence and participation of a member of the Military Services, or an attorney of the member's choosing, throughout the judicial proceeding from which the judgment was issued that is the basis for a request for enforcement through involuntary allotment.

(b) *Applicant*. The original judgment holder, a successor in interest, or attorney or agent thereof who requests an involuntary allotment from a member of the Military Services pursuant to DoD Directive 1344.9.[1]

(c) *Pay subject to involuntary allotment*. For purposes of complying with 32 CFR part 112 and 5 U.S.C. 5520a(k), pay subject to involuntary allotment shall be determined by:

(1) Including:

(i) Basic pay but excluding reduction for education for education benefits under section 38 U.S.C. 1411 (''New G.I. Bill'').

(ii) Special pay (including enlistment and reenlistment bonuses).

(iii) Incentive pay.

(iv) Accrued leave payments (basic pay portion only).

(v) Readjustment pay.

(vi) Severance pay (including disability severance pay).

(vii) Lump-sum Reserve bonus.

(viii) Inactive duty training pay.

(2) Excluding:

(i) Retired pay (including) disability retired pay).

(ii) Retainer pay.

(iii) Separation pay, Voluntary Separation Incentive (VSI), and Special Separation Benefit (SSB).

(iv) Allowances paid under titles 10 and 37 of the United States Code (e.g., Chapter 53 of title 10 and Chapter 7 of title 37, respectively) and other reimbursements for expenses incurred in connection with duty in the Military Service or allowances in lieu thereof.

(v) Payments not specifically enumerated in § 113.3(c)(1).

(3) After including the items in § 113.3(c)(1), subtracting the following pay items to compute the final earnings value of the pay subject to involuntary allotment:

(i) Federal and State employment and income tax withholding (amount limited only to that which is necessary to fulfill member's tax liability).

(ii) FICA tax.

(iii) Amounts mandatorily withheld for the United States Soldiers' and Airmen's Home.

[1] Copies may be obtained, at cost, from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161.

(iv) Deductions for the Servicemen's Group Life Insurance coverage.

(v) Retired Serviceman's Family Protection Plan.

(vi) Indebtedness to the United States.

(vii) Fines and forfeitures ordered by a court-martial or a commanding officer.

(viii) Amounts otherwise required by law to be deducted from a member's pay (except payments under 42 U.S.C. 659, 661, 662, and 665).

(d) *Preponderence of the evidence*. A greater weight of evidence that is more credible and convincing to the mind. That which best accords with reason and probability. (See Black's Law Dictionary[2])

(e) *Proper and Timely Manner*. A manner that under the circumstances does not reflect discredit on the Military Service.

**§ 113.4 Policy.**

(a) It is DoD policy under 32 CFR part 112 that procedures be established for the processing of debt complaints against members of the Military Services and involuntary allotments from the pay of members of the Military Services.

(b) An involuntary allotment shall not exceed the lesser of 25 percent of a member's pay subject to involuntary allotment or the maximum percentage of pay subject to garnishment proceedings under the applicable State law.

(c) The amount of an involuntary allotment under 32 CFR part 112 and this part when combined with deductions as a result of garnishments or statutory allotments for spousal support and child support under 42 U.S.C. 659, 661, 662, or 665, may not exceed the lesser of 25 percent of a member's pay subject to involuntary allotment or the maximum percentage of pay subject to garnishment proceedings under applicable State law. In any case in which the maximum percentage would be exceeded, garnishments and involuntary allotments for spousal and child support shall take precedence over involuntary allotments authorized under 32 CFR part 112 and this part. Involuntary allotments established under 32 CFR part 112 and this part shall be reduced or stopped as necessary to avoid exceeding the maximum percentage allowed.

(d) The Truth in Lending Act (15 U.S.C. 1601 note, 1601–1614, 1631–1646, 1661–1666j, and 1667–1667e) prescribes the general disclosure requirements that must be met by those offering or extending consumer credit and Federal Reserve Board Regulation Z (12 CFR 226) prescribes the specific disclosure requirements for both open-end and installment credit transactions. In place of Federal Government requirements, State regulations apply to credit transactions when the Federal Reserve Board has determined that the State regulations impose substantially similar requirements and provide adequate enforcement measures. Commanding officers, with the assistance of judge advocates, should check regulations of the Federal Reserve Board to determine whether Federal or State laws and regulations govern.

**§ 113.5 Responsibilities.**

(a) The Under Secretary of Defense for Personnel and Readiness shall monitor compliance with this part.

(b) The Under Secretary of Defense (Comptroller) shall ensure Defense Finance and Accounting Service (DFAS) implementation of this part.

(c) The Heads of the DoD Components shall ensure compliance with this part.

**§ 113.6 Procedures.**

(a) The following procedures apply to the processing of debt complaints against members of the Military Services.

(1) It is incumbent on those submitting indebtedness complaints to show that they have met the disclosure requirements of the Truth in Lending Act (15 U.S.C. 1601 note, 1601–1614, 1631–1646, 1661–1666j, and 1667–1667e) and Federal Reserve Board Regulation Z (12 CFR 226), and that they complied with the Standards of Fairness (appendix B to this part).

(2) Creditors subject to Federal Reserve Board Regulation Z (12 CFR 226), and assignees claiming thereunder, shall submit with their debt complaint

[2] Black's Law Dictionary, Fourth Edition, West Publishing Company, Saint Paul, Minnesota (1952).

an executed copy of the Certificate of Compliance (appendix A to this part), and a true copy of the general and specific disclosures provided the member of the Military Service as required by the Truth in Lending Act (15 U.S.C. 1601 note, 1601–1614, 1631–1646, 1661–1666j, and 1667–1667e). Debt complaints that request assistance but do not meet these requirements will be returned without action to the claimant.

(3) A creditor not subject to Federal Reserve Board Regulation Z (12 CFR 226), such as a public utility company, shall submit with the request a certificate that no interest, finance charge, or other fee is in excess of that permitted by the law of the State in which the obligation was incurred.

(4) A foreign-owned company having debt complaints shall submit with its request a true copy of the terms of the debt (English translation) and shall certify that it has subscribed to the Standards of Fairness (appendix B to this part).

(5) Debt complaints that meet the requirements of this part shall be processed by Department of Defense Components. ''Processed'' means that Heads of the Department of Defense Components, or designees, shall:

(i) Review all available facts surrounding the transaction forming the basis of the complaint, including the member's legal rights and obligations, and any defenses or counterclaims the member may have.

(ii) Advise the member concerned that:

(A) Just financial obligations are expected to be paid in a proper and timely manner, and what the member should do to comply with that policy;

(B) Financial and legal counseling services are available under DoD Directive 1344.7[3] in resolving indebtedness; and

(C) That a failure to pay a just debt may result in the creditor obtaining a judgment from a court that could form the basis for collection of pay from the member pursuant to an involuntary allotment.

(iii) If a member acknowledges a debt as a result of creditor contact with a DoD Component, advise the member that assistance and counseling may be available from the on-base military banking office, the credit union serving the military field of membership, or other available military community service organizations.

(iv) Direct the appropriate commander to advise the claimant that:

(A) Those aspects of DoD policy prescribed in 32 CFR part 112.4, are pertinent to the particular claim in question; and

(B) The member concerned has been advised of his or her obligations on the claim.

(v) The commander's response to the claimant shall not undertake to arbitrate any disputed debt, or admit or deny the validity of the claim. Under no circumstances shall the response indicate whether any action has been taken, or will be taken, against the member as a result of the complaint.

(b) The following procedures apply to the processing of involuntary allotments from the pay of members of the Military Services.

(1) *Involuntary allotment application.* (i) Regardless of the Service Affiliation of the member involved, with the exception of members of the Coast Guard an application to establish an involuntary allotment from the pay of a member of the Military Services shall be made by sending a completed DD Form 2653, ''Involuntary Allotment Application'' (appendix C to this part) to the appropriate address listed below. Applications sent to any other address shall be returned without action to the applicant.

(For Army, Navy, Air Force, or Marine Corps)

Defense Finance and Accounting Service, Cleveland Center, Code L, P.O. Box 998002, Cleveland, OH 44199–8002

(For Coast Guard only)

Coast Guard Pay and Personnel Center (LGL), 444 S.E. Quincy Street, Topeka, KS 66683–3591

(ii) Each application must include a copy of the final judgment certified by the clerk of court and such other documents as may be required by §113.6(b)(1)(iv).

(iii) A garnishment summons or order is insufficient to satisfy the final judgment requirement of §113.6(b)(1)(ii)

[3] See footnote 1 to §113.3(b).

and is not required to apply for an involuntary allotment under this part.

(iv) Involuntary allotment applications must contain the following information, certifications, and acknowledgment:

(A) The full name, social security number, and branch of Service of the military member against whose pay an involuntary allotment is sought. Although not required, inclusion of the member's current duty station and duty address on the application form will facilitate processing of the application.

(B) The applicant's full name and address. If the applicant is not a natural person, the application must be signed by an individual with the authority to act on behalf of such entity. If the allotment is to be in favor of a person other than the original judgment holder, proof of the right to succeed to the interest of the original judgment holder is required and must be attached to the application.

(C) The dollar amount of the judgment. Additionally, if the judgment awarded interest, the total dollar amount of the interest on the judgment accrued to the date of application.

(D) A certification that the judgment has not been amended, superseded, set aside, or satisfied; or, if the judgment has been satisfied in part, the extent to which the judgment remains unsatisfied.

(E) A certification that the judgment was issued while the member was not on active duty (in appropriate cases). If the judgment was issued while the member was on active duty, a certification that the member was present or represented by an attorney of the member's choosing in the proceedings, or if the member was not present or represented by an attorney of the member's choosing, that the judgment complies with the Soldiers' and Sailors' Civil Relief Act of 1940, as amended (50 U.S.C. appendix sections 501–591).

(F) A certification that the member's pay could be garnished under applicable State law and section 5520a(k) of the United States Code, if the member were a civilian employee.

(G) A certification that, to the knowledge of the applicant, the debt has not been discharged in bankruptcy, nor has the member filed for protection from creditors under the bankruptcy laws of the United States.

(H) A certification that if the judgment is satisfied prior to the collection of the total amount through the involuntary allotment process, the applicant will provide prompt notice that the involuntary allotment must be discontinued.

(I) A certification that if the member overpays the amount owed on the judgment, the applicant shall refund the amount of overpayment to the member within 30 days of discovery or notice of the overpayment, whichever, is earlier, and that if the applicant fails to repay the member, the applicant understands he or she may be denied the right to collect by involuntary allotment on other debt reduced to judgments.

(J) Acknowledgment that as a condition of application, the applicant agrees that neither the United States, nor any disbursing official or Federal employee whose duties include processing involuntary allotment applications and payments, shall be liable for any payment or failure to make payment from moneys due or payable by the United States to any person pursuant to any application made in accordance herewith.

(v) The original and three copies of the application and supporting documents must be submitted by the applicant to DFAS.

(vi) A complete ''application package'' (the DD Form 2653, supporting documentation, and three copies of the application and supporting documents), is required for processing of any request to establish an involuntary allotment pursuant to this part and 32 CFR part 112.

(vii) Applications that do not conform to the requirements of this part shall not be processed. If an application is ineligible for processing, the application package shall be returned to the applicant with an explanation of the deficiency. In cases involving repeated false certifications by an applicant, the designated DFAS official may refuse to accept or process additional applications by that applicant for such period

of time as the official deems appropriate to deter against such violations in the future.

(2) *Processing of involuntary allotment applications.* (i) Promptly upon receipt of DD Form 2653 (Appendix C to this part), the designated DFAS official shall review the ''application package'' to ensure compliance with the requirements of this part. If the application package is complete, the DFAS official shall:

(A) Complete Section I of DD Form 2654, ''Involuntary Allotment Notice and Processing'' (Appendix D to this part), by inserting the name, social security number, rank, and branch of service of the military member against whom an application for involuntary allotment is being processed. Additionally, the DFAS official shall provide the due date for receipt of a response at DFAS. The due date shall be 90 days from the date DFAS mails the DD Form 2654 to the commander and member concerned as provided for in § 113.6(b)(2)(i)(B).

(B) Mail one copy of the application package to the member and two copies of the application package, along with DD Form 2654, to the commander of the military member or other official as designated by the Military Service concerned during times of war, national emergency, deployment, or other similar circumstances, who may act for the commander, provided the Military Service concerned has provided DFAS with the name or position of the official and the appropriate address (hereinafter, the meaning of the term ''commander'' includes such other official).

(C) Within 60 days of mailing the copies of the application package and DD Form 2654, DFAS shall provide notice to the member and the member's commander that automatic processing of the involuntary allotment application shall occur if a response (including notice of an approved extension as authorized in § 113.6(b)(2)(iii)(B) and (F), is not received by the due date specified in Section I of DD Form 2654. In the absence of a response, DFAS may automatically process the involuntary allotment application on the fifteenth calendar day after the date a response was due. When DFAS has received notice of an extension, automatice processing shall not begin until the fifteenth calendar day after the approved extension date.

(D) Retain the original of the application package and DD Form 2654.

(ii) Upon receipt of an application, the commander shall determine if the member identified in Section I of DD Form 2654 is assigned or attached to the commander's unit and available to respond to the involuntary allotment application. If the member is not assigned or attached, or not available to respond (e.g., retired, in a prisoner of war status, or in a missing in action status), the commander will promptly complete Section II of DD Form 2654 and attach appropriate documentation supporting the determination. The commander will then mail the application package and DD Form 2654 to DFAS. Section II shall also be used by the commander to notify DFAS of extensions beyond the due date for a response contained in Section I of DD Form 2654. When such extensions are authorized, the commander will complete Section II, make a copy of Sections I and II, and promptly mail the copy to DFAS.

(iii) Within 5 days of receipt of an application package and DD Form 2654 from the designated DFAS official, the commander shall notify the member of the receipt of the application, provide the member a copy of the entire application package, and counsel the member using and completing Section III of DD Form 2654 about the following:

(A) That an application for the establishment of an involuntary allotment for the lesser of 25 percent of the member's pay subject to involuntary allotment or the maximum percentage of pay subject to garnishment proceedings under the applicable State law has been received.

(B) That the member has 15 calendar days from the date of receipt of the commander's notice to complete Section IV of DD Form 2654. That for good cause shown, the commander may grant an extension of reasonable time (normally not exceeding 30 calendar days) to submit a response. That during times of deployment, war, national emergency, assignment outside the United States, hospitalization, or other

similar situations that prevent the member from obtaining necessary evidence or from responding in a timely manner, extensions exceeding 30 calendar days may be granted. That if the member fails to respond within the time allowed, the commander will note the member's failure to respond in Section V of DD Form 2654 and send the form to DFAS for appropriate action.

(C) That the member's response will either consent to the involuntary allotment or contest it.

(D) That the member may contest the application for any one of the following reasons:

(*1*) There has not been compliance with the procedural requirements of the Soldiers' and Sailors' Civil Relief Act of 1940, as amended (50 U.S.C. appendix sections 501–591) during the judicial proceeding upon which the involuntary allotment application is sought.

(*2*) ''Exigencies of military duty'' (as defined in 32 CFR part 112.3(d)) caused the ''absence'' of the member from appearance in a judicial proceeding forming the basis for the judgment upon which the application is sought.

(*3*) Information in the application is patently false or erroneous in material part.

(*4*) The judgment has been fully satisfied, superseded, or set aside.

(*5*) The judgment has been materially amended, or partially satisfied. When asserting this defense, the member shall include evidence of the amount of the judgment that has been satisfied.

(*6*) There is a legal impediment to the establishment of the involuntary allotment (for example, the judgment debt has been discharged in bankruptcy, the judgment debtor has filed for protection from the creditors under the bankruptcy laws of the United States, the applicant is not the judgment holder nor a proper successor in interest to that holder, or the applicant has been enjoined by a Federal or state court from enforcing the judgment debt).

(*7*) Or other appropriate reasons that must be clearly specified and explained by the member.

(E) That, if the member contests the involuntary allotment, the member shall provide evidence (documentary or otherwise) in support thereof. Furthermore, that any evidence submitted by the member may be disclosed to the applicant for the involuntary allotment.

(F) That the member may consult with a legal assistance attorney, if reasonably available, or a civilian attorney at no expense to the government. That if a legal assistance attorney is available, the member should immediately arrange for an appointment. That the member may request a reasonable delay from the commander to obtain legal assistance (in cases where an approved delay will cause DFAS to receive the member's response after the due date identified in Section I of DD Form 2654, the commander must immediately notify the designated DFAS official of the delay, the date for an expected response, and the reason for the delay by completing Section II of DD Form 2654 and forwarding a copy of Sections I and II to DFAS). Additionally, that requests for extensions of time based on the need for legal assistance shall be denied to members who fail to exercise due diligence in seeking such assistance.

(G) That if the member contests the involuntary allotment on the grounds that exigencies of military duty caused the absence of the member from the judicial proceeding at which the judgment was rendered, then the member's commander shall review and make the final determination on this contention, and notify the designated DFAS official of the commander's decision by completing Section V of DD Form 2654 and forwarding the form to DFAS.

(*1*) In determining whether exigencies of military duty caused the absence of the member, the commander at the level designated by the Service concerned shall consider the definition of ''exigencies of military duty'' (as defined in 32 CFR part 112.3(d)).

(*2*) Additionally, consideration shall be given to whether the commander at the time determined the military duties in question to be of such paramount importance that they prevented making the member available to attend the judicial proceedings, or rendered the member unable to timely respond to process, motions, pleadings, or orders of the court.

(H) That if the member contests the involuntary allotment on any basis other than exigencies of military duty,

the application package and DD Form 2654 shall be returned to the commander who shall forward it to the designated DFAS official for appropriate action.

(I) That if the member fails to respond to the commander within the time allowed under §113.6(b)(2)(iii)(B), the commander shall notify the designated DFAS official of the member's failure to respond by completing Section V of DD Form 2654, and forwarding the form to DFAS.

(iv) After counseling the member in accordance with §113.6(b)(2)(iii)(A)–(I), the commander shall:

(A) Date and sign Section III of DD Form 2654.

(B) Obtain the member's acknowledgment of counseling by having the member sign the appropriate space on Section III of DD Form 2654.

(C) Determine if the member consents to the involuntary allotment or needs the time authorized under this part to review the application package and take appropriate action. If the member consents to the involuntary allotment, the commander shall direct the member to appropriately complete Section IV of DD Form 2654. The commander must then complete the appropriate item in Section V and promptly forward the completed DD Form 2654 to the designated DFAS official.

(D) Complete the appropriate items in Section V of DD Form 2654 when the member fails to respond within the time authorized for a response, or asserts that exigencies of military duty caused the absence of the member from an appearance in the judicial proceeding upon which the Involuntary Allotment Application is sought.

(*1*) In determining whether exigencies of military duty caused the absence of the member, the commander, at the level designated by the Service concerned, shall consider the definition of ''exigencies of military duty'' (as defined in 32 CFR part 112.3(d)), the evidence provided by the member, any other reasonably available evidence (e.g., a copy of the member's personnel record), and whether the commander at the time determined the military duties in question to be of such paramount importance that they prevented making the member available to attend the judicial proceedings, or rendered the member unable to timely respond to process, motions, pleadings, or orders of the court.

(*2*) The evidentiary standard for a commander to determine whether existences of military duty caused the absence of the member from an appearance in the judicial proceeding upon which the Involuntary Allotment Application is sought is a ''preponderance of the evidence'' (as defined in §113.3(d) of this part).

(*3*) If the commander has made a determination on exigencies of military duty, the commander must insert in Section V of DD Form 2654, the title and address of the appeal authority.

(E) Promptly following the date the member's response is due to the commander as determined by §113.6(b)(2)(iii)(B), ensure that the DD Form 2654 is appropriately completed and mail the form, along with any response received from the member, to DFAS.

(F) Provide the member a copy of the completed DD Form 2654 within 5 days of mailing to the designated DFAS official.

(v) Upon receipt of DD Form 2654 and any additional evidence submitted by the member, the designated DFAS official shall conduct a review of the entire application package, DD Form 2654, and any evidence submitted by the member, to determine whether the application for an involuntary allotment should be approved and established.

(A) In those cases where the member's commander has completed Section V of DD Form 2654, and determined that exigencies of military duty caused the absence of the member from an appearance in a judicial proceeding upon which the involuntary allotment application is sought, the designated DFAS official shall deny the involuntary allotment application and provide the applicant written notice of the denial and the reason therefor. The designated DFAS official shall also advise the applicant that:

(*1*) The responsibility for determining whether exigencies of military duty existed belonged to the member's commander and the Military Department concerned.

(*2*) The commander's decision may be appealed within 60 days of the date DFAS mailed the notice of the decision to the applicant.

(*3*) An Appeal must be submitted to the appeal authority at the address provided by DFAS (as found in Section V of the DD Form 2654) in their written notice of denial, and that an appeal submitted to an appeal authority and address different from the one provided by DFAS may be returned without action.

(*4*) An appeal must be submitted in writing and contain sufficient evidence to overcome the presumption that the commander's exigency determination was correct.

(*5*) The appellate authority shall decide an appeal within 30 days of its receipt and promptly notify the applicant in writing of the decision. The 30 day decision period may be extended during times of deployment, war, national emergency, or other similar situations.

(*6*) If an appeal is successful, the applicant must submit a written request, along with a copy of the appellate authority's decision, to DFAS within 15 days of receipt of the appellate authority's decision.

(B) Upon receiving written notice that an applicant has successfully appealed a commander's determination on exigencies of military duty that resulted in denial of an involuntary allotment application, DFAS shall review the application in accordance with §113.6(b)(2)(v)(C), and determine whether the involuntary allotment should be approved and initiated.

(C) In all cases, other than as described in §113.6(b)(2)(v)(A), the designated DFAS official shall deny an involuntary allotment application, and give written notice to the applicant of the reason(s) for denial, if the designated DFAS official determines that:

(*1*) There has not been compliance with the procedural requirements of the Soldier's and Sailor's Civil Relief Act of 1940, as amended (50 U.S.C. appendix sections 501–591) during the judicial proceeding upon which the involuntary allotment application is sought.

(*2*) Information in the application is patently false or erroneous in material part.

(*3*) The judgment has been fully satisfied, superseded, or set aside.

(*4*) The judgment has been materially amended, or partially satisfied. In such a case, the request for involuntary allotment may be approved only to satisfy that portion of the judgment that remains in effect and unsatisfied; the remainder of the request shall be denied.

(*5*) There is a legal impediment to the establishment of the involuntary allotment (for example, the judgment debt has been discharged in bankruptcy, the judgment debtor has filed for protection from the creditors under the bankruptcy laws of the United States, the applicant is not the judgment creditor nor a proper successor in interest to that creditor, or the applicant has been enjoined by a Federal or State court from enforcing the judgment debt).

(*6*) The member's pay is already subject to one or more involuntary allotments or garnishments that equal the lesser of 25 percent of the member's pay subject to involuntary allotment or the maximum percentage of pay subject to garnishment proceedings under the applicable State law.

(*7*) The applicant has abused the processing privilege (e.g., an applicant, having been notified of the requirements of this part, repeatedly refuses or fails to comply therewith).

(*8*) Or other appropriate reasons that must be clearly explained to the applicant.

(D) In all cases other than as described in §113.6(b)(2)(v) (A) and (C), the designated DFAS official shall approve the involuntary allotment application and establish an involuntary allotment against the pay subject to involuntary allotment of the member.

(vi) The designated DFAS official shall, at any time after establishing an involuntary allotment, cancel or suspend such allotment and notify the applicant of that cancellation if the member concerned, or someone acting on his or her behalf, submits legally sufficient proof, by affidavit or otherwise, that the allotment should not continue because of the existence of the factors enumerated in §113.6(b)(2)(v)(A) and (C)(*1*)–(*8*).

(3) *Payments.* (i) Payment of an approved involuntary allotment under 32

CFR part 112 and this part shall commence within 30 days after the designated DFAS official has approved the involuntary allotment.

(ii) Payments under this part shall not be required more frequently than once each month, and the designated official shall not be required to vary normal pay and disbursement cycles.

(iii) If the designated DFAS official receives several applications on the same member of a Military Service, payments shall be satisfied on a first-come, first-served basis.

(iv) Payments shall continue until the judgment is satisfied or until canceled or suspended.

(A) DFAS shall collect the total judgment, including interest when awarded by the judgment. Within 30 days following collection of the amount of the judgment, including interest as annotated by the applicant in Section I of DD Form 2654, the applicant may submit a final statement of interest that accrued during the pay-off period. This final statement of interest request must be accompanied by a statement of account showing how the applicant computed the interest amount. DFAS will collect this post-application interest provided it is an amount owed pursuant to the judgment. DFAS shall not accept any further interest requests.

(B) Interest or other costs associated with the debt forming the basis for the judgment, but not included as an amount awarded by the judgment, shall not be paid to applicants for involuntary allotments.

(v) If the member is found not to be entitled to money due from or payable by the Military Services, the designated official shall return the application and advise the applicant that no money is due from or payable by the Military Service to the member. When it appears that pay subject to an involuntary allotment is exhausted temporarily or otherwise unavailable, the applicant shall be told why and for how long that money is unavailable, if known. Involuntary allotments shall be canceled on or before the date a member retires, is discharged, or is released from active duty. The designated DFAS official shall notify the applicant of the reason for cancellation.

(vi) Upon receiving notice from an applicant that a judgment upon which an involuntary allotment is based has been satisfied, vacated, modified, or set aside, the designated DFAS official shall promptly adjust or discontinue the involuntary allotment.

(vii) The Under Secretary of Defense (Comptroller) may, in DoD 7000.14–R[4] Volume 7, Part A, designate the priority to be given to involuntary allotments pursuant to 32 CFR part 112 and this part, among the deductions and collections taken from a member's pay, except that they may not give precedence over deductions required to arrive at a member's disposable pay for garnishments or involuntary allotments authorized by statute for alimony and child support payments. In the absence of a contrary designation by the Comptroller, all other lawful deductions (except voluntary allotments by the member) and collections shall take precedence over these involuntary allotments.

## APPENDIX A TO PART 113—CERTIFICATE OF COMPLIANCE

I certify that the (Name of Creditor) upon extending credit

to _____

on _____
(Date)

complied with the full disclosure requirements of the Truth-in-Lending Act and Regulation Z, and the Fair Debt Collection Practices Act (or the laws and regulations of State of _____), and that the attached statement is a true copy of the general and specific disclosures provided the obligor as required by law.

I further certify that the Standards of Fairness set forth in DoD Directive 1344.9[1] have been applied to the consumer credit transaction to which this form refers. (If the unpaid balance has been adjusted as a consequence, the specific adjustments in the finance charge and the annual percentage rate should be set forth below.)

_____
(Adjustments)

_____
(Date of Certification)

[4] See footnote 1 to §113.3(b).

[1] Copies may be obtained, at cost, from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161.

_____
(Signature of Creditor or Authorized Representative)

_____
(Street)

_____
(City, State and Zip Code)

## APPENDIX B TO PART 113—STANDARDS OF FAIRNESS

1. No finance charge contracted for, made, or received under any contract shall be in excess of the charge that could be made for such contract under the law of the place in which the contract is signed in the United States by the military member.

a. In the event a contract is signed with a U.S. company in a foreign country, the lowest interest rate of the State or States in which the company is chartered or does business shall apply.

b. However, interest rates and service charges applicable to overseas military banking facilities shall be as established by the Department of Defense.

2. No contract or loan agreement shall provide for an attorney's fee in the event of default unless suit is filed, in which event the fee provided in the contract shall not exceed 20 percent of the obligation found due. No attorney fees shall be authorized if the attorney is a salaried employee of the holder.

3. In loan transactions, defenses that the debtor may have against the original lender or its agent shall be good against any subsequent holder of the obligation. In credit transactions, defenses against the seller or its agent shall be good against any subsequent holder of the obligation, provided that the holder had actual knowledge of the defense or under conditions where reasonable inquiry would have apprised the holder of this fact.

4. The military member shall have the right to remove any security for the obligation beyond State or national boundaries if the military member or family moves beyond such boundaries under military orders and notifies the creditor, in advance of the removal, of the new address where the security will be located. Removal of the security shall not accelerate payment of the obligation.

5. No late charge shall be made in excess of 5 percent of the late payment, or $5.00, whichever is the lesser amount, or as provided by law or applicable regulatory agency determination. Only one late charge may be made for any tardy installment. Late charges shall not be levied where an allotment has been timely filed, but payment of the allotment has been delayed. Late charges by overseas banking facilities are a matter of contract with the Department of Defense.

6. The obligation may be paid in full at any time or through accelerated payments of any amount. There shall be no penalty for prepayment. In the event of prepayment, that portion of the finance charges that has inured to the benefit of the seller or creditor shall be prorated on the basis of the charges that would have been ratably payable had finance charges been calculated and payable as equal periodic payments over the terms of the contract, and only the prorated amount to the date of prepayment shall be due. As an alternative, the ''Rule of 78'' may be applied.

7. If a charge is made for loan insurance protection, it must be evidenced by delivery of a policy or certificate of insurance to the military member within 30 days.

8. If the loan or contract agreement provides for payments in installation, each payment, other than the down payment, shall be in equal or substantially equal amounts, and installments shall be successive and of equal or substantially equal duration.

9. If the security for the debt is repossessed and sold in order to satisfy or reduce the debt, the repossession and resale shall be governed by the laws of the State in which the security is requested.

10. A contract for personal goods and services may be terminated at any time before delivery of the goods or services without charge to the purchaser. However, if goods made to the special order of the purchaser result in preproduction costs, or require preparation for delivery, such additional costs shall be listed in the order form or contract.

a. No termination charge shall be made in excess of this amount. Contracts for delivery at future intervals may be terminated as to the undelivered portion.

b. The purchaser shall be chargeable only for that proportion of the total cost that the goods or services delivered bear to the total goods called for by the contract. (This is in addition to the right to rescind certain credit transactions involving a security interest in real estate provided by the Truth in Lending Act (15 U.S.C. 1601 note, 1601–1614, 1631–1646, 1661–1665a, 1666–1666j, and 1667–1667e) and Federal Reserve Board Regulation Z (12 CFR 226)).

## APPENDIX C TO PART 113—SAMPLE DD FORM 2653, "INVOLUNTARY ALLOTMENT APPLICATION"

Appendix C to Part 113

**INVOLUNTARY ALLOTMENT APPLICATION**

*Form Approved*
*OMB No. 0704-0367*
*Expires Sep 30, 1997*

Public reporting burden for this collection of information is estimated to average 15 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Department of Defense, Washington Headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202-4302, and to the Office of Management and Budget, Paperwork Reduction Project (0704-0367), Washington, DC 20503.
**PLEASE DO NOT RETURN YOUR FORM TO EITHER OF THESE ADDRESSES. SEND YOUR COMPLETED FORM TO THE ADDRESS IN THE INSTRUCTIONS BELOW.**

**PRIVACY ACT STATEMENT**

**AUTHORITY:** 5 USC 5520a, EO 9397.

**PRINCIPAL PURPOSE:** To make an application for the involuntary allotment of pay from a member of the Armed Services or the Coast Guard.

**ROUTINE USES:** None.

**DISCLOSURE:** Voluntary; however, failure to provide the requested information may result in denial of the involuntary allotment application.

**INSTRUCTIONS**

1. These instructions govern an application for involuntary allotment payment from Military Service (or Coast Guard) member's active or reserve/guard's pay under 5 USC Section 5520a.

2. In order to be processed, this form must be filled out completely, signed, and the following supporting documents attached:
   a. A copy of the judgment, certified by the clerk of the appropriate court;
   b. If the applicant is other than the original judgment holder, proof of the applicant's right to succeed to the interest of the original judgment holder.

3. Submit the original and three copies of this application and all supporting documents to:
   For Army, Navy, Air Force and Marine Corps:
   Defense Finance and Accounting Service
   Cleveland Center, Code L
   PO Box 998002
   Cleveland, OH 44199-8002

   For Coast Guard:
   Coast Guard Pay and Personnel Center (LGL)
   444 S.E. Quincy Street
   Topeka, KS 66683-3591

**SECTION I - IDENTIFICATION**

**1. APPLICANT**

I hereby request that an involuntary allotment be established from the pay of the following identified member of the Military Services/ Coast Guard pursuant to the provisions of Pub. L. No. 103-94, the Hatch Act Reform Amendments of 1993. The debt in question has been reduced to a judgment. A copy of the judgment, as certified by the appropriate Clerk of Court, is attached.

**a. APPLICANT NAME** *(Provide whole name whether a person or business)*

**b. ADDRESS**

| (1) STREET AND APARTMENT OR SUITE NUMBER | (2) CITY | (3) STATE | (4) ZIP CODE *(9 digit)* |
|---|---|---|---|
| | | | |

**2. SERVICE MEMBER**

| a. NAME *(Last, First, Middle Initial)* | b. SSN | c. BRANCH OF SERVICE |
|---|---|---|
| | | |

**d. CURRENT DUTY ASSIGNMENT** *(If known)*

**e. CURRENT ADDRESS** *(If known)*

| (1) STREET AND APARTMENT OR SUITE NUMBER | (2) CITY | (3) STATE | (4) ZIP CODE *(9 digit)* |
|---|---|---|---|
| | | | |

**3. CASE**

| a. CASE NUMBER *(As assigned by court)* | b. NAME OF ORIGINAL JUDGMENT HOLDER *(If different from applicant)* | c. ACCOUNT NUMBER OF DEBTOR |
|---|---|---|
| | | |

**d. JUDGMENT AMOUNT**

| (1) DOLLAR AMOUNT OF JUDGMENT $ | (2) DOLLAR AMOUNT OF INTEREST OWED TO DATE OF APPLICATION *(Only if awarded by the judgment)* $ |
|---|---|

**DD FORM 2653, NOV 94**

Appendix C to Part 113

**SECTION II - APPLICANT CERTIFICATION**

**4. I HEREBY CERTIFY THAT:**

a. *(X as applicable)*

☐ (1) The judgment has not been amended, superseded, set aside, or satisfied;

☐ (2) If the judgment has been satisfied in part, that the judgment remains unsatisfied to the extent of $ _____

b. *(X as applicable)*

☐ (1) The judgment was issued while the member was not on active duty; or

☐ (2) If the judgment was issued while the member was on active duty, that the member was present or represented by an attorney of the member's choosing in the proceedings; or

☐ (3) If the member was not present or represented by an attorney at the judicial proceedings, that the judgment complies with the Soldiers' and Sailors' Civil Relief Act of 1940, as amended, 5 USC app. 501-592.

c. The member's pay could be garnished under applicable State law and 5 USC 5520a if the member were a civilian employee;

d. To the best of my knowledge, the debt has not been discharged in bankruptcy nor has the member filed for protection from creditors under the bankruptcy laws of the United States;

e. I will promptly notify you to discontinue the involuntary allotment at any time the judgment is satisfied prior to the collection of the total amount of the judgment through the involuntary allotment process;

f. If the member overpays the amount owed on the judgment, I will refund the amount of overpayment to the member within 30 days of discovery or notice of the overpayment, whichever is earlier, and that if I fail to repay the member, I understand that I may be denied the right to collect by involuntary allotment on other debts reduced to judgments.

**5. I HEREBY ACKNOWLEDGE THAT:**

As a condition of application, I agree that neither the United States, nor any disbursing official or Federal employee whose duties include processing involuntary allotment applications and payments, shall be liable with respect to any payment or failure to make payment from moneys due or payable by the United States to any person pursuant to this application.

**6. CERTIFICATION**

I make the foregoing statement as part of my application with full knowledge of the penalties involved for willfully making a false statement (U.S. Code, Title 18, Section 1001, provides a penalty as follows: A maximum fine of $10,000 or maximum imprisonment of 5 years, or both).

| a. TYPED NAME *(Last, First, Middle Initial)* | b. SIGNATURE | c. DATE SIGNED |
|---|---|---|
| | | |

**DD FORM 2653, NOV 94 (BACK)**

SAMPLE

## APPENDIX D TO PART 113—SAMPLE DD FORM 2654, "INVOLUNTARY ALLOTMENT NOTICE AND PROCESSING"

Appendix D to Part 113

### INVOLUNTARY ALLOTMENT NOTICE AND PROCESSING

**PRIVACY ACT STATEMENT**

**AUTHORITY:** 5 USC 5520a, EO 9397.

**PRINCIPAL PURPOSE:** To notify a member of the Armed Services or the Coast Guard of an involuntary allotment application against the member's disposable pay; to provide the member an opportunity to respond to the involuntary allotment application; and to provide for action by the member's commander to forward the member's response to the Defense Finance and Accounting Service (or the Coast Guard Pay and Personnel Center) and, as appropriate, to make determinations concerning exigencies of military duty; and to provide for appeals of exigency determinations.

**ROUTINE USES:** None.

**DISCLOSURE:** Voluntary for the member; however, failure to provide a response may result in the involuntary allotment of the member's disposable pay.

**INSTRUCTIONS**

1. These instructions govern notice and processing of an application for an involuntary allotment from the pay of a member of the Armed Forces or the Coast Guard under 5 USC 5520a.

2. Section I, item 1 is to be completed by the designated Defense Finance and Accounting Service (DFAS) (or Coast Guard Pay and Personnel Center) representative. After completing this section, the representative will mail the form, along with two copies of the DD Form 2653, "Involuntary Allotment Application" and associated paperwork, to the commander of the member identified, and one copy to the member.

3. Upon receipt, the commander will determine if the member identified in Section I is in his or her unit. If the member is no longer assigned or available, or, after receiving the notice required by Section III, requests an extension to respond that is granted, the commander will complete Section II. If the member is no longer available under Section II, item 3, the commander will return the entire form and application package to DFAS (or the Coast Guard Pay and Personnel Center); if an extension is authorized under Section II, item 4, that will cause the member's response to be received by DFAS (or the Coast Guard Pay and Personnel Center) later than the date the response is due, then the commander must immediately provide a copy of Sections I and II to DFAS (or the Coast Guard Pay and Personnel Center). The address for mailing is: "DFAS, Cleveland Center, Code L, PO Box 998002, Cleveland, OH 44199-8002" (or other address as specified by DFAS). For the Coast Guard, the address is: "Coast Guard Pay and Personnel Center (LGL), 444 S.E. Quincy Street, Topeka, KS 66683-3591." If the member is assigned, the commander will provide the member a complete copy of DD Form 2653, "Involuntary Allotment Application," and counsel the member in accordance with Section III, items 7a - g.

4. After counseling, the commander will complete Section III, item 8, and the member will complete Section III, item 9. The commander will then make and retain one copy of the form with Section III completed. After obtaining a copy, the commander will provide the member the signed original and advise the member to complete Section IV prior to the date the commander specifies that the member's response is due.

5. The member will complete Section IV and return the original form and accompanying evidence or additional matters, if any, to the commander on or before the due date as specified by the commander.

6. Following receipt of the member's response, the commander will complete Section V and forward the original form, to include any additional evidence or other matters from the member, to DFAS (or the Coast Guard Pay and Personnel Center) at the address listed in paragraph 3 above. Note, if the member fails to respond by the due date, the commander will complete Section V on a copy of the DD Form 2654 previously retained in accordance with the instructions in paragraph 4 above, and forward the form to DFAS (or the Coast Guard Pay and Personnel Center).

7. Within 5 working days from the date of forwarding to DFAS (or the Coast Guard Pay and Personnel Center), the commander will provide the member a copy of the completed DD Form 2654.

**SECTION I - NOTIFICATION OF APPLICATION FOR INVOLUNTARY ALLOTMENT**

**1. MEMBER IDENTIFICATION**

| a. NAME *(Last, First, Middle Initial)* | b. SSN | c. RANK | d. BRANCH OF SERVICE |
|---|---|---|---|
| | | | |

**2. DATE RESPONSE DUE** *(If not received by this date, an involuntary allotment may be automatically processed.)*

**SECTION II - COMMANDER'S DETERMINATION OF MEMBER'S AVAILABILITY AND EXTENSIONS TO RESPOND**

**3. MEMBER AVAILABILITY**

On _____ *(date - YYMMDD)*, I received this form and an application for an involuntary allotment from the pay of the member identified. The above named member is not available for purposes of processing an involuntary allotment because the member is as indicated below. Official documentation supporting this determination is attached.

| | |
|---|---|
| | a. Retired (Including placement on the Temporary or Permanent Disabled Retired List). |
| | b. In a prisoner of war status. |
| | c. In a missing in action status. |
| | d. Not assigned or attached to this unit or organization. |

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Appendix D to Part 113

**SECTION II** *(Continued)*

**4. EXTENSION**

I have determined that an extension is necessary until _____ *(YYMMDD)* because the member is not available for notice and counseling or unable to respond in a timely manner *(explain in Remarks section below)*. I will notify you prior to the above date if any further extensions are necessary.

**5. REMARKS**

**6. COMMANDER OR DESIGNEE**

| a. SIGNATURE | b. SIGNATURE BLOCK | c. DATE SIGNED |
|---|---|---|
| | | |

**SECTION III - NOTICE TO MEMBER BY COMMANDER OR AUTHORIZED DESIGNEE**

**7. NOTICE**

You are hereby notified that an application for the establishment of an involuntary allotment for the lesser of 25% of your pay subject to involuntary allotment or the maximum percentage of pay subject to garnishment proceedings under the applicable state law has been received. Along with this notice, I am providing you a copy of the entire application package.

Additionally, you are notified that:

a. You must respond within 15 calendar days from the date of this notification by either consenting to the involuntary allotment or contesting it. For good cause shown, I may grant an extension of reasonable time (normally not exceeding 30 calendar days, except during times of deployment, war, national emergency, or other similar situations) to submit a response. Additionally, if you fail to respond within the specified date (or any approved extended date), your failure to respond will be indicated in Section V of this form, which will then be sent back to the designated Defense Finance and Accounting Service (DFAS) (or Coast Guard Pay and Personnel Center) official for appropriate action.

b. You may contest this application for any of the reasons described in Section IV of this form.

c. If you contest the application, you must provide evidence (documentary or otherwise) supporting your reasons for contesting the application. Any evidence you submit may be disclosed to the applicant for this involuntary allotment.

d. You may, if reasonably available, consult with a legal assistance attorney, or a civilian attorney at no expense to the government. If a legal assistance attorney is available, you should immediately arrange for an appointment. If a legal assistance attorney is not available, you may request a reasonable delay to enable you to obtain legal assistance. If you have failed to exercise due diligence in seeking assistance, I will deny a request for delay.

e. If you contest the involuntary allotment on the grounds that exigencies of military duty caused your absence from an appearance at the judicial proceeding at which the judgment was rendered, then I will review and make the final determination on this contention. My decision will be reflected in Section V of this form which will be forwarded to the designated DFAS (or Coast Guard Pay and Personnel Center) official for appropriate action. I will consider the following when making this determination:

(1) That exigencies of military duty are defined as "a military assignment or mission essential duty that, because of its urgency, importance, duration, location, or isolation, necessitates the absence of a member of the military services from appearance at a judicial proceeding. Absence from an appearance in a judicial proceeding is normally presumed to be caused by exigencies of military duty during periods of war, national emergency, or when the member is deployed."

(2) Whether the military duties in question were of such paramount importance that they prevented making you available to attend the judicial proceedings, or rendered you unable to timely respond to process, motions, pleadings, or orders of the court.

f. If you contest the involuntary allotment on any basis other than exigencies of military duty, you must return this form and your response to me. This form, the application package, and your response will then be returned to the designated DFAS (or Coast Guard Pay and Personnel Center) official who will consider your response and determine whether to establish the involuntary allotment. The designated DFAS (or Coast Guard Pay and Personnel Center) official has decision authority on all issues other than exigencies of military duty.

Appendix D to Part 113

**SECTION III** *(Continued)*

g. If you fail to respond to me within the time period specified (including any extensions authorized by me), I shall indicate your failure to respond in Section V of this form, and mail this form and the application package back to the designated DFAS (or Coast Guard Pay and Personnel Center) official for appropriate action.

**8. COMMANDER OR DESIGNEE**

| a. SIGNATURE | b. SIGNATURE BLOCK | c. DATE SIGNED |
|---|---|---|
| | | |

**9. MEMBER ACKNOWLEDGMENT**

I hereby acknowledge that the commander or his or her designee has counseled me in accordance with Section III of this form; that I am being given an opportunity to review this form and the application package; I may seek legal assistance prior to responding; I have received a copy of DD Form 2653 and the entire application package for this involuntary allotment; and that I must complete Section IV of this form and return the form to my commander.

| a. SIGNATURE | b. DATE SIGNED |
|---|---|
| | |

**SECTION IV - MEMBER RESPONSE**

**10. MEMBER WILL INITIAL IN THE APPROPRIATE SPACE(S):**

| | |
|---|---|
| | a. I acknowledge that this is a valid judgment and consent to the establishment of an involuntary allotment. |
| | b. I contest this Involuntary Allotment Application for the following reasons *(If contesting, you must explain the reason in item 11, "Remarks," and provide appropriate evidence to support the reason.)*: |
| | (1) That my rights under the Soldiers' and Sailors' Civil Relief Act were not complied with during the judicial proceeding upon which this application is based. |
| | (2) That exigencies of military duty caused my absence from appearance in a judicial proceeding forming the basis for the judgment upon which this application is sought. |
| | (3) That information contained in the application is false or erroneous in material part. |
| | (4) The judgment has been fully satisfied, superseded, or set aside. |
| | (5) The judgment has been materially amended, or partially satisfied. *(Provide evidence of the amount satisfied and the amount which remains in effect.)* |
| | (6) There is a legal impediment to the establishment of the involuntary allotment. *(For example, the judgment debt has been discharged in bankruptcy, or you have filed for protection from the creditor(s) under the bankruptcy laws of the United States, or the applicant is not the judgment creditor or a proper successor in interest to the creditor.)* |

**11. REMARKS** *(Use additional sheets if necessary.)*

**12. MEMBER**

| a. SIGNATURE | b. DATE SIGNED |
|---|---|
| | |

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Appendix D to Part 113

| SECTION V - COMMANDER'S ACTION AND DETERMINATIONS | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| 13. COMMANDER OR DESIGNEE WILL INITIAL IN THE APPROPRIATE SPACE: | | | | | | | | |
| | a. The member has completed Section IV of this form and the member's response (to include any additional submissions) is hereby forwarded for appropriate action. | | | | | | | |
| | b. The member refused to respond by the authorized suspense date and this form is hereby returned without Section IV completed by the member. | | | | | | | |
| 14. COMPLETE ONLY IF THE MEMBER ASSERTED "EXIGENCIES OF MILITARY DUTY" AS REASON FOR CONTESTING THE INVOLUNTARY ALLOTMENT APPLICATION *(Initial in the appropriate space)* | | | | | | | | |
| | a. Exigencies of military duty DID NOT CAUSE the absence of the member from an appearance in the judicial proceeding upon which this Involuntary Allotment Application is sought. | | | | | | | |
| | b. Exigencies of military duty CAUSED the absence of the member from an appearance in the judicial proceeding upon which this application for involuntary allotment is sought. Exigency existed due to: *(X as applicable and explain in item 15, "Remarks.")* | | | | | | | |
| | | (1) Deployment | | (2) War | | (3) National Emergency | | (4) Other *(e.g., Major Exercise)* |
| 15. REMARKS | | | | | | | | |
| NOTE: Commander must provide member a copy of this form within 5 days of mailing to the designated DFAS (or Coast Guard Pay and Personnel Center) official. | | | | | | | | |
| 16. IF THE APPLICANT CHOOSES TO APPEAL MY EXIGENCY DETERMINATION, THE APPEAL MUST BE SENT TO: | | | | | | | | |
| a. TITLE OF APPEAL AUTHORITY | | | | | | | | |
| b. STREET ADDRESS | | | c. CITY | | d. STATE | | e. ZIP CODE | |
| 17. COMMANDER OR DESIGNEE | | | | | | | | |
| a. SIGNATURE | | | b. SIGNATURE BLOCK | | | | c. DATE SIGNED | |

DD FORM 2654, NOV 94 PAGE 4 OF 4 PAGES

SAMPLE

# PART 142—COPYRIGHTED SOUND AND VIDEO RECORDINGS

Sec.
142.1 Purpose.
142.2 Applicability.
142.3 Policy.
142.4 Procedures.
142.5 Responsibilities.

AUTHORITY: 10 U.S.C. 133.

SOURCE: 49 FR 49452, Dec. 20, 1984, unless otherwise noted.

### § 142.1 Purpose.

This part provides policy, prescribes procedures, and assigned responsibilities regarding the use of copyrighted sound and video recordings within the Department of Defense.

### § 142.2 Applicability.

(a) The provisions of this part apply to the Office of the Secretary of Defense, the Military Departments, the Organization of the Joint Chiefs of Staff, the Unified and Specified commands, and the Defense Agencies (hereafter referred to collectively as ''DoD Components'').

(b) This part does not regulate the procurement or use of copyrighted works for authorized official purposes.

### § 142.3 Policy.

(a) It is DoD policy: (1) To recognize the rights to copyright owners by establishing specific guidelines for the use of copyrighted works by individuals within the DoD community, consistent with the Department's unique mission and worldwide commitments, and (2) Not to condone, facilitate, or permit unlicensed public performance or unlawful reproduction for private or personal use of copyrighted sound or video recordings, using government appropriated or nonappropriated-fund-owned or leased equipment or facilities.

(b) Although the policy expressed in this Directive takes into account the copyright law of the United States, the application of that law to specific situations is a matter for interpretation by the U.S. Copyright Office and the Department of Justice.

### § 142.4 Procedures.

(a) Permission or licenses from copyright owners shall be obtained for public performance of copyrighted sound and video recordings.

(b) Component procedures established pursuant to § 142.5, below provide guidance for determining whether a performance is ''public.'' These general principles will be observed:

(1) A performance in a residential facility or a physical extension thereof is not considered a public performance.

(2) A performance in an isolated area or deployed unit is not considered a public performance.

(3) Any performance at which admission is charged normally would be considered a public performance.

(c) Government audio and video duplicating equipment and appropriated funded playback equipment may not be used for reproduction of copyrighted sound or video recordings.

### § 142.5 Responsibilities.

Heads of DoD Components shall establish procedures to comply with this Directive and shall provide necessary local guidance and legal interpretation.

## PART 143—DOD POLICY ON ORGANIZATIONS THAT SEEK TO REPRESENT OR ORGANIZE MEMBERS OF THE ARMED FORCES IN NEGOTIATION OR COLLECTIVE BARGAINING

Sec.

143.1 Purpose.
143.2 Applicability.
143.3 Definitions.
143.4 Policy.
143.5 Prohibited activity.
143.6 Activity not covered by this part.
143.7 Responsibilities.
143.8 Guidelines.

AUTHORITY: 10 U.S.C. 801–940 and 10 U.S.C. 976.

SOURCE: 71 FR 76914, Dec. 22, 2006, unless otherwise noted.

### § 143.1 Purpose.

This part provides DoD policies and procedures for organizations whose objective is to organize or represent members of the Armed Forces of the United States for purposes of negotiating or bargaining about terms or conditions of military service. The policies and procedures set forth herein are designed to promote the readiness of the Armed Forces to defend the United States. This part does not modify or diminish the existing authority of commanders to control access to, or maintain good order and discipline on,

military installations; nor does it modify or diminish the obligations of commanders and supervisors under 5 U.S.C. 7101–7135 with respect to organizations representing DoD civilian employees.

### § 143.2 Applicability.

(a) The provisions of this part apply to:

(1) The Office of the Secretary of Defense, the Military Departments, the Chairman of the Joint Chiefs of 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 in the Department of Defense (hereafter referred collectively as the ''DoD Components'').

(2) Individuals and groups entering, using, or seeking to enter or use military installations.

(b) This part does not limit the application of the Uniform Code of Military Justice in 10 U.S.C. 901–940 or 10 U.S.C. 976 including the prohibitions and criminal penalties set forth therein with respect to matters that are the subject of this part or that are beyond its scope.

### § 143.3 Definitions.

(a) *Member of the Armed Forces*. A member of the Armed Forces who is serving on active duty, or a member of a Reserve component while performing inactive duty training.

(b) *Military labor organization*. Any organization that engages in or attempts to engage in:

(1) Negotiating or bargaining with any civilian officer or employee, or with any member of the Armed Forces, on behalf of members of the Armed Forces, concerning the terms or conditions of military service of such members in the Armed Forces;

(2) Representing individual members of the Armed Forces before any civilian officer or employee, or any member of the Armed Forces, in connection with any grievance or complaint of any such member arising out of the terms or conditions of military service of such member in the Armed Forces; or

(3) Striking, picketing, marching, demonstrating, or any other similar form of concerted action which is directed against the Government of the United States and that is intended to induce any civilian officer or employee, or any member of the Armed Forces, to:

(i) Negotiate or bargain with any person concerning the terms or conditions of military service of any member of the Armed Forces,

(ii) Recognize any organization as a representative of individual members of the Armed Forces in connection with complaints and grievances of such members arising out of the terms or conditions of military service of such members in the Armed Forces, or

(iii) Make any change with respect to the terms or conditions of military service of individual members of the Armed Forces.

(c) *Civilian officer or employee*. An employee, as defined in 5 U.S.C. 2105.

(d) *Military installations*. Includes installations, reservations, facilities, vessels, aircraft, and other property controlled by the Department of Defense.

(e) *Negotiation or bargaining*. A process whereby a commander or supervisor acting on behalf of the United States engages in discussions with a member or members of the Armed Forces (purporting to represent other such members), or with an individual, group, organization, or association purporting to represent such members, for the purpose of resolving bilaterally terms or conditions of military service.

(f) *Terms or conditions of military service*. Terms or conditions of military compensation or duty including but not limited to wages, rates of pay, duty hours, assignments, grievances, or disputes.

### § 143.4 Policy.

It is the policy of the United States under Public Law 95–610 that:

(a) Members of the Armed Forces of the United States must be prepared to fight and, if necessary, to die to protect the welfare, security, and liberty of the United States and of their fellow citizens.

(b) Discipline and prompt obedience to lawful orders of superior officers are essential and time-honored elements of the American military tradition and have been reinforced from the earliest articles of war by laws and regulations

prohibiting conduct detrimental to the military chain of command and lawful military authority.

(c) The processes of conventional collective bargaining and labor-management negotiation cannot and should not be applied to the relationships between members of the Armed Forces and their military and civilian superiors.

(d) Strikes, slowdowns, picketing, and other traditional forms of job action have no place in the Armed Forces.

(e) Unionization of the Armed Forces would be incompatible with the military chain of command, would undermine the role, authority, and position of the commander, and would impair the morale and readiness of the Armed Forces.

(f) The circumstances that could constitute a threat to the ability of the Armed Forces to perform their mission are not comparable to the circumstances that could constitute a threat to the ability of Federal civilian agencies to perform their functions and should be viewed in light of the need for effective performance of duty by each member of the Armed Forces.

### § 143.5 Prohibited activity.

(a) *Membership and enrollment.* (1) A member of the Armed Forces, knowing of the activities or objectives of a particular military labor organization, may not:

(i) Join or maintain membership in such organization; or

(ii) Attempt to enroll any other member of the Armed Forces as a member of such organization.

(2) No person on a military installation, and no member of the Armed Forces, may enroll in a military labor organization any member of the Armed Forces or solicit or accept dues or fees for such an organization from any member of the Armed Forces.

(b) *Negotiation or bargaining.* (1) No person on a military installation, and no member of the Armed Forces, may negotiate or bargain, or attempt through any coercive act to negotiate or bargain, with any civilian officer or employee, or any member of the Armed Forces, on behalf of members of the Armed Forces, concerning the terms or conditions of service of such members.

(2) No member of the Armed Forces, and no civilian officer or employee, may negotiate or bargain on behalf of the United States concerning the terms or conditions of military service of members of the Armed Forces with any person who represents or purports to represent members of the Armed Forces.

(c) *Strikes and other concerted activity.* (1) No person on a military installation, and no member of the Armed Forces, may organize or attempt to organize, or participate in, any strike, picketing, march, demonstration, or other similar form of concerted action involving members of the Armed Forces that is directed against the Government of the United States and that is intended to induce any civilian officer or employee, or any member of the Armed Forces, to:

(i) Negotiate or bargain with any person concerning the terms or conditions of service of any member of the Armed Forces,

(ii) Recognize any military labor organization as a representative of individual members of the Armed Forces in connection with any complaint or grievance of any such member arising out of the terms or conditions of service of such member in the Armed Forces, or

(iii) Make any change with respect to the terms or conditions of service in the Armed Forces of individual members of the Armed Forces.

(2) No person may use any military installation for any meeting, march, picketing, demonstration, or other similar activity for the purpose of engaging in any activity prohibited by this part.

(3) No member of the Armed Forces, and no civilian officer or employee, may permit or authorize the use of any military installation for any meeting, march, picketing, demonstration, or other similar activity that is for the purpose of engaging in any activity prohibited by this part.

(d) *Representation.* A military labor organization may not represent, or attempt to represent, any member of the Armed Forces before any civilian officer or employee, or any member of the

Armed Forces, in connection with any grievance or complaint of any such member arising out of the terms or conditions of service of such member in the Armed Forces.

### § 143.6 Activity not covered by this part.

(a) This part does not limit the right of any member of the Armed Forces to:

(1) Join or maintain membership in any lawful organization or association not constituting a ''military labor organization'' as defined in § 146.3 of this part;

(2) Present complaints or grievances concerning the terms or conditions of the service of such member in the Armed Forces in accordance with established military procedures;

(3) Seek or receive information or counseling from any source;

(4) Be represented by counsel in any legal or quasi-legal proceeding, in accordance with applicable laws and regulations;

(5) Petition the Congress for redress of grievances; or

(6) Take such other administrative action to seek such administrative or judicial relief, as is authorized by applicable laws and regulations.

(b) This part does not prevent commanders or supervisors from giving consideration to the views of any member of the Armed Forces presented individually or as a result of participation on command-sponsored or authorized advisory councils, committees, or organizations.

(c) This part does not prevent any civilian employed at a military installation from joining or being a member of an organization that engages in representational activities with respect to terms or conditions of civilian employment.

### § 143.7 Responsibilities.

(a) The Heads of DoD Components shall:

(1) Ensure compliance with this part and with the guidelines contained in § 143.8 of this part.

(2) Establish procedures to ensure that any action initiated under this part is reported immediately to the Head of the DoD Component concerned.

(3) Report any action initiated under this part immediately to the Secretary of Defense.

(b) The Deputy Under Secretary of Defense (Program Integration) shall serve as the administrative point of contact in the Office of the Secretary of Defense for all matters relating to this part.

### § 143.8 Guidelines.

The guidelines for making certain factual determinations are as follows:

(a) In determining whether an organization is a military labor organization, whether a person is a member of a military labor organization, or whether such person or organization is in violation of any provision of this part, the history and operation of the organization (including its constitution and bylaws, if any) or person in question may be evaluated, along with evidence on the conduct constituting a prohibited act.

(b) In determining whether the commission of a prohibited act by a person can be imputed to the organization, examples of factors that may be considered include: The frequency of such act; the position in the organization of persons committing the act; whether the commission of such act was known by the leadership of the organization; whether the commission of the act was condemned or disavowed by the leadership of the organization.

(c) Any information about persons and organizations not affiliated with the Department of Defense needed to make the determinations required by this part shall be gathered in strict compliance with the provisions of DoD Directive 5200.27[1] and shall not be acquired by counterintelligence or security investigative personnel. The organization itself shall be considered a primary source of information.

## PART 144—SERVICE BY MEMBERS OF THE ARMED FORCES ON STATE AND LOCAL JURIES

Sec.
144.1 Purpose.
144.2 Applicability.

[1] Copies are available at *http://www.dtic.mil/whs/directives*.

144.3 Definitions.
144.4 Policy.
144.5 Responsibilities.
144.6 Procedures.

AUTHORITY: 10 U.S.C. 982.

SOURCE: 71 FR 76917, Dec. 22, 2006, unless otherwise noted.

### § 144.1 Purpose.

This part implements 10 U.S.C. 982 to establish uniform DoD policies for jury service by members of the Armed Forces on active duty.

### § 144.2 Applicability.

The provisions of this part apply to active-duty members of the Armed Forces.

### § 144.3 Definitions.

(a) *Armed Forces*. The Army, the Navy, the Air Force, the Marine Corps.

(b) *State*. Includes the 50 United States, U.S. Territories, District of Columbia, and the Commonwealth of Puerto Rico.

(c) *Active Duty*. Full-time duty in the active Military Service of the United States; Includes full-time training duty, annual training duty, active duty for training, and attendance, while in the active Military Service, at a school designated as a Service school by law or by the Secretary of the Military Department concerned.

(d) *Operating Forces*. Those forces whose primary missions are to participate in combat and the integral supporting elements thereof.

### § 144.4 Policy.

It is DoD policy to permit members of the Armed Forces to maximally fulfill their civic responsibilities consistent with their military duties. For Service members stationed in the United States, serving on a State or local jury is one such civic obligation. Service members are exempt from jury duty, when it unreasonably would interfere with performance of their military duties or adversely affect the readiness of a unit, command, or activity.

### § 144.5 Responsibilities.

The Secretaries of the Military Departments, or designees, in accordance with regulations prescribed by the Secretary concerned, shall determine whether Service members shall be exempt from jury duty. This authority may be delegated no lower than to commanders authorized to convene special courts-martial.

### § 144.6 Procedures.

The Secretaries of the Military Departments shall publish procedures that provide the following:

(a) When a Service member on active duty is summoned to perform State or local jury duty, the Secretary concerned, or the official to whom such authority has been delegated, shall decide if such jury duty would:

(1) Interfere unreasonably with the performance of the Service members military duties.

(2) Affect adversely the readiness of the unit, command, or activity to which the member is assigned.

(b) If such jury service would interfere with the Service member's military duties or adversely affect readiness, the Service member shall be exempted from jury duty. The decision of the Secretary concerned, or the official to whom such authority has been delegated, shall be conclusive.

(c) All general and flag officers, commanding officers, and all personnel assigned to the operating forces, in a training status, or stationed outside the United States are exempt from serving on a State or local jury. Such jury service necessarily would interfere unreasonably with the performance of military duties by these members and adversely affect the readiness of the unit, command, or activity to which they are assigned.

(d) Service members who serve on State or local juries shall not be charged leave or lose any pay or entitlements during the period of service. All fees accrued to members for jury service are payable to the U.S. Treasury. Members are entitled to any reimbursement from the State or local jury authority for expenses incurred in the performance of jury duty, such as for transportation costs or parking fees.

(e) Written notice of each exemption determination shall be provided to the responsible State or local official who summoned an exempt member for jury duty.

# PART 145—COOPERATION WITH THE OFFICE OF SPECIAL COUNSEL OF THE MERIT SYSTEMS PROTECTION BOARD

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AUTHORITY: 5 U.S.C. 301; 10 U.S.C. 133.

SOURCE: 51 FR 17178, May 9, 1986, unless otherwise noted.

## § 145.1 Purpose.

This part establishes policy, assigns responsibilities, and prescribes procedures for cooperation with the Office of Special Counsel (OSC) of the Merit Systems Protection Board (MSPB) in fulfilling the responsibilities of the Special Counsel under Pub. L. 95–454 and 5 CFR 1201 and 1250 to conduct investigations of alleged prohibited personnel practices and to ensure the investigation of other allegations of improper or illegal conduct referred to the Department of Defense by the OSC. This part provides internal guidance to DoD officials, and does not establish an independent basis for any person or organization to assert a right, benefit, or privilege.

## § 145.2 Applicability and scope.

(a) This part applies to the Office of the Secretary of Defense (OSD), the Military Departments, the Office of the Joint Chiefs of Staff (OJCS), the Inspector General, Department of Defense (IG, DoD) and the Defense Agencies (hereafter referred to collectively ''as DoD Components'').

(b) The provisions of this part that relate to prohibited personnel practices do not apply to the Defense Intelligence Agency (DIA) or the National Security Agency (NSA), as prescribed by 5 U.S.C. 2302(a)(2)(C)(ii.).

(c) This part does not restrict the IG, DoD, in coordinating investigative efforts on individual cases with the OSC where concurrent jurisdiction exists.

## § 145.3 Definitions.

*Improper or illegal conduct.* (a) A violation of any law, rule, or regulation in connection with Government misconduct; or

(b) Mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

*Office of the Secretary of Defense (OSD).* (a) The immediate offices of the Secretary, the Deputy Secretary, the Assistant Secretaries, Assistants to the Secretary, and other officials serving the Secretary of Defense directly.

(b) The field activities of the Secretary of Defense.

(c) The Organization of the Joint Chiefs of Staff.

(d) The Unified and Specified Commands.

*Personnel action.* (a) An appointment.

(b) A promotion.

(c) An adverse action under 5 U.S.C. 7501 *et seq.* or other disciplinary or corrective action.

(d) A detail, transfer, or reassignment.

(e) A reinstatement.

(f) A restoration.

(g) A reemployment.

(h) A performance evaluation under 5 U.S.C. 4301 *et seq.*

(i) A decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other personnel action.

(j) Any other significant change in duties or responsibilities that is inconsistent with the employee's salary or grade level.

*Prohibited personnel practice.* Action taken by an employee who has authority to take, direct others to take, recommend, or approve any personnel action:

(a) That discriminates for or against any employee or applicant for employment on the basis of race, color, religion, sex, national origin, age, handicapping condition, marital status, or political affiliation, as prohibited by certain specified laws (see 5 U.S.C. 2302(b)(1).

(b) To solicit or consider any recommendation or statement, oral or

written, with respect to any individual who requests, or is under consideration for, any personnel action, unless the recommendation or statement is based on the personal knowledge or records of the person furnishing it, and consists of an evaluation of the work performance, ability, aptitude, or general qualifications of the individual, or an evaluation of the character, loyalty, or suitability of such individual.

(c) To coerce the political activity of any person (including the providing of any political contribution or service), or take any action against any employee or applicant for employment as a reprisal for the refusal of any person to engage in such political activity.

(d) To deceive or willfully obstruct any person with respect to such person's right to compete for employment.

(e) To influence any person to withdraw from competition for any position for the purpose of improving or injuring the prospects of any other person for employment.

(f) To grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment.

(g) To appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian position any individual who is a relative (as defined in 5 U.S.C. 3110) of the employee if the position is in the agency in which the employee is serving as a public official (as defined in 5 U.S.C. 3110) or over which the employee exercises jurisdiction or control as an official.

(h) To take or fail to take a personnel action with respect to any employee or applicant for employment as a reprisal for being a whistleblower. (See whistleblower)

(i) To take or fail to take a personnel action against an employee or applicant for employment as a reprisal for the exercise of any appeal right granted by law, rule, or regulation.

(j) To discriminate for or against any employee or applicant for employment on the basis of conduct that does not adversely affect the performance of the employee or applicant or the performance of others.

(k) To take or fail to take any other personnel action if the taking of, or failure to take, such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in 5 U.S.C. 2301.

*Whistleblower*. A present or former Federal employee or applicant for Federal employment who discloses information he or she reasonably believes evidences:

(a) A violation of any law, rule, or regulation.

(b) Mismanagement, a gross waste of funds, or an abuse of authority.

(c) A substantial or specific danger to public health or safety.

(d) Such disclosure qualifies if it is not specifically prohibited by statute and if such information is not specifically required by Executive Order to be kept secret in the interest of national defense or the conduct of foreign affairs.

(e) Where the information disclosed affects only the personal situation of the complaintant, it is generally to be regarded as an allegation of a prohibited personnel practice or violation of other civil service law, rule, or regulation, and the complainant will not be considered a whistleblower.

### § 145.4 Policy.

It is DoD policy that:

(a) Civilian personnel actions taken by DoD management officials, civilian and military, shall conform to laws and regulations implementing established merit system principles and must be free of any prohibited personnel practices, as described in 5 U.S.C. 2302 and § 145.3 of this part.

(b) It is the responsibility of each DoD management official to take vigorous corrective action and, when appropriate, to initiate disciplinary measures when prohibited personnel practices occur.

(c) DoD Components shall cooperate with the Office of Special Counsel by:

(1) Promoting merit system principles in civilian employment programs within the Department of Defense.

(2) Investigating and reporting on allegations of improper or illegal conduct forwarded to the Component by the OSC pursuant to 5 U.S.C. 1206(b) (2) or (3).

(3) Facilitating orderly investigation by the OSC of alleged prohibited personnel practices and other matters assigned for investigation to the OSC by law, such as the Freedom of Information Act and the Hatch Act.

(d) DoD Components shall cooperate with the OSC by providing appropriate assistance and information to its representatives during their investigations and by furnishing to the OSC investigators copies of releasable documents requested under the authority of the Civil Service Reform Act of 1978, 5 CFR 1250, the Privacy Act, and Civil Service Rule V.

(e) Close coordination between DoD and OSC personnel during an OSC investigation is encouraged to eliminate duplication of effort, and to avoid unnecessary delay in initiating, when appropriate, corrective or disciplinary action. This coordination shall be conducted in full recognition of the independent statutory basis for the OSC, as provided in Pub. L. 95–454 and of the responsibilities of the Department of Defense.

(f) OSC investigative requests involving classified information shall be accorded special attention and prompt consideration under existing administrative procedures.

(g) When OSC and a DoD Component or an employee assigned DoD counsel are engaged in litigation, release of information shall be accomplished pursuant to MSPB rules of discovery (5 CFR 1201, subpart B.).

### § 145.5 Responsibilities.

(a) The *Secretaries of the Military Departments* and the *Director, Defense Logistics Agency (DLA)*, shall prescribe implementing documents to ensure that:

(1) The policies, standards, and procedures set forth in this part are administered in a manner that encourages consistency in responding to investigations of alleged prohibited personnel practices.

(2) Alleged illegal or improper conduct referred to a Military Department or the DLA by the OSC or by OSD is carefully investigated.

(3) There is full cooperation with the IG, DoD, and the General Counsel, Department of Defense (GC, DoD), including assignment of military and civilian attorneys to represent employees suspected or accused by the OSC of committing a prohibited personnel practice or an otherwise illegal or improper act.

(b) The *General Counsel, Department of Defense* (GC, DoD) shall provide overall legal guidance, whether by the issuance of regulations or otherwise, on all issues concerning cooperation with the OSC. This authority extends to:

(1) Ensuring that DoD legal counsel is assigned upon request to represent a DoD employee suspected or accused by the OSC of committing a prohibited personnel practice or an illegal or improper act when the act complained of was within the scope of the employee's official responsibilities and such representation is in the interest of the Department of Defense; or, in unusual situations, that outside legal counsel is engaged where the use of DoD counsel would be inappropriate, and the same conditions are satisfied.

(2) Providing DoD legal counsel to seek intervention for the purpose of representing the interests of OSD or a Defense agency (other than the DLA) in an MSPB hearing resulting from charges of misconduct against an employee of OSD or a Defense agency, under the authority of the Civil Service Reform Act of 1978.

(3) Seeking the assistance of the Department of Justice in responding to requests by employees for legal representation in obtaining judicial review of an order by the MSPB, under 5 U.S.C. 1207.

(4) Modifying §145.3 and Appendix to this part and issuing supplementary instructions concerning all aspects of DoD cooperation with the OSC, including instructions on OSC investigations of allegedly arbitrary and capricious withholding of information under the Freedom of Information Act or violations of the Hatch Act.

(5) Reviewing for adequacy and legal sufficiency with the IG, DoD, each report of an investigation that must be personally reviewed by the Secretary

or Deputy Secretary of Defense on action taken or to be taken in response to an OSC finding of reasonable cause to believe there has been a violation of law, rule, or regulation, not including a prohibited personnel practice or allegation referred to the Attorney General of the United States for appropriate action.

(c) The *Inspector General, Department of Defense* (IG, DoD) shall:

(1) Investigate, or cause to be investigated, as appropriate, any complaint referred to the Department of Defense by OSC.

(2) Coordinate, where feasible, investigative efforts by DoD Components and the OSC, with particular emphasis on those conducted or initiated by action of the OSC.

(3) Submit the results of any investigation conducted under this part to the appropriate General Counsel.

(d) The *Deputy Assistant Secretary of Defense (Administration)* (DASD(A)) shall serve as the Senior Management Official, as described in §145.6(b) concerning allegations by the OSC of prohibited personnel practices or other illegal or improper acts in the OSD.

(e) The *General Counsels of the Military Departments* and the *General Counsel of the Defense Logistics Agency* shall have the same authority for their respective Components as given to the General Counsel, DoD, under paragraphs (b) (1) and (2) of this section.

**§ 145.6 Procedures.**

(a) *Allegations of improper or illegal conduct received from the OSC under 5 U.S.C. 1206(b)(2), (3), or (c)(3).* (1) Allegations of improper or illegal conduct referred by the OSC to the Secretary of Defense or to a Defense agency (other than the DLA) shall be forwarded to the IG, DoD.

(2) Allegations of improper or illegal conduct referred to a Military Department or to the DLA by the OSC shall be forwarded to the General Counsel of that Component.

(3) Upon receipt of a referral under paragraph (a) (1) or (2) of this section IG, DoD, or the GC of the Component concerned, as appropriate, shall ensure compliance with the Civil Service Reform Act of 1978 by obtaining a suitable investigation of an allegation, including compliance with time limits for reporting results of the investigation and personal review of the report by the head of the Component when required.

(4) Copies of each allegation referred under paragraph (a)(2) shall be forwarded by the General Counsel concerned to the IG, DoD.

(b) *OSC Investigations of Prohibited Personnel Practices.* (1) The head of each DoD Component shall designate a Senior Management Official to:

(i) Serve as a point of contact in providing assistance to the OSC in conducting investigations of alleged prohibited activities before any designation of an attorney of record for the Component or individual respondent for matters in litigation.

(ii) Monitor those investigations.

(iii) Ensure that appropriate Component personnel are fully apprised of the nature and basis for an OSC investigation, as well as the rights and duties of Component personnel in regard to such investigations.

(iv) Ensure that any corrective or disciplinary action considered appropriate because of facts disclosed by such an investigation is accomplished under paragraph (b)(2), in a timely manner.

(2) The designated Senior Management Official shall have authority to:

(i) Refer to responsible officials recommendations by the OSC for corrective action.

(ii) Seek OSC approval of proposed disciplinary action against an employee for an alleged prohibited personnel practice or illegal or improper act under investigation by the OSC when it is determined that such discipline is warranted.

(iii) Ensure that disciplinary action against an employee adjudged at fault following completion of an OSC investigation has been considered to avoid the need for a proceeding before the MSPB.

(iv) Ensure that information concerning members of the Armed Forces who are found by the Component to have committed a prohibited personnel practice or other violation of this Directive in the exercise of authority over civilian personnel is referred to appropriate military authority.

(3) The Senior Management Official shall:

(i) Establish a system under which an employee is identified to serve as the Liaison Officer for any OSC investigator who may initiate an investigation at a facility, base, or installation for which the employee is assigned liaison duties. It shall be the responsibility of the Liaison Officer to:

(A) Assist the OSC investigator.

(B) Ensure that all OSC requests for documents are in writing.

(C) Process such requests, as well as all requests for interviews.

(ii) Determine, to the extent practicable, whether an investigation is being, or has been, conducted that replicates in whole or in part the proposed or incomplete investigation by the OSC, and convey that information to the OSC whenever this might avoid redundant investigative effort.

(iii) Inform the General Counsel of the Component concerned of any OSC investigation and consult with the General Counsel on any legal issue related to an OSC investigation.

(iv) Ensure that Component personnel involved are given timely legal and policy advice, through arrangements effected by the Liaison Officer, on the nature and basis for an OSC investigation, the authority of the OSC, and the rights and duties of Component personnel, including those set forth in Appendix.

(v) Inform the IG, DoD, of any OSC investigation of an alleged prohibited personnel practice that is identified as having resulted from a whistleblower complaint or involves an allegation of otherwise illegal or improper conduct.

## APPENDIX TO PART 145—LEGAL REPRESENTATION

1. An employee or member of the Armed Forces asked to provide information (testimonial or documentary) to the OSC in the course of an investigation by that office may obtain legal advice from DoD attorneys, both civilian and military, on that employee's or members's rights and obligations. This includes assistance at any interviews with OSC investigators. However, the attorney-client relationship shall not be established unless the employee is suspected or accused by the OSC of committing a prohibited personnel practice or other illegal or improper act and has been assigned DoD counsel.

2. An employee who believes that he or she is suspected or has been accused by the OSC of committing a prohibited personnel practice or other illegal or improper act may obtain legal representation from the Department of Defense under the conditions prescribed in §145(b)(1) of this part, except as provided in section 7, below. The attorney assigned shall be a military member or employee from another Component whenever an attorney from the same Component is likely to face a conflict between his or her ethical obligation to the employee client and to the Component employer, and in any case where the suspected or accused employee has requested representation from another Component. Outside legal counsel may be retained by the Component on behalf of the employee only under unusual circumstances and only with the personal approval of the General Counsel of the Department of Defense.

3. The General Counsel responsible for authorizing representation shall determine whether a conflict is liable to occur if an attorney from the same Component is assigned to represent the employee and, in that case or in a case in which the suspected or accused employee has requested representation from another Component, shall seek the assistance of another General Counsel in obtaining representation from outside the Component. The General Counsels of the Military Departments and the DLA shall ensure the availability of appropriately trained counsel for assignment to such cases.

4. To obtain legal representation the employee:

a. Must request legal representation, in writing, together with all process and pleadings served, and explain the circumstances that justify DoD legal assistance.

b. Indicate whether he or she has retained legal counsel from outside the Department of Defense.

c. Obtain a written certification from his or her supervisor that the employee was acting within the scope of his of her official duties, and that no adverse or disciplinary personnel action against the employee for the conduct being investigated by the OSC has been initiated by the Component.

5. Employee requests for legal representation must be approved by the General Counsel, DoD, for employees of OSD or a Defense Agency (other than the DLA), or by the General Counsel of a Military Department or the General Counsel of the DLA for employees of those Components.

6. The conditions of legal representation must be explained to the accused employee in writing and accepted in writing by that employee.

7. DoD resources may not be used to provide legal representation for an employee with respect to a DoD disciplinary action against the employee for committing or participating in a prohibited personnel practice

or for engaging in illegal or improper conduct, regardless of whether that participation or conduct is also the basis for disciplinary action proposed by the OSC.

8. After approval of an employee's request, under section 4, above, a DoD attorney shall be assigned (or, in unusual circumstances, outside counsel retained) as the employee's representative in matters pending before the OSC or MSPB. This approval may be limited to representing the employee only with respect to some of the pending matters if other specific matters of concern to the OSC or MSPB do not satisfy the requirements of his Directive.

9. An attorney-client relationship shall be established and continued between the suspected or accused employee and assigned DoD counsel.

10. In representing a DoD employee under this part, a DoD attorney designated counsel for the employee shall act as a vigorous advocate of the employee's individual legal interests before the OSC or MSPB; the attorney's professional responsibility to the Department of Defense and his or her employing Component will be satisfied by fulfilling this responsibility to the employee. Legal representation may be terminated only with the approval of the General Counsel who authorized representation, and normally only on the basis of information not available at the time the attorney was assigned.

11. The attorney-client relationship may be terminated if the assigned DoD counsel for the employee determines, with the approval of the General Counsel who authorizes representation, that:

a. The employee was acting outside the scope of his or her official duties when engaging in the conduct that is the basis for the OSC investigation or charge.

b. Termination of the professional representation is not in violation of the rules of professional conduct applicable to the assigned counsel.

12. The DoD attorney designated counsel may request relief from the duties of representation or counseling without being required to furnish explanatory information that might compromise the assurance to the client of confidentiality.

13. This part authorizes cognizant DoD officials to approve a represented employee's request for travel, per diem, witness appearances, or other departmental support necessary to ensure effective legal representation of the employee by the designated counsel.

14. An employee's participation in OSC investigations, MSPB hearings, and other related proceedings shall be considered official departmental business for time and attendance requirements and similar purposes.

15. The following advice to employees questioned during the course of an OSC investigation may be appropriate in response to the most frequent inquiries:

a. An employee may decline to provide a ''yes'' or ''no'' answer in favor of a more qualified answer when this is necessary to ensure accuracy in responding to an OSC interviewer's questions.

b. Requests for clarification of both questions and answers are appropriate to avoid misinterpretation.

c. Means to ensure verification of an interview by OSC investigators are appropriate, whether the employee is or is not accompanied by a legal representative. Tape recorders may only be used for this purpose when:

(1) The recorder is used in full view.

(2) All attendees are informed.

(3) The OSC interrogator agrees to the tape recording of the proceeding.

d. Any errors that appear in a written summary of an interview prepared by the interviewer should be corrected before the employee signs the statement. The employee is not required to sign any written summary that is not completely accurate. An employee may make a copy of the summary for his or her own use as a condition of signing.

# PART 147—ADJUDICATIVE GUIDELINES FOR DETERMINING ELIGIBILITY FOR ACCESS TO CLASSIFIED INFORMATION

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AUTHORITY: E.O. 12968 (60 FR 40245, 3 CFR 1995 Comp., p 391).

SOURCE: 63 FR 4573, Jan. 30, 1998, unless otherwise noted.

## Subpart A—Adjudication

### § 147.1 Introduction.

The following adjudicative guidelines are established for all United States Government civilian and military personnel, consultants, contractors, employees of contractors, licensees, certificate holders or grantees and their employees and other individuals who require access to classified information. They apply to persons being considered for initial or continued eligibility for access to classified information, to include sensitive compartmented information and special access programs and are to be used by government departments and agencies in all final clearance determinations.

### § 147.2 Adjudicative process.

(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 eligible for a security clearance. Eligibility for access to classified information is predicated upon the individual meeting these personnel security guidelines. The adjudicative process is the careful weighing of a number of variables known as the whole person concept. Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination. In evaluating the relevance of an individual's conduct, the adjudicator should consider the following actors:

(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 voluntariness of participation;

(6) The presence or absence of rehabilitation and other pertinent behavioral changes;

(7) The motivation for the conduct;

(8) The potential for pressure, coercion, exploitation, or duress;

(9) The likelihood of continuation of recurrence.

(b) Each case must be judged on its own merits, and final determination remains the responsibility of the specific department or agency. Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security.

(c) The ultimate determination of whether the granting or continuing of eligibility for a security clearance is clearly consistent with the interests of national security must be an overall common sense determination based upon careful consideration of the following, each of which is to be evaluated in the context of the whole person, as explained further below:

(1) Guideline A: Allegiance to the United States.

(2) Guideline B: Foreign influence.

(3) Guideline C: Foreign preference.
(4) Guideline D: Sexual behavior.
(5) Guideline E: Personal conduct.
(6) Guideline F: Financial considerations.
(7) Guideline G: Alcohol consumption.
(8) Guideline H: Drug involvement.
(9) Guideline I: Emotional, mental, and personality disorders.
(10) Guideline J: Criminal conduct.
(11) Guideline K: Security violations.
(12) Guideline L: Outside activities.
(13) Guideline M: Misuse of Information Technology Systems.

(d) Although adverse information concerning a single criterion may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or emotionally unstable behavior. Notwithstanding, the whole person concept, pursuit of further investigations may be terminated by an appropriate adjudicative agency in the face of reliable, significant, disqualifying, adverse information.

(e) When information of security concern becomes known about an individual who is currently eligible for access to classified information, the adjudicator should consider whether the person:

(1) Voluntarily reported the information;

(2) Was truthful and complete in responding to questions;

(3) Sought assistance and followed professional 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.

(f) If after evaluating information of security concern, the adjudicator decides that the information is not serious enough to warrant a recommendation of disapproval or revocation of the security clearance, it may be appropriate to recommend approval with a warning that future incidents of a similar nature may result in revocation of access.

## § 147.3 Guideline A—Allegiance to the United States.

(a) *The concern.* 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 Untied States.

(b) *Conditions that could raise a security concern and may be disqualifying include:* (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;

(2) Association or sympathy with persons who are attempting to commit, or who are committing, any of the above acts;

(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;

(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.

(c) *Conditions that could mitigate security concerns include:* (1) The individual was unaware of the unlawful aims of the individual or organization and severed ties upon learning of these;

(2) The individual's involvement was only with the lawful or humanitarian aspects of such an organization;

(3) Involvement in the above activities occurred for only a short period of time and was attributable to curiosity or academic interest;

(4) The person has had no recent involvement or association with such activities.

## § 147.4 Guideline B—Foreign influence.

(a) *The concern.* A security risk may exist when an individual's immediate family, including cohabitants and other persons to whom he or she may be bound by affection, influence, or obligation are not citizens of the Untied 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.

(b) *Conditions that could raise a security concern and may be disqualifying include:* (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;

(2) Sharing living quarters with a person or persons, regardless of their citizenship status, if the potential for adverse foreign influence or duress exists;

(3) Relatives, cohabitants, or associates who are connected with any foreign government;

(4) Failing to report, where required, associations with foreign nationals;

(5) Unauthorized association with a suspected or known collaborator or employee of a foreign intelligence service;

(6) Conduct which may make the individual vulnerable to coercion, exploitation, or pressure by a foreign government;

(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;

(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.

(c) *Conditions that could mitigate security concerns include:* (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 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;

(2) Contacts with foreign citizens are the result of official United States Government business;

(3) Contact and correspondence with foreign citizens are casual and infrequent;

(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;

(5) Foreign financial interests are minimal and not sufficient to affect the individual's security responsibilities.

### § 147.5 Guideline C—Foreign preference.

(a) *The concern.* 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.

(b) Conditions that could raise a security concern and may be disqualifying include:

(1) The exercise of dual citizenship;

(2) Possession and/or use of a foreign passport;

(3) Military service or a willingness to bear arms for a foreign country;

(4) Accepting educational, medical, or other benefits, such as retirement and social welfare, from a foreign country;

(5) Residence in a foreign country to meet citizenship requirements;

(6) Using foreign citizenship to protect financial or business interests in another country;

(7) Seeking or holding political office in the foreign country;

(8) Voting in foreign elections;

(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.

(c) *Conditions that could mitigate security concerns include:* (1) Dual citizenship is based solely on parents' citizenship or birth in a foreign country;

(2) Indicators of possible foreign preference (e.g., foreign military service) occurred before obtaining United States citizenship;

(3) Activity is sanctioned by the United States;

(4) Individual has expressed a willingness to renounce dual citizenship.

### § 147.6 Guidance D—Sexual behavior.

(a) *The concern*. 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 discretion.[1] 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.

(b) *Conditions that could raise a security concern and may be disqualifying include:* (1) Sexual behavior of a criminal nature, whether or not the individual has been prosecuted;

(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;

(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.

(c) *Conditions that could mitigate security concerns include:* (1) The behavior occurred during or prior to adolescence and there is no evidence of subsequent conduct of a similar nature;

(2) The behavior was not recent and there is no evidence of subsequent conduct of a similar nature;

(3) There is no other evidence of questionable judgment, irresponsibility, or emotional instability;

(4) The behavior no longer serves as a basis for coercion, exploitation, or duress.

### § 147.7 Guideline E—Personal conduct.

(a) *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. The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:

(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.

(b) *Conditions that could raise a security concern and may be disqualifying also include:* (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 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;

(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;

(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;

(5) A pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency;

(6) Association with persons involved in criminal activity.

[1] The adjudicator should also consider guidelines pertaining to criminal conduct (Guideline J) and emotional, mental and personality disorders (Guideline I) in determining how to resolve the security concerns raised by sexual behavior.

(c) *Conditions that could mitigate security concerns include:* (1) The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability;

(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 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;

(7) Association with persons involved in criminal activities has ceased.

### § 147.8 Guideline F—Financial considerations.

(a) *The concern.* 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.

(b) *Conditions that could raise a security concern and may be disqualifying include:* (1) A history of not meeting financial obligations;

(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;

(3) Inability or unwillingness to satisfy debts;

(4) Unexplained affluence;

(5) Financial problems that are linked to gambling, drug abuse, alcoholism, or other issues of security concern.

(c) *Conditions that could mitigate security concerns include:* (1) The behavior was not recent;

(2) It was an isolated incident;

(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);

(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;

(5) The affluence resulted from a legal source;

(6) The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

### § 147.9 Guideline G—Alcohol consumption.

(a) *The 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.

(b) *Conditions that could raise a security concern and may be disqualifying include:* (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;

(2) Alcohol-related incidents at work, such as reporting for work or duty in an intoxicated or impaired condition, or drinking on the job;

(3) Diagnosis by a credentialed medical professional (e.g., physician, clinical psychologist, or psychiatrist) of alcohol abuse or alcohol dependence;

(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;

(5) Habitual or binge consumption of alcohol to the point of impaired judgment;

(6) Consumption of alcohol, subsequent to a diagnosis of alcoholism by a credentialed medical professional and following completion of an alcohol rehabilitation program.

(c) *Conditions that could mitigate security concerns include:* (1) The alcohol related incidents do not indicate a pattern;

(2) The problem occurred a number of years ago and there is no indication of a recent problem;

(3) Positive changes in behavior supportive of sobriety;

(4) Following diagnosis of alcohol abuse or alcohol dependence, the individual has successfully completed impatient or 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.

### § 147.10 Guideline H—Drug involvement.

(a) *The concern.* (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.

(2) Drugs are defined as mood and behavior altering substances, and include:

(i) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens),

(ii) Inhalants and other similar substances.

(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.

(b) *Conditions that could raise a security concern and may be disqualifying include:* (1) Any drug abuse (see above definition);

(2) Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution;

(3) Diagnosis by a credentialed medical professional (e.g., physician, clinical psychologist, or psychiatrist) of drug abuse or drug dependence;

(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;

(5) Failure to successfully complete a drug treatment program prescribed by a 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.

(c) *Conditions that could mitigate security concerns include:* (1) The drug involvement was not recent;

(2) The drug involvement was an isolated or aberration event;

(3) A demonstrated intent not to abuse any drugs in the future;

(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.

### § 147.11 Guideline I—Emotional, mental, and personality disorders.

(a) *The concern:* 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.

(b) *Conditions that could raise a security concern and may be disqualifying include:* (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;

(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;

(3) A pattern of high-risk, irresponsible, aggressive, anti-social or emotionally unstable behavior;

(4) Information that suggests that the individual's current behavior indicates a defect in his or her judgment or reliability.

(c) *Conditions that could mitigate security concerns include:* (1) There is no indication of a current problem;

(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;

(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.

### § 147.12 Guideline J—Criminal conduct.

(a) *The concern.* A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

(b) *Conditions that could raise a security concern and may be disqualifying include:* (1) Allegations or admissions of criminal conduct, regardless of whether the person was formally charged;

(2) A single serious crime or multiple lesser offenses.

(c) *Conditions that could mitigate security concerns include:* (1) The criminal behavior was not recent;

(2) The crime was an isolated incident;

(3) The person was pressured or coerced into committing the act and those pressures are no longer present in that person's life;

(4) The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur;

(5) Acquittal;

(6) There is clear evidence of successful rehabilitation.

### § 147.13 Guideline K—Security violations.

(a) *The concern.* Noncompliance with security regulations raises doubt about an individual's trustworthiness, willingness, and ability to safeguard classified information.

(b) *Conditions that could raise a security concern and may be disqualifying include.* (1) Unauthorized disclosure of classified information;

(2) Violations that are deliberate or multiple or due to negligence.

(c) *Conditions that could mitigate security concerns include actions that:* (1) Were inadvertent;

(2) Were isolated or infrequent;

(3) Were due to improper or inadequate training;

(4) Demonstrate a positive attitude towards the discharge of security responsibilities.

### § 147.14 Guideline L—Outside activities.

(a) *The concern.* 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 increased risk of unauthorized disclosure of classified information.

(b) *Conditions that could raise a security concern and may be disqualifying include any service, whether compensated, volunteer, or employment with:* (1) A foreign country;

(2) Any foreign national;

(3) A representative of any foreign interest;

(4) Any foreign, domestic, or international organization or person engaged in analysis, discussion, or publication of material on intelligence, defense, foreign affairs, or protected technology.

(c) *Conditions that could mitigate security concerns include:* (1) Evaluation of the outside employment or activity indicates that it does not pose a conflict with an individual's security responsibilities;

(2) The individual terminates the employment or discontinues the activity upon being notified that it is in conflict with his or her security responsibilities.

### § 147.15 Guideline M—Misuse of Information technology systems.

(a) *The concern.* 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.

(b) *Conditions that could raise a security concern and may be disqualifying include:* (1) Illegal or unauthorized entry into any information technology system;

(2) Illegal or unauthorized modification, destruction, manipulation or denial of access to information residing on an information technology system;

(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;

(4) Introduction of hardware, software, or media into any information technology system without authorization, when specifically prohibited by rules, procedures, guidelines or regulations.

(c) *Conditions that could mitigate security concerns include:* (1) The misuse was not recent or significant;

(2) The conduct was unintentional or inadvertent;

(3) The introduction or removal of media was authorized;

(4) The misuse was an isolated event;

(5) The misuse was followed by a prompt, good faith effort to correct the situation.

## Subpart B—Investigative Standards

### § 147.18 Introduction.

The following investigative standards are established for all United States Government civilian and military personnel, consultants, contractors, employees of contractors, licensees, certificate holders or grantees and their employees and other individuals who require access to classified information, to include Sensitive Compartmented Information and Special Access Programs, and are to be used by government departments and agencies as the investigative basis for final clearance determinations. However, nothing in these standards prohibits an agency from using any lawful investigative procedures in addition to these requirements in order to resolve any issue identified in the course of a background investigation or reinvestigation.

### § 147.19 The three standards.

There are three standards (Attachment D to this subpart part summarizes when to use each one):

(a) The investigation and reinvestigation standards for ''L'' access authorizations and for access to confidential and secret (including all secret-level Special Access Programs not specifically approved for enhanced investigative requirements by an official authorized to establish Special Access Programs by section in 4.4 of Executive Order 12958) (60 FR 19825, 3 CFR 1995 Comp., p. 33);

(b) The investigation standard for''Q'' access authorizations and for access to top secret (including top secret Special Access Programs) and Sensitive Compartmented Information;

(c) The reinvestigation standard for continued access to the levels listed in paragraph (b) of this section.

### § 147.20 Exception to periods of coverage.

Some elements of standards specify a period of coverage (e.g. seven years). Where appropriate, such coverage may be shortened to the period from the subject's eighteenth birthday to the present or to two years, whichever is longer.

### § 147.21 Expanding investigations.

Investigations and reinvestigations may be expanded under the provisions of Executive Order 12968 (60 FR 40245, 3 CFR 1995 Comp., p. 391) and other applicable statutes and Executive Orders.

### § 147.22 Transferability.

Investigations that satisfy the requirements of a given standard and are current meet the investigative requirements for all levels specified for the standard. They shall be mutually and reciprocally accepted by all agencies.

### § 147.23 Breaks in service.

If a person who requires access has been retired or separated from U.S. government employment for less than two years and is the subject of an investigation that is otherwise current, the agency regranting the access will, as a minimum, review an updated Standard Form 86 and applicable records. A reinvestigation is not required unless the review indicates the person may no longer satisfy the standards of Executive Order 12968 (60 FR 40245, 3 CFR 1995 Comp., p. 391); (Attachment D to this subpart, Table 2).

### § 147.24 The national agency check.

The National Agency Check is a part of all investigations and reinvestigations. It consists of a review of;

(a) Investigative and criminal history files of the FBI, including a technical fingerprint search;

(b) OPM's Security/Suitability Investigations Index;

(c) DoD's Defense Clearance and Investigations Index;

(d) Such other national agencies (e.g., CIA, INS) as appropriate to the individual's background.

## ATTACHMENT A TO SUBPART B OF PART 147—STANDARD A—NATIONAL AGENCY CHECK WITH LOCAL AGENCY CHECKS AND CREDIT CHECK (NACLC)

(a) *Applicability*. Standard A applies to investigations and reinvestigations for;

(1) Access to CONFIDENTIAL and SECRET (including all SECRET-level Special Access Programs not specifically approved for enhanced investigative requirements by an official authorized to establish Special Access Programs by sect. 4.4 of Executive Order 12958) (60 FR 19825, 3 CFR 1995 Comp., p. 333);

(2) ''L'' access authorizations.

(b) *For Reinvestigation: When to Reinvestigate*. The reinvestigation may be initiated at any time following completion of, but not later than ten years (fifteen years for CONFIDENTIAL) from the date of, the previous investigation or reinvestigation. (Attachment D to this subpart, Table 2, reflects the specific requirements for when to request a reinvestigation, including when there has been a break in service.)

(c) *Investigative Requirements*. Investigative requirements are as follows:

(1) *Completion of Forms:* Completion of Standard Form 86, including applicable releases and supporting documentation.

(2) *National Agency Check:* Completion of a National Agency Check.

(3) *Financial Review:* Verification of the subject's financial status, including credit bureau checks covering all locations where the subject has resided, been employed, or attended school for six months or more for the past seven years.

(4) *Date and Place of Birth:* Corroboration of date and place of birth through a check of appropriate documentation, if not completed in any previous investigation; a check of Bureau of Vital Statistics records when any discrepancy is found to exist.

(5) *Local Agency Checks:* As a minimum, all investigations will include checks of law enforcement agencies having jurisdiction where the subject has lived, worked, and/or attended school within the last five years, and, if applicable, of the appropriate agency for any identified arrests.

(d) *Expanding the Investigation:* The investigation may be expanded if necessary to determine if access is clearly consistent with the national security.

## ATTACHMENT B TO SUBPART B OF PART 147—STANDARD B—SINGLE SCOPE BACKGROUND INVESTIGATION (SSBI)

(a) *Applicability*. Standard B applies to initial investigations for;

(1) Access to TOP SECRET (including TOP SECRET Special Access Programs) and Sensitive Compartment Information;

(2) ''Q'' access authorizations.

(b) *Investigative Requirements*. Investigative requirements are as follows:

(1) *Completion of Forms:* Completion of Standard Form 86, including applicable releases and supporting documentation.

(2) *National Agency Check:* Completion of a National Agency Check.

(3) *National Agency Check for the Spouse or Cohabitant (if applicable):* Completion of a National Agency Check, without fingerprint cards, for the spouse or cohabitant.

(4) *Date and Place of Birth:* Corroboration of date and place of birth through a check of appropriate documentation; a check of Bureau of Vital Statistics records when any discrepancy is found to exist.

(5) *Citizenship:* For individuals born outside the United States, verification of US citizenship directly from the appropriate registration authority; verification of US citizenship or legal status of foreign-born immediate

family members (spouse, cohabitant, father, mother, sons, daughters, brothers, sisters).

(6) *Education:* Corroboration of most recent or most significant claimed attendance, degree, or diploma. Interviews of appropriate educational sources if education is a primary activity of the subject during the most recent three years.

(7) *Employment:* Verification of all employments for the past seven years; personal interviews of sources (supervisors, coworkers, or both) for each employment of six months or more; corroboration through records or sources of all periods of unemployment exceeding sixty days; verification of all prior federal and military service, including discharge type. For military members, all service within one branch of the armed forces will be considered as one employment, regardless of assignments.

(8) *References:* Four references, of whom at least two are developed; to the extent practicable, all should have social knowledge of the subject and collectively span at least the last seven years.

(9) *Former Spouse:* An interview of any former spouse divorced within the last ten years.

(10) *Neighborhoods:* Confirmation of all residences for the last three years through appropriate interviews with neighbors and through records reviews.

(11) *Financial Review:* Verification of the subject's financial status, including credit bureau checks covering all locations where subject has resided, been employed, and/or attended school for six months or more for the last seven years.

(12) *Local Agency Checks:* A check of appropriate criminal history records covering all locations where, for the last ten years, the subject has resided, been employed, and/or attended school for six months or more, including current residence regardless of duration.

NOTE: If no residence, employment, or education exceeds six months, local agency checks should be performed as deemed appropriate.

(13) *Public Records:* Verification of divorces, bankruptcies, and other court actions, whether civil or criminal, involving the subject.

(14) *Subject Interview:* A subject interview, conducted by trained security, investigative, or counterintelligence personnel. During the investigation, additional subject interviews may be conducted to collect relevant information, to resolve significant inconsistencies, or both. Sworn statements and unsworn declarations may be taken whenever appropriate.

(15) *Polygraph (only in agencies with approved personnel security polygraph programs):* In departments or agencies with policies sanctioning the use of the polygraph for personnel security purposes, the investigation may include a polygraph examination, conducted by a qualified polygraph examiner.

(c) *Expanding the Investigation.* The investigation may be expanded as necessary. As appropriate, interviews with anyone able to provide information or to resolve issues, including but not limited to cohabitants, relatives, psychiatrists, psychologists, other medical professionals, and law enforcement professionals may be conducted.

## ATTACHMENT C TO SUBPART B OF PART 147—STANDARD C—SINGLE SCOPE BACKGROUND INVESTIGATION PERIODIC REINVESTIGATION (SSBI-PR)

(a) *Applicability.* Standard C applies to reinvestigation for;

(1) *Access to TOP SECRET (including TOP SECRET Special Access Programs) and Sensitive Compartmented Information;*

(2) ''Q'' access authorizations.

(b) *When to Reinvestigate.* The reinvestigation may be initiated at any time following completion of, but not later than five years from the date of, the previous investigation (see Attachment D to this subpart, Table 2).

(c) *Reinvestigative Requirements.* Reinvestigative requirements are as follows:

(1) *Completion of Forms:* Completion of Standard Form 86, including applicable releases and supporting documentation.

(2) *National Agency Check:* Completion of a National Agency Check (fingerprint cards are required only if there has not been a previous valid technical check of the FBI).

(3) *National Agency Check for the Spouse or Cohabitant (if applicable):* Completion of a National Agency Check, without fingerprint cards, for the spouse or cohabitant. The National Agency Check for the spouse or cohabitant is not required if already completed in conjunction with a previous investigation or reinvestigation.

(4) *Employment:* Verification of all employments since the last investigation. Attempts to interview a sufficient number of sources (supervisors, coworkers, or both) at all employments of six months or more. For military members, all services within one branch of the armed forces will be considered as one employment, regardless of assignments.

(5) *References:* Interviews with two character references who are knowledgeable of the subject; at least one will be a developed reference. To the extent practical, both should have social knowledge of the subject and collectively span the entire period of the reinvestigation. As appropriate, additional interviews may be conducted, including with cohabitants and relatives.

(6) *Neighborhoods:* Interviews of two neighbors in the vicinity of the subject's most recent residence of six months or more. Confirmation of current residence regardless of length.

(7) *Financial Review—Financial Status:* Verification of the subject's financial status, including credit bureau checks covering all locations where subject has resided, been employed, and/or attended school for six months or more for the period covered by the reinvestigation;

(ii) *Check of Treasury's Financial Data Base:* Agencies may request the Department of the Treasury, under terms and conditions prescribed by the Secretary of the Treasury, to search automated data bases consisting of reports of currency transactions by financial institutions, international transportation of currency or monetary instruments, foreign bank and financial accounts, and transactions under $10,000 that are reported as possible money laundering violations.

(8) *Local Agency Checks:* A check of appropriate criminal history records covering all locations where, during the period covered by the reinvestigation, the subject has resided, been employed, and/or attended school for six months or more, including current residence regardless of duration. (Note: If no residence, employment, or education exceeds six months, local agency checks should be performed as deemed appropriate.)

(9) *Former Spouse:* An interview with any former spouse unless the divorce took place before the date of the last investigation or reinvestigation.

(10) *Public Records:* Verification of divorces, bankruptcies, and other court actions, whether civil or criminal, involving the subject since the date of the last investigation.

(11) *Subject Interview:* A subject interview, conducted by trained security, investigative, or counterintelligence personnel. During the reinvestigation, additional subject interviews may be conducted to collect relevant information, to resolve significant inconsistencies, or both. Sworn statements and unsworn declarations may be taken whenever appropriate.

(d) *Expanding the Reinvestigation:* The reinvestigation may be expanded as necessary. As appropriate, interviews with anyone able to provide information or to resolve issues, including but not limited to cohabitants, relatives, psychiatrists, psychologists, other medical professionals, and law enforcement professionals may be conducted.

## ATTACHMENT D TO SUBPART B OF PART 147—DECISION TABLES

### TABLE 1—WHICH INVESTIGATION TO REQUEST

| If the requirement is for | And the person has this access | Based on this investigation | Then the investigation required is | Using standard |
|---|---|---|---|---|
| Confidental Secret; "L" | None | None<br>Out of date NACLC or SSBI. | NACLC | A |
| | Conf, Sec; "L" | | | |
| Top Secret, SCI; "Q" | None | None | SSBI | B |
| | None; Conf, Sec; "L". | Current or out of date NACLC<br>Out of date SSBI | | |
| | TS, SCI; "Q" | | SSBI-PR | C |

### TABLE 2—REINVESTIGATION REQUIREMENTS

| If the requirement is for | And the age of the investigation is | Type required if there has been a break in service of | |
|---|---|---|---|
| | | 0–23 months | 24 month's or more |
| Confidential | 0 to 14 years. 11 mos | None (note 1) | NACLC |
| | 15 yrs. or more | NACLC. | |
| Secret; "L" | 0 to 9 yrs 11 mos | None (note 1). | |
| | 10 yrs. or more | NACLC | |
| Top Secret, SCI; "Q" | 0 to 4 yrs. 11 mos | None (note 1) | SSBI |
| | 5 yrs or more | SSBI-PR. | |

NOTE: As a minimum, review an updated Standard Form 84 and applicable records. A reinvestigation (NACLC or SSBI-PR) is not required unless the review indicates the person may no longer satisfy the standards of Executive Order 12968.

## Subpart C—Guidelines for Temporary Access

### § 147.28 Introduction.

The following minimum investigative standards, implementing section 3.3 of Executive Order 12968, *Access to Classified Information*, are established for all United States Government and military personnel, consultants, contractors, subcontractors, employees of contractors, licensees, certificate holders or grantees and their employees and other individuals who require access to classified information before the appropriate investigation can be completed and a final determination made.

### § 147.29 Temporary eligibility for access.

Based on a justified need meeting the requirements of section 3.3 of Executive Order 12968, temporary eligibility for access may be granted before investigations are complete and favorably adjudicated, where official functions must be performed prior to completion of the investigation and adjudication process. The temporary eligibility will be valid until completion of the investigation and adjudication; however, the agency granting it may revoke it at any time based on unfavorable information identified in the course of the investigation.

### § 147.30 Temporary eligibility for access at the confidential and secret levels and temporary eligibility for "L" access authorization.

As a minimum, such temporary eligibility requires completion of the Standard Form 86, including any applicable supporting documentation, favorable review of the form by the appropriate adjudicating authority, and submission of a request for an expedited National Agency Check with Local Agency Checks and Credit (NACLC).

### § 147.31 Temporary eligibility for access at the top secret levels and temporary eligibility for "Q" access authorization: For someone who is the subject of a favorable investigation not meeting the investigative standards for access at those levels.

As a minimum, such temporary eligibility requires completion of the Standard Form 86, including any applicable supporting documentation, favorable review of the form by the appropriate adjudicating authority, and expedited submission of a request for a Single Scope Background Investigation (SSBI).

### § 147.32 Temporary eligibility for access at the top secret and SCI levels and temporary eligibility for "Q" access authorization: For someone who is not the subject of a current, favorable personnel or personnel-security investigation of any kind.

As a minimum, such temporary eligibility requires completion of the Standard Form 86, including any applicable supporting documentation, favorable review of the form by the appropriate adjudicating authority, immediate submission of a request for an expedited Single Scope Background Investigation (SSBI), and completion and favorable review by the appropriate adjudicating authority of relevant criminal history and investigative records of the Federal Bureau of Investigation and of information in the Security/Suitability Investigations Index (SII) and the Defense Clearance and Investigations Index (DCII).

### § 147.33 Additional requirements by agencies.

Temporary eligibility for access must satisfy these minimum investigative standards, but agency heads may establish additional requirements based on the sensitivity of the particular, identified categories of classified information necessary to perform the lawful and authorized functions that are the basis for granting temporary eligibility for access. However, no additional requirements shall exceed the common standards for background investigations developed under section 3.2(b) of Executive Order 12968. Temporary eligibility for access is valid only at the agency granting it and at other agencies who expressly agree to accept it and acknowledge understanding of its investigative basis. It is further subject to limitations specified in sections 2.4(d) and 3.3 of Executive Order 12968, *Access to Classified Information*.

# PART 148—NATIONAL POLICY AND IMPLEMENTATION OF RECIPROCITY OF FACILITIES

## Subpart A—National Policy on Reciprocity of Use and Inspections of Facilities

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148.13 Responsibilities.
148.14 Procedures.

AUTHORITY: E.O. 12968 (60 FR 40245, 3 CFR 1995 Comp., p. 391.)

SOURCE: 63 FR 4580, Jan. 30, 1998, unless otherwise noted.

## Subpart A—National Policy on Reciprocity of Use and Inspections of Facilities

### § 148.1 Intergency reciprocal acceptance .

Interagency reciprocal acceptance of security policies and procedures for approving, accrediting, and maintaining the secure posture of shared facilities will reduce aggregate costs, promote interoperability of agency security systems, preserve vitality of the U.S. industrial base, and advance national security objectives.

### § 148.2 Classified programs.

Once a facility is authorized, approved, certified, or accredited, all U.S. Government organizations desiring to conduct classified programs at the facility at the same security level shall accept the authorization, approval, certification, or accreditation without change, enhancements, or upgrades. Executive Order, Safeguarding Directives, National Industrial Security Program Operating Manual (NISPOM), the NISPOM Supplement, the Director of Central Intelligence Directives, interagency agreements, successor documents, or other mutually agreed upon methods shall be the basis for such acceptance.

### § 148.3 Security review.

After initial security authorization, approval, certification, or accreditation, subsequent security reviews shall normally be conducted no more frequently than annually.

Additionally, such reviews shall be aperiodic or random, and be based upon risk management principles. Security reviews may be conducted ''for cause'', to follow up on previous findings, or to accomplish close-out actions. Visits may be made to a facility to conduct security support actions, administrative inquiries, program reviews, and approvals as deemed appropriate by the cognizant security authority or agency.

### § 148.4 Policy documentation.

Agency heads shall ensure that any policy documents their agency issues setting out facilities security policies and procedures incorporate the policy set out herein, and that such policies are reasonable, effective, efficient, and enable and promote interagency reciprocity.

### § 148.5 Idenfification of the security policy board.

Agencies which authorize, approve, certify, or accredit facilities shall provide to the Security Policy Board Staff a points of contact list to include names and telephone numbers of personnel to be contacted for verification of authorized, approved, certified, or accredited facility status. The Security Policy Board Staff will publish a comprehensive directory of points of contact.

### § 148.6 Agency review.

Agencies will continue to review and assess the potential value added to the process of co-use of facilities by development of electronic data retrieval across government. As this review continues, agencies creating or modifying facilities databases will do so in a manner which facilitates community data

sharing, interest of national defense or foreign policy.

## Subpart B—Guidelines for the Implementation and Oversight of the Policy on Reciprocity of use and Inspections of Facilities

### § 148.10 General.

(a) Redundant, overlapping, and duplicative policies and practices that govern the co-use of facilities for classified purposes have resulted in excessive protection and unnecessary expenditure of funds. Lack of reciprocity has also impeded achievement of national security objectives and adversely affected economic and technological interest.

(b) Interagency reciprocal acceptance of security policies and procedures for approving, accrediting, and maintaining the secure posture of shared facilities will reduce the aggregate costs, promote interoperability of agency security systems, preserve the vitality of the U.S. industrial base, and advance national security objectives.

(c) Agency heads, or their designee, are encouraged to periodically issue written affirmations in support of the policies and procedures prescribed herein and in the Security Policy Board (SPB) policy, entitled ''Reciprocity of Use and Inspections of Facilities.''

(d) The policies and procedures prescribed herein shall be applicable to all agencies. This document does not supersede the authority of the Secretary of Defense under Executive Order 12829 (58 FR 3479, 3 CFR 1993 Comp., p. 570); the Secretary of Energy or the Chairman of the Nuclear Regulatory Commission under the Atomic Energy Act of 1954, as amended; the Secretary of State under the Omnibus Diplomatic Security and Anti-Terrorism Act of 1986; the Secretaries of the military departments and military department installation Commanders under the Internal Security Act of 1950; the Director of Central Intelligence under the National Security Act of 1947, as amended, or Executive Order 12333; the Director of the Information Security Oversight Office under Executive Order 12829 or Executive Order 12958 (60 FR 19825, 3 CFR 1995 Comp., p. 333); or substantially similar authority instruments assigned to any other agency head.

### § 148.11 Policy.

(a) Agency heads, or their designee, shall ensure that security policies and procedures for which they are responsible are reasonable, effective, and efficient, and that those policies and procedures enable and promote interagency reciprocity.

(b) To the extent reasonable and practical, and consistent with US law, Presidential decree, and bilateral and international obligations of the United States, the security requirements, restrictions, and safeguards applicable to industry shall be equivalent to those applicable within the Executive Branch of government.

(c) Once a facility is authorized approved, certified, or accredited, all government organizations desiring to conduct classified programs at the facility at the same security level shall accept the authorization, approval, certification, or accreditation without change, enhancements, or upgrades.

### § 148.12 Definitions.

*Agency*. Any ''executive agency,'' as defined in 5 U.S.C. 105; any ''Military department'' as defined in 5 U.S.C. 102; and any other entity within the Executive Branch that comes into possession of classified information.

*Classified Information*. All information that requires protection under Executive Order 12958, or any of its antecedent orders, and the Atomic Energy Act of 1954, as amended.

*Cognizant Security Agency (CSA)*. Those agencies that have been authorized by Executive Order 12829 to establish an industrial security program for the purpose of safeguarding classified information disclosed or released to industry.

*Cognizant Security Office (CSO)*. The office or offices delegated by the head of a CSA to administer industrial security in a contractor's facility on behalf of the CSA.

*Facility*. An activity of a government agency or cleared contractor authorized by appropriate authority to conduct classified operations or to perform classified work.

*Industry*. Contractors, licensees, grantees, and certificate holders obligated by contract or other written agreement to protect classified information under the National Industrial Security Program.

*National Security*. The national defense and foreign relations of the United States.

*Senior Agency Official*. Those officials, pursuant to Executive Order 12958, designated by the agency head who are assigned the responsibility to direct and administer the agency's information security program.

**§ 148.13 Responsibilities.**

(a) Each Senior Agency Official shall ensure that adequate reciprocity provisions are incorporated within his or her regulatory issuances that prescribe agency safeguards for protecting classified information.

(b) Each Senior Agency Official shall develop, implement, and oversee a program that ensures agency personnel adhere to the policies and procedures prescribed herein and the reciprocity provisions of the National Industrial Security Program Operating Manual (NISPOM).

(c) Each Senior Agency Official must ensure that implementation encourages reporting of instances of non-compliance, without fear of reprisal, and each reported instance is aggressively acted upon.

(d) The Director, Information Security Oversight Office (ISOO), consistent with his assigned responsibilities under Executive Order 12829, serves as the central point of contact within Government to consider and take action on complaints and suggestions from industry concerning alleged violations of the reciprocity provisions of the NISPOM.

(e) The Director, Security Policy Board Staff (D/SPBS) or his/her designee, shall serve as the central point of contact within Government to receive from Federal Government employees alleged violations of the reciprocity provisions prescribed herein and the policy ''Reciprocity of Use and Inspections of Facilities'' of the SPB.

**§ 148.14 Procedures.**

(a) Agencies that authorize, approve, certify, or accredit facilities shall provide to the SPB Staff a points of contact list to include names and telephone numbers of personnel to be contacted for verification of the status of facilities. The SPB Staff will publish a comprehensive directory of agency points of contact.

(b) After initial security authorization, approval, certification, or accreditation, subsequent reviews shall normally be conducted no more frequently than annually. Additionally, such reviews shall be aperiodic or random, and be based upon risk-management principles. Security Reviews may be conducted ''for cause'', to follow up on previous findings, or to accomplish closeout actions.

(c) The procedures employed to maximize interagency reciprocity shall be based primarily upon existing organizational reporting channels. These channels should be used to address alleged departures from established reciprocity requirements and should resolve all, including the most egregious instances of non-compliance.

(d) Two complementary mechanisms are hereby established to augment existing organizational channels: (1) An accessible and responsive venue for reporting and resolving complaints/reported instances of non-compliance. Government and industry reporting channels shall be as follows:

(1) *Governnment*. (A) Agency employees are encouraged to bring suspected departures from applicable reciprocity requirements to the attention of the appropriate security authority in accordance with established agency procedures.

(B) Should the matter remain unresolved, the complainant (employee, Security Officer, Special Security Officer, or similar official) is encouraged to report the matter formally to the Senior Agency Official for resolution.

(C) Should the Senior Agency Official response be determined inadequate by the complainant, the matter should be reported formally to the Director, Security Policy Board Staff (D/SPBS).

The D/SPBS, may revisit the matter with the Senior Agency Official or refer the matter to the Security Policy Forum as deemed appropriate.

(D) Should the matter remain unresolved, the Security Policy Forum may consider referral to the SPB, the agency head, or the National Security Council as deemed appropriate.

(ii) *Industry*. (A) Contractor employees are encouraged to bring suspected departures from the reciprocity provisions of the NISPOM to the attention to their Facility Security Officer (FSO) or Contractor Special Security Officer (CSSO), as appropriate, for resolution.

(B) Should the matter remain unresolved, the complainant (employee, FSO, or CSSO) is encouraged to report the matter formally to the Cognizant Security Office (CSO) for resolution.

(C) Should the CSO responses be determined inadequate by the complainant, the matter should be reported formally to the Senior Agency Official within the Cognizant Security Agency (CSA) for resolution.

(D) Should the Senior Agency Official response be determined inadequately by the complainant, the matter should be reported formally to the Director, information Security Oversight Office (ISOO) for resolution.

(E) The Director, ISOO, may revisit the matter with the Senior Agency Official or refer the matter to the agency head or the National Security Council as deemed appropriate.

(2) An annual survey administered to a representative sampling of agency and private sector facilities to assess overall effectiveness of agency adherence to applicable reciprocity requirements.

(i) In coordination with the D/SPBS, the Director, ISOO, as Chairman of the NISP Policy Advisory Committee (NISPPAC), shall develop and administer an annual survey to a representative number of cleared contractor activities/employees to assess the effectiveness of interagency reciprocity implementation. Administration of the survey shall be coordinated fully with each affected Senior Agency Official.

(ii) In coordination with the NISPPAC, the D/SPBS shall develop and administer an annual survey to a representative number of agency activities/personnel to assess the effectiveness of interagency reciprocity implementation. Administration of the survey shall be coordinated fully with each affected Senior Agency Official.

(iii) The goal of annual surveys should not be punitive but educational. All agencies and departments have participated in the crafting of these facilities policies, therefore, non-compliance is a matter of internal education and direction.

(e) Agencies will continue to review and assess the potential value added to the process of co-use of facilities by development of electronic data retrieval across government.

# PART 149—POLICY ON TECHNICAL SURVEILLANCE COUNTERMEASURES

Sec.
149.1 Policy.
149.2 Responsibilities.
149.3 Definitions.

AUTHORITY: E.O. 12968 (60 FR 40245, 3 CFR 1995 Comp., p. 391.)

SOURCE: 63 FR 4583, Jan. 30, 1998, unless otherwise noted.

## § 149.1 Policy.

(a) Heads of federal departments and agencies which process, discuss, and/or store classified national security information, restricted data, and sensitive but unclassified information, shall, in response to specific threat data and based on risk management principles, determine the need for Technical Surveillance Countermeasures (TSCM).

To obtain maximum effectiveness by the most economical means in the various TSCM programs, departments and agencies shall exchange technical information freely; coordinate programs; practice reciprocity; and participate in consolidated programs, when appropriate.

## § 149.2 Responsibilities.

(a) Heads of U.S. Government departments and agencies which plan, implement, and manage TSCM programs shall:

(1) Provide TSCM support consisting of procedures and countermeasures determined to be appropriate for the facility, consistent with risk management principles.

(2) Report to the Security Policy Board, attention: Chair, Facilities Protection Committee (FPC), for appropriate dissemination, all-source intelligence that concerns technical surveillance threats, devices, techniques, and unreported hazards, regardless of the source or target, domestic or foreign.

(3) Train a professional cadre of personnel in TSCM techniques.

(4) Ensure that the FPC and Training and Professional Development Committee are kept apprised of their TSCM program activities as well as training and research and development requirements.

(5) Assist other departments and agencies, in accordance with federal law, with TSCM services of common concern.

(6) Coordinate, through the FPC, proposed foreign disclosure of TSCM equipment and techniques.

(b) The FPC shall advise and assist the Security Policy Board in the development and review of TSCM policy, including guidelines, procedures, and instructions. The FPC shall:

(1) Coordinate TSCM professional training, research, development, test, and evaluation programs.

(2) Promote and foster joint procurement of TSCM equipment.

(3) Evaluate the impact on the national security of foreign disclosure of TSCM equipment or techniques and recommend policy changes as needed.

(4) Develop guidance for use in obtaining intelligence information on the plans, capabilities and actions of organizations hostile to the U.S. Government concerning technical penetrations and countermeasures against them.

(5) Biennially, review, update and disseminate the national strategy for TSCM.

**§ 149.3 Definitions.**

*Classified National Security Information (CNSI)*. Information that has been determined pursuant to Executive Order 12958 (60 FR 19825, 3 CFR 1995 Comp., p. 333) or any predecessor order to require protection against unauthorized disclosure and is marked to indicate its classified status when in documentary form.

*Restricted Data (RD)*. All data concerning design, manufacture or utilization of atomic weapons; the production of special nuclear material; or the use of special nuclear material in the production of energy, but shall not include data declassified or removed from the RD category pursuant to section 102 of the Atomic Energy Act of 1954, as amended.

*Sensitive but Unclassified*. Any information, the loss, misuse, or unauthorized access to or modification of which could adversely affect the national interest or the conduct of federal programs, or the privacy to which individuals are entitled under 5 U.S.C. 552a, but which has not been specifically authorized under criteria established by an Executive Order or an Act of Congress to be kept secret in the interest of national defense or foreign policy.

*Technical Surveillance Countermeasures (TSCM)*. Techniques and measures to detect and nullify a wide variety of technologies that are used to obtain unauthorized access to classified national security information, restricted data, and/or sensitive but unclassified information.

# SUBCHAPTER E—REGULATIONS PERTAINING TO MILITARY JUSTICE

## PART 150—COURTS OF CRIMINAL APPEALS RULES OF PRACTICE AND PROCEDURE


Sec.
150.1 Name and seal.
150.2 Jurisdiction.
150.3 Scope of review.
150.4 Quorum.
150.5 Place for filing papers.
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APPENDIX A TO PART 150—FORMAT FOR DIRECTION FOR REVIEW IN A COURT OF CRIMINAL APPEALS

APPENDIX B TO PART 150—FORMAT FOR ASSIGNMENT OF ERRORS AND BRIEF ON BEHALF OF ACCUSED (§ 150.15)


AUTHORITY: Article 66(f), Uniform Code of Military Justice (10 U.S.C. § 866(f) (1994)).

SOURCE: 62 FR 2017, Jan. 15, 1997, unless otherwise noted.

### § 150.1 Name and seal.

(a) The titles of the Courts of Criminal Appeals of the respective services are:

(1) ''United States Army Court of Criminal Appeals.''

(2) ''United States Navy-Marine Corps Court of Criminal Appeals.''

(3) ''United States Air Force Court of Criminal Appeals.''

(4) ''United States Coast Guard Court of Criminal Appeals.''

(b) Each Court is authorized a seal in the discretion of the Judge Advocate General concerned. The design of such seal shall include the title of the Court.

### § 150.2 Jurisdiction.

(a) The jurisdiction of the Court is as follows:

(1) *Review under Article 66.* All cases of trial by court-martial in which the sentence as approved extends to:

(i) Death; or

(ii) Dismissal of a commissioned officer, cadet or midshipman, dishonorable or bad-conduct discharge, or confinement for 1 year or longer; and in which the accused has not waived or withdrawn appellate review.

(2) *Review upon direction of the Judge Advocate General under Article 69.* All cases of trial by court-martial in which there has been a finding of guilty and a sentence:

(i) For which Article 66 does not otherwise provide appellate review, and

(ii) Which the Judge Advocate General forwards to the Court for review pursuant to Article 69(d), and

(iii) In which the accused has not waived or withdrawn appellate review.

(3) *Review under Article 62.* All cases of trial by court-martial in which a punitive discharge may be adjudged and a military judge presides, and in which the government appeals an order or ruling of the military judge that terminates the proceedings with respect to a charge or specification or excludes evidence that is substantial proof of a fact material to the proceedings, or directs the disclosure of classified information, imposes sanctions for nondisclosure of classified information, or refuses to issue or enforce a protective order sought by the United States to prevent the disclosure of classified information.

(4) *Review under Article 73.* All petitions for a new trial in cases of trial by court-martial which are referred to the Court by the Judge Advocate General.

(b) *Extraordinary writs.* The Court may, in its discretion, entertain petitions for extraordinary relief including, but not limited to, writs of mandamus, writs of prohibition, writs of habeas corpus, and writs of error coram nobis.

(c) *Effect of rules on jurisdiction.* Nothing in this part shall be construed to extend or limit the jurisdiction of the Courts of Criminal Appeals as established by law.

**§ 150.3 Scope of review.**

In cases referred to it for review pursuant to Article 66, the Court may act only with respect to the findings and sentence as approved by the convening authority. In reviewing a case or action under Article 69(d) or in determining an appeal under Article 62, the Court may act only with respect to matters of law. The Court may, in addition, review such other matters and take such other action as it determines to be proper under substantive law.e

**§ 150.4 Quorum.**

(a) *In panel.* When sitting in panel, a majority of the judges assigned to that panel constitutes a quorum for the purpose of hearing or determining any matter referred to the panel. The determination of any matter referred to the panel shall be according to the opinion of a majority of the judges participating in the decision. However, any judge present for duty may issue all necessary orders concerning any proceedings pending on panel and any judge present for duty, or a clerk of court or commissioner to whom the Court has delegated authority, may act on uncontested motions, provided such action does not finally dispose of a petition, appeal, or case before the Court.

(b) *En banc.* When sitting as a whole, a majority of the judges of the Court constitutes a quorum for the purpose of hearing and determining any matter before the Court. The determination of any matter before the Court shall be according to the opinion of a majority of the judge participating in the decision. In the absence of a quorum, any judge present for duty may issue all necessary orders concerning any proceedings pending in the Court preparatory to hearing or decision thereof.

**§ 150.5 Place for filing papers.**

When the filing of a notice of appearance, brief, or other paper in the office of a Judge Advocate General is required by this part, such papers shall be filed in the office of the Judge Advocate General of the appropriate armed force or in such other place as the Judge Advocate General or rule promulgated pursuant to § 150.26 may designate. If transmitted by mail or other means, they are not filed until received in such office.

**§ 150.6 Signing of papers.**

All formal papers shall be signed and shall show, typewritten or printed, the signer's name, address, military grade (if any), and the capacity in which the paper is signed. Such signature constitutes a certification that the statements made therein are true and correct to the best of the knowledge, information, and belief of the persons signing the paper and that the paper is filed in good faith and not for purposes of unnecessary delay.

**§ 150.7 Computation of time.**

In computing any period of time prescribed or allowed by this part, by order of the Court, or by any applicable statute, the day of the act, event or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or legal holiday, or, when the act to be done is the filing of a paper in court, a day on which the office of the Clerk of the Court is closed due to weather or other conditions or by order of the Chief Judge, in which event the period runs until the end of the next day which is neither a Saturday, Sunday, nor a holiday.

**§ 150.8 Qualification of counsel.**

(a) *All counsel.* Counsel in any case before the Court shall be a member in good standing of the bar of a Federal Court, the highest court of a State or another recognized bar.

(b) *Military counsel.* Assigned appellate defense and appellate government counsel shall, in addition, be qualified in accordance with Articles 27(b)(1) and

70(a), Uniform Code of Military Justice.

(c) *Admission*. Each Court may license counsel to appear before it. Otherwise, upon entering an appearance, counsel shall be deemed admitted pro hac vice, subject to filing a certificate setting forth required qualifications if directed by the Court.

(d) *Suspension*. No counsel may appear in any proceeding before the Court while suspended from practice by the Judge Advocate General of the service concerned.

**§ 150.9 Conduct of counsel.**

The conduct of counsel appearing before the Court shall be in accordance with rules of conduct prescribed pursuant to Rule for Courts-Martial 109 by the Judge Advocate General of the service concerned. However, the Court may exercise its inherent power to regulate counsel appearing before it, including the power to remove counsel from a particular case for misconduct in relation to that case. Conduct deemed by the Court to warrant consideration of suspension from practice or other professional discipline shall be reported by the Court to the Judge Advocate General concerned.

**§ 150.10 Request for appellate defense counsel.**

An accused may be represented before the Court by appellate counsel detailed pursuant to Article 70(a) or by civilian counsel provided by the accused, or both. An accused who does not waive appellate review pursuant to Rule for Courts-Martial 1110 shall, within 10 days after service of a copy of the convening authority's action under Rule for Courts-Martial 1107(h), forward to the convening authority or the Judge Advocate General:

(a) A request for representation by military appellate defense counsel, or

(b) Notice that civilian counsel has been retained or that action has been taken to retain civilian counsel (must include name and address of civilian counsel), or

(c) Both a request for representation by military appellate defense counsel under paragraph (a) for this section and notice regarding civilian counsel under paragraph (b) of this section, or

(d) A waiver of representation by counsel.

**§ 150.11 Assignment of counsel.**

(a) When a record of trial is referred to the court—

(1) If the accused has requested representation by appellate defense counsel, pursuant to Article 70(c)(1), counsel detailed pursuant to Article 70(a) will be assigned to represented the accused; or

(2) If the accused gives notice that he or she has retained or has taken action to retain civilian counsel, appellate defense counsel shall be assigned to represent the interests of the accused pending appearance of civilian counsel. Assigned defense counsel will continue to assist after appearance by civilian counsel unless excused by the accused; or

(3) If the accused has neither requested appellate counsel nor given notice of action to retain civilian counsel, but has not waived representation by counsel, appellate defense counsel will be assigned to represent the accused, subject to excusal by the accused or by direction of the Court.

(b) In any case—

(1) The Court may request counsel when counsel have not been assigned.

(2) Pursuant to Article 70(c)(2), and subject to paragraph (a)(2) of this section, appellate defense counsel will represent the accused when the United States is represented by counsel before the Court.

**§ 150.12 Retention of civilian counsel.**

When civilian counsel represents an accused before the Court, the Court will notify counsel when the record of trial is received. If both civilian and assigned appellate defense counsel represent the accused, the Court will regard civilian counsel as primary counsel unless notified otherwise. Ordinarily, civilian counsel will use the accused's copy of the record. Civilian counsel may reproduce, at no expense to the government, appellate defense counsel's copy of the record.

### § 150.13 Notice of appearance of counsel.

Military and civilian appellate counsel shall file a written notice of appearance with the Court. The filing of any pleading relative to a case which contains the signature of counsel constitutes notice of appearance of such counsel.

### § 150.14 Waiver or withdrawal of appellate review.

Withdrawals from appellate review, and waivers of appellate review filed after expiration of the period prescribed by the Rule for Courts-Martial 1110(f)(1), will be referred to the Court for consideration. At its discretion, the Court may require the filing of a motion for withdrawal, issue a show cause order, or grant the withdrawal without further action, as may be appropriate. The Court will return the record of trial, in a case withdrawn from appellate review, to the Judge Advocate General for action pursuant to Rule for Courts-Martial 1112.

### § 150.15 Assignments of error and briefs.

(a) *General provisions.* Appellate counsel for the accused may file an assignment of error if any are to be alleged, setting forth separately each error asserted. The assignment of errors should be included in a brief for the accused in the format set forth in Appendix B to this part. An original of all assignments of error and briefs, and as many additional copies as shall be prescribed by the Court, shall be submitted. Briefs and assignments of errors shall be typed or printed, double-spaced on white paper, and securely fastened at the top. All references to matters contained in the record shall show record page numbers and any exhibit designations. A brief on behalf of the government shall be of like character as that prescribed for the accused.

(b) *Time for filing and number of briefs.* Any brief for an accused shall be filed within 60 days after appellate counsel has been notified of the receipt of the record in the Office of the Judge Advocate General. If the Judge Advocate General has directed appellate government counsel to represent the United States, such counsel shall file an answer on behalf of the government within 30 days after any brief and assignment of errors has been filed on behalf of an accused. Appellate counsel for an accused may file a reply brief no later than 7 days after the filing of a response brief on behalf of the government. If no brief is filed on behalf of an accused, a brief on behalf of the government may be filed within 30 days after expiration of the time allowed for the filing of a brief on behalf of the accused.

(c) *Appendix.* The brief of either party may include an appendix. If an unpublished opinion is cited in the brief, a copy shall be attached in an appendix. The appendix may also include extracts of statutes, rules, or regulations. A motion must be filed under § 150.23, *infra,* to attach any other matter.

### § 150.16 Oral arguments.

Oral arguments may be heard in the discretion of the Court upon motion by either party or when otherwise ordered by the Court. The motion of a party for oral argument shall be made no later than 7 days after the filing of an answer to an appellant's brief. Such motion shall identify the issue(s) upon which counsel seek argument. The Court may, on its own motion, identify the issue(s) upon which it wishes argument.

### § 150.17 En banc proceedings.

(a)(1) A party may suggest the appropriateness of consideration or reconsideration by the Court as a whole. Such consideration or reconsideration ordinarily will not be ordered except:

(i) When consideration by the full Court is necessary to secure or maintain uniformity of decision, or

(ii) When the proceedings involve a question of exceptional importance, or

(iii) When a sentence being reviewed pursuant to Article 66 extends to death.

(2) In cases being reviewed pursuant to Article 66, a party's suggestion that a matter be considered initially by the Court as a whole must be filed with the Court within 7 days after the government files its answer to the assignment of errors, or the appellant files a reply under § 150.15(b). In other proceedings, the suggestion must be filed with the party's initial petition or other initial

pleading, or within 7 days after the response thereto is filed. A suggestion for reconsideration by the Court as a whole must be made within the time prescribed by § 150.19 for filing a motion for reconsideration. No response to a suggestion for consideration or reconsideration by the Court as a whole may be filed unless the Court shall so order.

(b) The suggestion of a party for consideration or reconsideration by the Court as a whole shall be transmitted to each judge of the Court who is present for duty, but a vote need not be taken to determine whether the cause shall be considered or reconsidered by the Court as a whole on such a suggestion made by a party unless a judge requests a vote.

(c) A majority of the judges present for duty may order that any appeal or other proceeding be considered or reconsidered by the Court sitting as a whole. However, en banc reconsideration of an en banc decision will not be held unless at least one member of the original majority concurs in a vote for reconsideration.

(d) This rule does not affect the power of the Court *sua sponte* to consider or reconsider any case sitting as a whole.

### § 150.18 Orders and decisions of the Court.

The Court shall give notice of its orders and decisions by immediately serving them, when rendered, on appellate defense counsel, including civilian counsel, if any, government counsel and the Judge Advocate General, or designee, as appropriate.

### § 150.19 Reconsideration.

(a) The Court may, in its discretion and on its own motion, enter an order announcing its intent to reconsider its decision or order in any case not later than 30 days after service of such decision or order on appellate defense counsel or on the appellant, if the appellant is not represented by counsel, provided a petition for grant of review or certificate for review has not been filed with the United States Court of Appeals for the Armed Forces, or a record of trial for review under Article 67(b) has not been received by that Court. No briefs or arguments shall be received unless the order so directs.

(b) Provided a petition for grant of review or certificate for review has not been filed with the United States Court of Appeals for the Armed Forces, or a record of trial for review under Article 67(b) or writ appeal has not been received by the United States Court of Appeals for the Armed Forces, the Court may, in its discretion, reconsider its decision or order in any case upon motion filed either:

(1) By appellate defense counsel within 30 days after receipt by counsel, or by the appellant if the appellant is not represented by counsel, of a decision or order, or

(2) By appellate government counsel within 30 days after the decision or order is received by counsel.

(c) A motion for reconsideration shall briefly and directly state the grounds for reconsideration, including a statement of facts showing jurisdiction in the Court. A reply to the motion for reconsideration will be received by the Court only if filed within 7 days of receipt of a copy of the motion. Oral arguments shall not be heard on a motion for reconsideration unless ordered by the Court. The original of the motion filed with the Court shall indicate the date of receipt of a copy of the same by opposing counsel.

(d) The time limitations prescribed by this part shall not be extended under the authority of §§ 150.24 or 150.25 beyond the expiration of the time for filing a petition for review or writ appeal with the United States Court of Appeals for the Armed Forces, except that the time for filing briefs by either party may be extended for good cause.

### § 150.20 Petitions for extraordinary relief, answer, and reply.

(a) *Petition for extraordinary relief.* A petition for extraordinary relief in the number of copies required by the Court shall be accompanied by proof of service on each party respondent and will contain:

(1) A previous history of the case including whether prior actions have been filed or are pending for the same relief in this or any other court and the disposition or status of such actions;

(2) A concise and objective statement of all facts relevant to the issue presented and of any pertinent opinion, order or ruling;

(3) A copy of any pertinent parts of the record and all exhibits related to the petition if reasonably available and transmittable at or near the time the petition is filed;

(4) A statement of the issue;

(5) The specific relief sought;

(6) Reasons for granting the writ;

(7) The jurisdictional basis for relief sought and the reasons why the relief sought cannot be obtained during the ordinary course of appellate review;

(8) If desired, a request for appointment of appellate counsel.

(b) *Format*. The title of the petition shall include the name, military grade and service number of each named party and, where appropriate, the official military or civilian title of any named party acting in an official capacity as an officer or agent of the United States. When an accused has not been named as a party, the accused shall be identified by name, military grade and service number by the petitioner and shall be designated as the real party in interest.

(c) *Electronic petitions*. The Court will docket petitions for extraordinary relief submitted by electronic means. A petition submitted by electronic means will conclude with the full name and address of petitioner's counsel, if any, and will state when the written petition and brief, when required, were forwarded to the Court and to all named respondents, and by what means they were forwarded.

(d) *Notice to the Judge Advocate General*. Immediately upon receipt of any petition, the clerk shall forward a copy of the petition to the appropriate Judge Advocate General or designee.

(e) *Briefs*. Each petition for extraordinary relief must be accompanied by a brief in support of the petition unless it is filed in propria persona. The Court may issue a show cause order in which event the respondent shall file an answer within 10 days of the receipt of the show cause order. The petitioner may file a reply to the answer within 7 days of receipt of the answer.

(f) *Initial action by the Court*. The Court may dismiss or deny the petition, order the respondent to show cause and file an answer within the time specified, or take whatever other action it deems appropriate.

(g) *Oral argument and final action*. The Court may set the matter for oral argument. However, on the basis of the pleading alone, the Court may grant or deny the relief sought or make such other order in the case as the circumstances may require. This includes referring the matter to a special master, who need not be a military judge, to further investigate; to take evidence; and to make such recommendations as the Court deems appropriate.

### § 150.21 Appeals by the United States.

(a) *Restricted filing*. Only a representative of the government designated by the Judge Advocate General of the respective service may file an appeal by the United States under Article 62.

(b) *Counsel*. Counsel must be qualified and appointed, and give notice of appearance in accordance with this part and those of the Judge Advocate General concerned.

(c) *Form of appeal*. The appeal must include those documents specified by Rule for Courts-Martial 908 and by applicable regulations of the Secretary concerned. A certificate of the Notice of Appeal described in Rule for Courts-Martial 908(b)(3) must be included. The certificate of service must reflect the date and time of the military judge's ruling or order from which the appeal is taken, and the time and date of service upon the military judge.

(d) *Time for filing*. All procedural Rules of the Court shall apply except as noted in this paragraph:

(1) The representative of the government designated by the Judge Advocate General shall decide whether to file the appeal with the Court. The trial counsel shall have 20 days from the date written notice to appeal is filed with the trial court to forward the appeal, including an original and two copies of the record of trial, to the representative of the government designated by the Judge Advocate General. The person designated by the Judge Advocate General shall promptly file the original record with the Clerk of the Court and forward one copy to

opposing counsel. Appellate government counsel shall have 20 days (or more upon a showing of good cause made by motion for enlargement within the 20 days) from the date the record is filed with the Court to file the appeal with supporting brief with the Court. Should the government decide to withdraw the appeal after the record is received by the Court, appellate government counsel shall notify the Court in writing. Appellate brief(s) shall be prepared in the manner prescribed by § 150.15.

(2) Appellee shall prepare an answer in the manner prescribed by § 150.15 and shall file such answer within 20 days after any filing of the government brief.

(e) The government shall diligently prosecute all appeals by the United States and the Court will give such appeals priority over all other proceedings where practicable.

**§ 150.22 Petitions for new trial.**

(a) Whether submitted to the Judge Advocate General by the accused in propria persona or by counsel for the accused, a petition for new trial submitted while the accused's case is undergoing review by a Court of Criminal Appeals shall be filed with an original and two copies and shall comply with the requirements of Rule for Courts-Martial 1210(c).

(b) Upon receipt of a petition for new trial submitted by other than appellate defense counsel, the Court will notify all counsel of record of such fact.

(c) A brief in support of a petition for new trial, unless expressly incorporated in or filed with the petition, will be filed substantially in the format specified by § 150.15 no later than 30 days after the filing of the petition or receipt of the notice required by paragraph (b) of this section, whichever is later. An appellate's answer shall be filed no later than 30 days after the filing of an appellant's brief. A reply may be filed no later than 10 days after the filing of the appellee's answer.

**§ 150.23 Motions.**

(a) *Content.* All motions, unless made during the course of a hearing, shall state with particularity the relief sought and the grounds therefor. Motions, pleading, and other papers desired to be filed with the Court may be combined in the same document, with the heading indicating, for example ''MOTION TO FILE (SUPPLEMENTAL ASSIGNMENT OF ERRORS) (CERTIFICATE OF CORRECTION) (SUPPLEMENTAL PLEADING)''; or ''ASSIGNMENT OF ERRORS AND MOTION TO FILE ATTACHED REPORT OF MEDICAL BOARD''.

(b) *Motions to attach documents.* If a party desires to attach a statement of a person to the record for consideration by the Court on any matter, such statement shall be made either as an affidavit or as an unsworn declaration under penalty of perjury pursuant to 28 U.S.C. 1746. All documents containing language other than English shall have, attached, a certified English translation.

(c) *Opposition.* Any opposition to a motion shall be filed within 7 days after receipt by the opposing party of service of the motion.

(d) *Leave to file.* Any pleading not authorized or required by this part, shall be accompanied by a motion for leave to file such pleading.

(e) *Oral argument.* Oral argument shall not normally be permitted on motions.

**§ 150.24 Continuances and interlocutory matters.**

Except as otherwise provided in § 150.19(d), the Court, in its discretion, may extend any time limits prescribed and may dispose of any interlocutory or other appropriate matter not specifically covered by this part, in such manner as may appear to be required for a full, fair, and expeditious consideration of the case. See § 150.4.

**§ 150.25 Suspension of rules.**

For good cause shown, the Court acting as a whole or in panel may suspend the requirements or provisions of any of this part in a particular case on petition of a party or on its own motion and may order proceedings in accordance with its direction.

**§ 150.26 Internal rules.**

The Chief Judge of the Court has the authority to prescribe internal rules for the Court.

### § 150.27 Recording, photographing, broadcasting, or telecasting of hearings.

The recording, photographing, broadcasting, or televising of any session of the Court or other activity relating thereto is prohibited unless specifically authorized by the Court.

### § 150.28 Amendments.

Proposed amendments to this part may be submitted to the Chief Judge of any Court named in § 150.1 or to a Judge Advocate General. Before acting on any proposed amendments not received from the Chief Judges, the Judge Advocates General shall refer them to the Chief Judges of the Courts for comment. The Chief Judges shall confer on any proposed changes, and shall report to the Judge Advocates General as to the suitability of proposed changes and their impact on the operation of the Courts and on appellate justice.

## APPENDIX A TO PART 150—FORMAT FOR DIRECTION FOR REVIEW IN A COURT OF CRIMINAL APPEALS

In the United States _____[1] Court of Criminal Appeals

United States v. _____
(Fulltyped name, rank, service, & service number of accused)
Direction for Review Case No. _____

Tried at (location), on (date(s)) before a (type in court-martial) appointed by (convening authority)

To the Honorable, the Judges of the United States _____ Court of Criminal Appeals

1. Pursuant to Article 69 of the Uniform Code of Military Justice, 10 U.S.C. § 869 (1994) and the Rules of Practice and Procedure for Courts of Criminal Appeals, Rule 2(b), the record of trial in the above-entitled case is forwarded for review.

2. The accused was found guilty by a (type of court-martial) of a violation of Article(s) _____ of the Uniform Code of Military Justice, and was sentenced to (include entire adjudged sentence) on (insert trial date). The convening authority (approved the sentence as adjudged) (approved the following findings and sentence: _____). The officer exercising general court-martial jurisdiction (where applicable) took the following action: _____. The case was received for review pursuant to Article 69 on (date).

3. In review, pursuant to Uniform Code of Military Justice, Article 66, it is requested that action be taken with respect to the following issues:

[set out issues here]

_____
The Judge Advocate General

Received a copy of the foregoing Direction for Review this _____ (date).

_____
Appellate Government Counsel

_____
Address and telephone number

_____
Appellate Defense Counsel

_____
Address and telephone number

## APPENDIX B TO PART 150—FORMAT FOR ASSIGNMENT OF ERRORS AND BRIEF ON BEHALF OF ACCUSED (§ 150.15)

In the United States _____[2] Court of Criminal Appeals

United States v. _____
(Full typed name, rank, service, & service number of accused), Appellant
Assignment of Errors and Brief on Behalf of Accused Case No. _____

Tried at (location), on (date(s)) before a (type of court-martial) appointed by (convening authority)

To the Honorable, the Judges of the United States _____ Court of Criminal Appeals

Statement of the Case

[Set forth a concise summary of the chronology of the case, including the general nature of the charges, the pleas of the accused, the findings and sentence at trial, the action by the convening authority, and any other pertinent information regarding the proceedings.]

Statement of Facts

[Set forth those facts necessary to a disposition of the assigned errors, including specific page references and exhibit numbers. Answers may adopt appellant's or petitioner's statement of facts if there is no dispute, may state additional facts, or, if there is a dispute, may restate the facts as they appear from appellee's or respondent's viewpoint. The repetition of uncontroverted matters is not desired.]

[1] Use "Army," "Navy-Marine Corps," "Air Force," or "Coast Guard," as applicable.

[2] Use "Army," "Navy-Marine Corps," "Air Force," or "Coast Guard," as applicable.

Errors and Argument

[Set forth each error alleged in upper case letters, followed by separate arguments for each error. Arguments shall discuss briefly the question presented, citing and quoting such authorities as are deemed pertinent. Each argument shall include a statement of the applicable standard of review, and shall be followed by a specific prayer for the relief requested.]

Appendix

[The brief of either party may include an appendix containing copies of unpublished opinions cited in the brief, and extracts of statutes, rules or regulations pertinent to the assigned errors.]

_____
(Signature of counsel)

_____
Name (and rank) of counsel, address and telephone number

Certificate of Filing and Service

I certify that a copy of the foregoing was mailed or delivered to the Court and opposing counsel on (date).

_____
Name (rank) (and signature)

_____
Address and telephone number

_____ (Date)

# PART 151—STATUS OF FORCES POLICIES AND INFORMATION

Sec.
151.1 Reissuance and purpose.
151.2 Applicability.
151.3 Policy.
151.4 Procedures and responsibilities.
151.5 Reports on the exercise of foreign criminal jurisdiction.
151.6 Resolution of ratification, with reservations, as agreed to by the Senate on July 15, 1953.
151.7 Fair trial guarantees.

AUTHORITY: 1 U.S.C. 133, 75 Stat. 517.

SOURCE: 45 FR 20465, Mar. 28, 1980, unless otherwise noted.

## § 151.1 Reissuance and purpose.

This part is reissued to update established DoD policy and procedures on trial by foreign courts and treatment in foreign prisons of U.S. military personnel, nationals of the U.S. serving with, employed by, or accompaning the Armed Forces of the United States, and the dependents of both (hereafter referred to as U.S. personnel); and provides uniform reporting on the exercise of foreign criminal jurisdiction.

## § 151.2 Applicability.

The provisions of this part apply to the Office of the Secretary of Defense, the Military Departments, and the Unified and Specified Commands. As used herein, the term ''Military Services'' refers to the Army, Navy, Air Force, and Marine Corps.

## § 151.3 Policy.

It is the policy of the Department of Defense to protect, to the maximum extent possible, the rights of U.S. personnel who may be subject to criminal trial by foreign courts and imprisonment in foreign prisons.

## § 151.4 Procedures and responsibilities.

(a) *Application of Senate resolution on status of forces.* This directive implements the Senate Resolution accompanying the Senate's consent to ratification of the North Atlantic Treaty (NATO) Status of Forces Agreement (§ 151.6). Although the Senate Resolution applies only to countries where the NATO Status of Forces Agreement is in effect, the same procedures for safeguarding the interests of U.S. personnel subject to foreign jurisdiction shall be applied insofar as practicable in overseas areas where U.S. forces are regularly stationed.

(b) *Orientation of personnel.* The Military Services shall issue uniform regulations establishing an information and education policy on the laws and customs of the host country for personnel assigned to foreign areas.

(c) *Designated commanding officer.* Formal invocation of the Senate Resolution procedure shall be the responsibility of a single military commander in each foreign country where United States forces are stationed. Attache personnel and other military personnel serving under a chief of a diplomatic mission shall not be considered U.S. forces in this part.

(1) In the geographical areas for which a unified command exists, the commander shall designate within each country the ''Commanding Officer'' referred to in the Senate Resolution (§ 151.6).

(2) In areas where a unified command does not exist, a commanding officer in each country shall be nominated by the Military Departments. These recommendations shall be forwarded by the Judge Advocate General of the Army to the Secretary of Defense, for implementation through the Office of the Assistant Secretary of Defense (International Security Affairs). In designating the commanding officer to act for all the Military Departments, consideration must be given to the availability of legal officers and readiness of access to the seat of the foreign government. Such an officer may also be appointed by the Military Departments for countries where no U.S. forces are regularly stationed.

(d) *Country law studies.* (1) For each foreign country where U.S. forces are subject to the criminal jurisdiction of foreign authorities, the designated commanding officer for such country shall make and maintain a current study of the laws and legal procedures in effect. Studies of the laws of other countries shall be made when directed. This study shall be a general examination of the substantive and procedural criminal law of the foreign country, and shall contain a comparison thereof with the procedural safeguards of a fair trial in the State courts of the United States.

(2) Copies of these studies shall be forwarded by the designated commanding officer to each of the Judge Advocates General of the Military Services. Principal emphasis is to be placed on those safeguards that are of such a fundamental nature as to be guaranteed by the Constitution of the United States in all criminal trials in State courts of the United States. See § 151.7 for enumeration of safeguards considered important. These country law studies shall be subject to a continuing review. Whenever there is a significant change in any country's criminal law, the change shall be forwarded by the designated commanding officer to each of the Military Service's Judge Advocates General.

(e) *Waivers of local jurisdiction—military personnel.* (1) In cases where it appears probable that release of jurisdiction over U.S. military personnel will not be obtained and the accused may not obtain a fair trial, the commander exercising general court-martial jurisdiction over the accused shall communicate directly with the designated commanding officer, report the full facts of the case, and supply a recommendation.

(2) The designated commanding officer shall determine, in the light of legal procedures in effect in that country, whether there is danger that the accused will not receive a fair trial. A trial shall not be considered unfair merely because it is not identical with trials held in the United States. Due regard, however, should be given to those United States trial rights listed in § 151.7 that are relevant to the facts and circumstances of the trial in question.

(3) If the designated commanding officer determines there is risk of an unfair trial, the commanding officer shall decide, after consultation with the chief of the diplomatic mission, whether to press a request for waiver of jurisdiction through diplomatic channels. If the commanding officer so decides, the recommendation shall be submitted through the unified commander, if any, and The Judge Advocate General of the accused's service, to the Office of the Secretary of Defense. The objective in each case is to see that U.S. military personnel obtain a fair trial in the receiving state under all circumstances.

(f) *Request to foreign authorities not to exercise their criminal jurisdiction over civilians and dependents.* The following procedures shall be followed when it appears that foreign authorities may assume criminal jurisdiction over dependents of U.S. military personnel, civilian personnel, and their dependents:

(1) When the designated commanding officer determines, after a careful consideration of all the circumstances, that suitable corrective action can be taken under existing administrative regulations, the commanding officer may request the local foreign authorities to refrain from exercising their criminal jurisdiction.

(2) When it appears possible that release of jurisdiction will not be obtained and that the accused may not obtain a fair trial, the commander exercising general court-martial jurisdiction over the command in which such

personnel are located shall communicate directly with the designated commanding officer, reporting the full facts of the case and supplying a recommendation.

(3) The designated commanding officer shall then determine, in the light of legal procedures in effect in that country, whether there is danger that the accused will not receive a fair trial.

(4) If it is determined that there is such danger, the designated commanding officer shall decide, after consultation with the chief of the diplomatic mission, whether a request should be submitted through diplomatic channels to foreign authorities seeking their assurances of a fair trial for the accused or, in appropriate circumstances, that they forego their right to exercise jurisdiction over the accused. If the designated commanding officer so decides, a recommendation shall be submitted through the unified commander, if any, and The Judge Advocate General of the Military Service concerned, to the Office of the Secretary of Defense.

(g) *Trial observers and trial observer report.* (1) The designated commanding officer shall submit to the chief of the diplomatic mission a list of persons qualified to serve as U.S. observers at trials before courts of the receiving state. Nominees shall be lawyers, and shall be selected for maturity of judgment. The list shall include, where possible, representatives of all Military Services whose personnel are stationed in that country to enable the chief of the diplomatic mission to appoint an observer from the same Military Service as the accused. The requirement that nominees shall be lawyers may be waived in cases of minor offenses. Incidents that result in serious personal injury or that would normally result in sentences to confinement, whether or not suspended, shall not be considered minor offenses.

(2) Trial observers shall attend and prepare formal reports in all cases of trials of U.S. personnel by foreign courts or tribunals, except for minor offenses. In cases of minor offenses, the observer shall attend the trial at the discretion of the designated commanding officer, but shall not be required to make a formal report. These reports need not be classified, but shall be treated as For Official Use Only documents. They shall be forwarded intact to the designated commanding officer through such agencies as the designated commanding officer may prescribe for transmission to the Judge Advocate General of the accused's service, with any comments of the appropriate Military Service commander. These reports shall be forwarded immediately upon the completion of the trial in the lower court, and shall not be delayed because of the possibility of a new trial, rehearing or appeal, reports of which shall be forwarded in the same manner. Copies shall also be forwarded to the unified commander, if any, and to the chief of the diplomatic mission.

(3) The trial observer report shall contain a factual description or summary of the trial proceedings. It should enable an informed judgment to be made regarding: (i) Whether there was any failure to comply with the procedural safeguards secured by a pertinent status of forces agreement, and (ii) whether the accused received a fair trial under all the circumstances. The report shall specify the conclusions of the trial observer with respect to paragraph (g)(3)(i) of this section, and shall state in detail the basis for the conclusions. Unless the designated commanding officer directs otherwise, the report shall not contain conclusions with respect to paragraph (g)(3)(ii) of this section.

(4) The designated commanding officer, upon receipt of a trial observer report, shall be responsible for determining: (i) Whether there was any failure to comply with the procedural safeguards secured by the pertinent status of forces agreement, and (ii) whether the accused received a fair trial under all the circumstances. Due regard should be given to those fair trial rights listed in § 151.7 that are relevant to the particular facts and circumstances of the trial. However, a trial shall not be found unfair merely because it is not identical with trials held in the United States. If the designated commanding officer is of the opinion that the procedural safeguards specified in pertinent agreements were denied or that the trial was otherwise

unjust, the commanding officer shall submit to the Office of the Secretary of Defense, through the unified commander and the Judge Advocate General of the Military Service concerned, a recommendation as to appropriate action to rectify the trial deficiencies and otherwise to protect the rights or interests of the accused. This shall include a statement of efforts taken or to be taken at the local level to protect the right of the accused. An information copy of the recommendation of the designated commanding officer shall be forwarded to the diplomatic or consular mission in the country concerned.

(h) *Counsel fees and related assistance.* When the Secretary of the Military Department concerned or designee considers such action to be in the best interests of the United States, representation by civilian counsel and other assistance described under 10 U.S.C. 1037 may be furnished at Government expense to U.S. personnel tried in foreign countries.

(i) *Treatment of U.S. personnel confined in foreign penal institutions.* (1) Insofar as practicable and subject to the laws and regulations of the country concerned and the provisions of any agreement therewith, the Department of Defense seeks to ensure that U.S. military personnel: (i) When in the custody of foreign authorities are fairly treated at all times and (ii) when confined (pretrial and post-trial) in foreign penal institutions are accorded the treatment and are entitled to all the rights, privileges, and protections of personnel confined in U.S. military facilities. Such rights, privileges, and protections are enunciated in present Military Service directives and regulations, and include, but are not limited to, legal assistance, visitation, medical attention, food, bedding, clothing, and other health and comfort supplies.

(2) In consonance with this policy, U.S. military personnel confined in foreign penal institutions shall be visited at least every 30 days, at which time the conditions of confinement and other matters relating to their health and welfare shall be observed. The Military Services shall maintain, on a current basis, records of these visits as reports by their respective commands. Records of each visit should contain the following information:

(i) Names of personnel conducting visit and date of visit.

(ii) Name of each prisoner visited, serial number, and sentence.

(iii) Name and location of prison.

(iv) Treatment of the individual prisoner by prison warden and other personnel (include a short description of the rehabilitation program, if any, as applied to the prisoner).

(v) Conditions existing in the prison, such as light, heat, sanitation, food, recreation, and religious activities.

(vi) Change in status of prisoner, conditions of confinement or transfer to another institution.

(vii) Condition of prisoner, physical and mental.

(viii) Assistance given to prisoner, such as legal, medical, food, bedding, clothing, and health and comfort supplies.

(ix) Action taken to have any deficiencies corrected, either by the local commander or through diplomatic or consular mission.

(x) Designation of command responsible for prisoner's welfare and reporting of visits.

(xi) Information as to discharge of a prisoner from the Military Service or termination of confinement.

(3) When it is impracticable for the individual's commanding officer or representative to make visits, the designated commanding officer should be requested to arrange that another unit be responsible for such visits or to request that the appropriate diplomatic or consular mission assume responsibility therefor. When necessary, a medical officer should participate in the visits and record the results of medical examinations. If reasonable requests for permission to visit U.S. military personnel are arbitrarily denied, or it is ascertained that the individual is being mistreated or that the conditions of custody or confinement are substandard, the case should be referred to the diplomatic or consular mission concerned for appropriate action.

(4) To the extent possible, military commanders should seek to conclude local arrangements whereby U.S. military authorities may be permitted to

accord U.S. military personnel confined in foreign institutions the treatment, rights, privileges, and protection similar to those accorded such personnel confined in U.S. military facilities. The details of such arrangements should be submitted to the Judge Advocates General of the Military Services.

(5) The military commanders shall make appropriate arrangements with foreign authorities whereby custody of individuals who are members of the Armed Forces of the United States shall, when they are released from confinement by foreign authorities, be turned over to U.S. military authorities. In appropriate cases, diplomatic or consular officers should be requested to keep the military authorities advised as to the anticipated date of the release of such persons by the foreign authorities.

(6) In cooperation with the appropriate diplomatic or consular mission, military commanders shall, insofar as possible, ensure that dependents of U.S. military personnel, nationals of the United States serving with, employed by or accompanying the armed forces, and dependents of such nationals when in the custody of foreign authorities, or when confined (pretrial and post-trial) in foreign penal institutions receive the same treatment, rights, and support as would be extended to U.S. military personnel in comparable situations pursuant to the provisions of § 151.4(i).

(j) *Discharge*. U.S. military personnel confined in foreign prisons shall not be discharged from military service until the completion of the term of imprisonment and the return of the accused to the United States, except that in unusual cases such discharges may be accomplished upon prior authorization of the Secretary of the Military Department concerned.

(k) *Information policy*. It is the basic policy of the Department of Defense that the general public and the Congress must be provided promptly with the maximum information concerning status of forces matters that are consistent with the national interest. Information shall be coordinated and furnished to the public and the Congress in accordance with established procedures, including DoD Directive 5122.5,[1] ''Assistant Secretary of Defense (Public Affairs),'' July 10, 1961, and parts 286 and 286a of this title.

### § 151.5 Reports on the exercise of foreign criminal jurisdiction.

The following reporting system, which has been implemented by the Military Departments, shall be continued after revision in accordance with the provisions herein. The Department of the Army is designated as executive agent within the Department of Defense for maintaining and collating information received on the basis of the reports submitted.

(a) *Annual reports*. Annual reports, based on information furnished by the Military Departments covering the period December 1 through November 30 shall be prepared by the Department of the Army and submitted within such time as may be required but not later than 120 days after the close of the reporting period. The reports shall be submitted in one reproducible copy to the Office of the General Counsel, DoD, in accordance with departmental implementation of this part. The reporting content of this requirement shall be as follows:

(1) A statistical summary (DD Form 838) by country and type of offense of all cases involving U.S. personnel.

(2) A report signed by the appropriate Military Service commander in each country for which DD Form 838 is prepared, concerning the commander's personal evaluation of the impact, if any, the local jurisdictional arrangements have had upon accomplishment of the mission and upon the discipline and morale of the forces, together with specific facts or other information, where appropriate, substantiating the commanders' opinion.

(3) A report of the results of visits made and particular actions taken by appropriate military commanders under § 151.4(i).

(4) A report of the implementation of 10 U.S.C. 1037 showing by country and Military Service:

[1] Copies may be obtained, if needed, from the U.S. Naval Publications and Forms Center, 5801 Tabor Avenue, Philadelphia, PA 19120, Attention: Code 301.

(i) The total number of cases in which funds were expended and

(ii) Total expenditures in each of the following categories:

(A) Payment of counsel fees,

(B) Provision of bail,

(C) Court costs and other expenses.

(b) *Quarterly reports.* (1) Quarterly reports for the periods ending November 30, February 28, May 31, and August 31, consisting of lists of U.S. personnel imprisoned and released, shall be submitted, in accordance with departmental implementation of this part to the Department of the Army and by the Department of the Army, as executive agent, to the Director, Washington Headquarters Services, in four copies, on or before the 15th day following the report quarter as follows:

(i) An alphabetical list of U.S. personnel who were imprisoned during the reporting period under sentence of confinement imposed by a foreign country, indicating the individual's home address, grade, and serial number (where applicable), offense of which found guilty, date and place of confinement, length of sentence to confinement imposed, and estimated date of release from confinement.

(ii) A similar list of the names of prisoners released during the reporting period.

(2) An information copy of these lists shall be furnished by the appropriate Military Service commander to the diplomatic or consular mission in the country concerned.

(c) *Other reports.* (1) Each Military Department shall maintain, on a current basis, and submit monthly to the Director, Washington Headquarters Service, in four copies, a list of the most important cases pending, with a brief summary of the salient facts in each case. Selection of the cases to be included shall be left to the judgment of the appropriate officials of each Military Department. Instances of deficiency in the treatment or conditions of confinement in foreign penal institutions or arbitrary denial of permission to visit such personnel shall be considered important cases. Lists covering the previous month shall be submitted on the 6th day of the month following.

(2) Important new cases or important developments in pending cases shall be reported informally and immediately to the Office of the General Counsel, DoD.

### § 151.6 Resolution of ratification, with reservations, as agreed to by the Senate on July 15, 1953.

Resolved (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of Executive T, Eighty-second Congress, second session, an agreement between the parties to the North Atlantic Treaty Regarding the Status of their Forces, signed at London on June 19, 1951. It is the understanding of the Senate, which understanding inheres in its advise and consent to the ratification of the Agreement, that nothing in the Agreement diminishes, abridges, or alters the right of the United States of America to safeguard its own security by excluding or removing persons whose presence in the United States is deemed prejudicial to its safety or security, and that no person whose presence in the United States is deemed prejudicial to its safety or security shall be permitted to enter or remain in the United States. In giving its advise and consent to ratification, it is the sense of the Senate that:

(a) The criminal jurisdiction provisions of Article VII do not constitute a precedent for future agreements;

(b) Where a person subject to the military jurisdiction of the United States is to be tried by the authorities of a receiving state, under the treaty the Commanding Officer of the armed forces of the United States in such state shall examine the laws of such state with particular reference to the procedural safeguards contained in the Constitution of the United States;

(c) If, in the opinion of such Commanding Officer, under all the circumstances of the case, there is danger that the accused will not be protected becase of the absence or denial of constitutional rights the accused would enjoy in the United States, the Commanding Officer shall request the authorities of the receiving State to waive jurisdiction in accordance with the provisions of paragraph 3(c) of Article VII (which requires the receiving

State to give ''sympathetic consideration'' to such request) and if such authorities refuse to waive jurisdiction, the commanding officer shall request the Department of State to press such request through diplomatic channels and notification shall be given by the Executive Branch to the Armed Services Committees of the Senate and House of Representatives;

(d) A representative of the United States to be appointed by the Chief of Diplomatic Mission with the advice of the senior U.S. military representative in the receiving State will attend the trial of any such person by the authorities of a receiving State under the agreement, and any failure to comply with the provisions of paragraph 9 of Article VII of the Agreement shall be reported to the commanding officer of the Armed Forces of the United States in such State who shall then request the Department of State to take appropriate action to protect the rights of the accused, and notification shall be given by the Executive Branch to the Armed Services Committees of the Senate and House of Representatives.

### § 151.7 Fair trial guarantees.

The following is a listing of ''fair trial'' safeguards or guarantees that are considered to be applicable to U.S. State court criminal proceedings, by virtue of the 14th Amendment as interpreted by the Supreme Court of the United States. The list is intended as a guide for the preparation of country law studies prescribed by § 151.4 and for the determinations made by the designated commanding officer under § 151.4(e) through § 151.4(g). Designated commanding officers should also consider other factors that could result in a violation of due process of law in State court proceedings in the United States.

(a) Criminal statute alleged to be violated must set forth specific and definite standards of guilt.

(b) Accused shall not be prosecuted under an *ex post facto* law.

(c) Accused shall not be punished by bills of attainder.

(d) Accused must be informed of the nature and cause of the accusation and have a reasonable time to prepare a defense.

(e) Accused is entitled to have the assistance of defense counsel.

(f) Accused is entitled to be present at the trial.

(g) Accused is entitled to be confronted with hostile witnesses.

(h) Accused is entitled to have compulsory process for obtaining favorable witnesses.

(i) Use of evidence against the accused obtained through unreasonable search or seizure or other illegal means is prohibited.

(j) Burden of proof is on the Government in all criminal trials.

(k) Accused is entitled to be tried by an impartial court.

(l) Accused may not be compelled to be a witness against him or herself; and shall be protected from the use of a confession obtained by torture, threats, violence, or the exertion of any improper influence.

(m) Accused shall not be subjected to cruel and unusual punishment.

(n) Accused is entitled to be tried without unreasonable (prejudicial) delay.

(o) Accused is entitled to a competent interpreter when the accused does not understand the language in which the trial is conducted and does not have counsel proficient in the language both of the court and of the accused.

(p) Accused is entitled to a public trial.

(q) Accused may not be subjected to consecutive trials for the same offense that are so vexatious as to indicate fundamental unfairness.

## PART 152—REVIEW OF THE MANUAL FOR COURTS-MARTIAL

Sec.
152.1 Purpose.
152.2 Applicability.
152.3 Policy.
152.4 Responsibilities.
152.5 Implementation.
APPENDIX A TO PART 152—GUIDANCE TO THE JOINT SERVICE COMMITTEE (JSC)

AUTHORITY: E.O. 12473; 10 U.S.C. 47.

SOURCE: 68 FR 36916, June 20, 2003, unless otherwise noted.

### § 152.1 Purpose.

This part:

(a) Implements the requirement established by the President in Executive Order 12473 that the Manual for Courts-Martial (MCM), United States, 1984, and subsequent editions, be reviewed annually.

(b) Formalizes the Joint Service Committee (JSC) and defines the roles, responsibilities, and procedures of the JSC in reviewing and proposing changes to the MCM and proposing legislation to amend the Uniform Code of Military Justice (UCMJ) (10 U.S.C., Chapter 47).

(c) Provides for the designation of a Secretary of a Military Department to serve as the Executive Agent for the JSC.

### § 152.2 Applicability.

This part applies to the Office of the Secretary of Defense, the Military Departments (including the Coast Guard by agreement with the Department of Homeland Security when it is not operating as a Service of the Department of the Navy), the Chairman of the Joint Chiefs of Staff, the Combatant Commands, the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities in the Department of Defense (hereafter collectively referred to as ''the DoD Components'').

### § 152.3 Policy.

To assist the President in fulfilling his responsibilities under the UCMJ, and to satisfy the requirements of Executive Order 12473, the Department of Defense shall review the Manual for Courts-Martial annually, and, as appropriate, propose legislation amending the UCMJ to ensure that the MCM and the UCMJ fulfill their fundamental purpose as a comprehensive body of military criminal law and procedure. The role of the JSC furthers these responsibilities. Under the direction of the General Counsel of the Department of Defense, the JSC is responsible for reviewing the MCM and proposing amendments to it and, as necessary, to the UCMJ.

### § 152.4 Responsibilities.

(a) The General Counsel to the Department of Defense shall:

(1) Administer this part, to include coordination on and approval of legislative proposals to amend the UCMJ, approval of the annual review of the MEM, and coordination of any proposed changes to the MCM under OMB Circular A–19.[1]

(2) Designate the Secretary of a Military Department to serve as the joint Service provider for the JSC. The joint Service provider shall act on behalf of the JSC for maintaining the JSC's files and historical records, and for publication of the updated editions of the MCM to be distributed throughout the Department of Defense, as appropriate.

(3) Invite the Secretary of Homeland Security to appoint representatives to the JSC.

(4) Invite the Chief Judge of the United States Court of Appeals for the Armed Forces to provide a staff member to serve as an advisor to the JSC.

(5) Invite the Chairman of the Joint Chiefs of Staff to provide a staff member from the Chairman's Office of Legal Counsel to serve as an advisor to the JSC.

(6) Ensure that the Associate Deputy General Counsel (Military Justice and Personnel Policy), Office of the General Counsel, Department of Defense, shall serve as the General Counsel's representative to the JSC in a non-voting capacity. In addition, the United States Court of Appeals for the Armed Forces (USCAAF) and the Legal Counsel to the Chairman of the Joint Chiefs of Staff shall be invited to provide a staff member to serve as an advisor to the JSC in a non-voting capacity.

(b) The Secretaries of the Military Departments shall ensure that the Judge Advocates General of the Military Departments and the Staff Judge Advocate to the Commandant of the Marine Corps appoint representatives to the JSC.

(c) The JSC shall further the DoD policy established in section 3 of this part and perform additional studies or other duties related to the administration of military justice, as the General Counsel of the Department of Defense may direct. (See DoD Directive 5105.18,

[1] Available at *http://www.whitehouse.gov/omb/circulars/index.html*.

''DoD Committee Management Program''.[2]) The membership of the JSC shall consist of one representative of each of the following, who shall comprise the JSC Voting Group:

(1) The Judge Advocate General of the Army.

(2) The Judge Advocate General of the Navy.

(3) The Judge Advocate General of the Air Force.

(4) The Staff Judge Advocate to the Commandant of the Marine Corps; and

(5) By agreement with the Department of Homeland Security, the Chief Counsel, United States Coast Guard.

(d) The JSC Working Group (WG) shall assist the JSC Voting Group in fulfilling its responsibilities under this part. The WG consists of non-voting representatives from each of the Services and may include the representatives from the USCAAF, and the Office of the Legal Counsel to the Chairman of the Joint Chiefs of Staff.

(e) The JSC chairmanship rotates biennially among the Services in the following order: The Army, the Air Force, the Marine Corps, the Navy, and the Coast Guard. Due to its size and manning constraints, a Coast Guard's request not to be considered for JSC chairmanship shall be honored. The Military Service of the JSC Chairman shall provide an Executive Secretary for the JSC.

### § 152.5 Implementation.

The foregoing policies and procedures providing guidelines for implementation of this part, as well as those contained in the appendix, are intended exclusively for the guidance of military personnel and civilian employees of the Department of Defense, and the United States Coast Guard by agreement of the Department of Homeland Security. These guidelines are intended to improve the internal management of the Federal Government and are not intended to create any right, privilege, or benefit, substantive of procedural, to any person or enforceable at law by any party against the United States, its agencies, its officers, or any person.

[2] Available at *http://www.dtic.mil/whs/directives*.

## APPENDIX A TO PART 152—GUIDANCE TO THE JOINT SERVICE COMMITTEE (JSCA)

(a) *Review the Manual for Courts-Martial.* (1) The Joint Service Committee (JSC) shall conduct an annual review of the Manual for Courts-Martial (MCM), in light of judicial and legislative developments in military and civilian practice, to ensure:

(i) The MCM implements the Uniform Code of Military Justice (UCMJ) and reflects current military practice and judicial precedent.

(ii) The rules and procedures of the MCM are uniform insofar as practicable.

(iii) The MCM applies, to the extent practicable, the principles of law and the rules of evidence generally recognized in the trial of criminal cases in United States district courts, but which are not contrary to or inconsistent with the UCMJ.

(iv) The MCM is workable throughout the worldwide jurisdiction of the UCMJ; and,

(v) The MCM is workable across the spectrum of circumstances in which courts-martial are conducted, including combat conditions.

(2) During this review, any JSC voting member may propose for the Voting Group's consideration an amendment to the MCM. Proposed amendments to the MCM shall ordinarily be referred to the JSC Working Group (WG) for study. The WG assists the JSC in staffing various proposals, conducting studies of proposals and other military justice related topics at the JSC's direction, and making reports to the JSC. Any proposed amendment to the MCM, if approved by a majority of the JSC voting members, becomes a part of the annual review.

(3) The JSC shall prepare a draft of the annual review of the MCM and forward it to the General Counsel of the Department of Defense, on or about December 31st. The General Counsel of the Department of Defense may submit the draft of the annual review to the Code Committee established by Article 146 of the UCMJ, with an invitation to submit comments.

(4) The draft of the annual review shall set forth any specific recommendations for changes to the MCM, including, if not adequately addressed in the accompanying discussion or analysis, a concise statement of the basis and purpose of any proposed change. If no changes are recommended, the draft review shall so state. If the JSC recommends changes to the MCM, the draft review shall so state. If the JSC recommends changes to the MCM, the public notice procedures of paragraph (d)(3) of this appendix are applicable.

(b) *Changes to the Manual for Courts-Martial.* (1) By January 1st of each year, the JSC voting members shall ensure that a solicitation for proposed changes to the MCM is sent

to appropriate agencies within their respective Services that includes, but is not limited to, the judiciary, the trial counsel and defense counsel organizations, and the judge advocate general schools.

(2) The FEDERAL REGISTER announcement of each year's annual review of proposed changes to the MCM shall also invite members of the public to submit any new proposals for JSC consideration during subsequent JSC annual reviews.

(3) When the JSC receives proposed changes to the MCM either by solicitation or FEDERAL REGISTER notice, the JSC shall determine whether the proposal should be considered under paragraph (a)(2) of this appendix by determining if one or more of the JSC voting member(s) intends to sponsor the proposed change. The JSC shall determine when such sponsored proposals should be considered under the annual review process, taking into account any other proposals under consideration and any other reviews or studies directed by the General Counsel of the Department of Defense.

(4) Changes to the MCM shall be proposed as part of the annual review conducted under paragraph (a) of this appendix. When earlier implementation is required, the JSC may send proposed changes to the General Counsel of the Department of Defense, for coordination under DoD Directive 5500.1.[3]

(c) *Proposals to Amend the Uniform Code of Military Justice.* The JSC may determine that the efficient administration of military justice within the Armed Services requires amendments to the UCMJ, or that a desired amendment to the MCM makes necessary an amendment to the UCMJ. In such cases, the JSC shall forward to the General Counsel of the Department of Defense, a legislative proposal to change the UCMJ. The General Counsel of the Department of Defense may direct that the JSC forward any such legislative proposal to the Code Committee for its consideration under Article 146, UCMJ.

(d) *Public Notice and Meeting.* (1) Proposals to amend the UCMJ are not governed by the procedures set out in this paragraph. (See DoD Directive 5105. 18. This paragraph applies only to the JSC recommendations to amend the MCM.)

(2) It is DoD policy to encourage public participation in the JSC's review of the MCM. Notice that the Department of Defense, through the JSC, intends to propose changes to the MCM normally shall be published in the FEDERAL REGISTER before submission of such changes to the President. This notice is not required when the Secretary of Defense in his sole and unreviewable discretion proposes that the President issue the change without such notice on the basis that public notice procedures, as set forth in this part, are unnecessary or contrary to the sound administration of military justice, or a MCM change corresponding to legislation is expeditiously required to keep the MCM current and consistent with changes in applicable law.

(3) The Office of General Counsel of the Department of Defense shall facilitate publishing the FEDERAL REGISTER notice required under this paragraph.

(4) The notice under this paragraph shall consist of the publication of the full text of the proposed changes, including discussion and analysis, unless the General Counsel of the Department of Defense determines that such publication in full would unduly burden the FEDERAL REGISTER, the time and place where a copy of the proposed change may be examined, and the procedure for obtaining access to or a copy of the proposed change.

(5) A period of not fewer than 60 days after publication of notice normally shall be allowed for public comment, but a shorter period may be authorized when the General Counsel of the Department of Defense determines that a 60-day period is unnecessary or is contrary to the sound administration of military justice. The FEDERAL REGISTER notice shall normally indicate that public comments shall be submitted to the Executive Secretary of the JSC.

(6) The JSC shall provide notice in the FEDERAL REGISTER and hold a public meeting during the public comments period, where interested persons shall be given a reasonable opportunity to submit views on any of the proposed changes contained in the annual review. Public proposals and comments to the JSC should include a reference to the specific provision to be changed, a rational for the proposed change, and specific and detailed proposed language to replace the current language. Incomplete submissions might be insufficient to receive the consideration desired. The JSC shall seek to consider all views presented at the public meeting as well as any written comments submitted during the 60-day period when determining the final form of any proposed amendments to the MCM.

(E) *Internal Rules and Record-Keeping.* (1) In furthering DoD policy, studying issues, or performing other duties relating to the administration of military justice, the JSC may establish internal rules governing its operation.

(2) The JSC shall create a file system and maintain appropriate JSC records.

[3] Available at *http://www.dtic.mil/whs/directives.*

# PART 153—CRIMINAL JURISDICTION OVER CIVILIANS EMPLOYED BY OR ACCOMPANYING THE ARMED FORCES OUTSIDE THE UNITED STATES, CERTAIN SERVICE MEMBERS, AND FORMER SERVICE MEMBERS

Sec.
153.1 Purpose.
153.2 Applicability and scope.
153.3 Definitions.
153.4 Responsibilities.
153.5 Procedures.

APPENDIX A TO PART 153—GUIDELINES
APPENDIX B TO PART 153—ACKNOWLEDGEMENT OF LIMITED LEGAL REPRESENTATION (SAMPLE)

AUTHORITY: 10 U.S.C. 301.

SOURCE: 71 FR 8947, Feb. 22, 2006, unless otherwise noted.

## § 153.1 Purpose.

This part:

(a) Implements policies and procedures, and assigns responsibilities under the Military Extraterritorial Jurisdiction Act of 2000, as amended by section 1088 of the ''Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005,'' October 28, 2004 (hereinafter referred to as ''the Act'') for exercising extraterritorial criminal jurisdiction over certain military personnel, former service members of the United States Armed Forces, and over civilians employed by or accompanying the Armed Forces outside the United States (U.S.).

(b) Implements section 3266 of the Act.

## § 153.2 Applicability and scope.

(a) This part applies to the Office of the Secretary of Defense, the Military Departments (including the Coast Guard by agreement with the Department of Homeland Security when it is not operating as a Service of the Department of the Navy), the Chairman of the Joint Chiefs of Staff, the Combatant Commands, 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''). The term ''Military Services,'' as used herein, refers to the Army, the Navy, the Air Force, and the Marine Corps.

(b) *Coast Guard*. The Coast Guard ordinarily operates as a separate branch of the Armed Forces in the Department of Homeland Security (DHS). However, upon Presidential Directive, the Coast Guard operates as a Service within the Department of the Navy and becomes part of the Department of Defense. By agreement with the Secretary of the Department of Homeland Security, when the Coast Guard is operating as a separate Service within the DHS, this part shall apply to the Coast Guard to the extent permitted by the Act. Whether a provision of this Instruction applies to a Coast Guard case is determined by whether the Coast Guard is operating as a Service in the DHS or as a Service within the Department of the Navy.

(c) While some Federal criminal statutes are expressly or implicitly extraterritorial, many acts described therein are criminal only if they are committed within ''the special maritime and territorial jurisdiction of the United States'' or if they affect interstate or foreign commerce. Therefore, in most instances, Federal criminal jurisdiction ends at the nation's borders. State criminal jurisdiction, likewise, normally ends at the boundaries of each State. Because of these limitations, acts committed by military personnel, former service members, and civilians employed by or accompanying the Armed Forces in foreign countries, which would be crimes if committed in the U.S., often do not violate either Federal or State criminal law. Similarly, civilians are generally not subject to prosecution under the Uniform Code of Military Justice (UCMJ), unless Congress had declared a ''time of war'' when the acts were committed. As a result, these acts are crimes, and therefore criminally punishable, only under the law of the foreign country in which they occurred. See section 2 of Report Accompanying the Act (Report to Accompany H.R. 3380, House of Representatives Report 106–778, July 20, 2000 hereafter referred to as ''the Report Accompanying the Act''). While the U.S. could impose administrative discipline for such actions, the Act and

this part are intended to address the jurisdictional gap with respect to criminal sanctions.

(d) Nothing in this part may be construed to deprive a court-martial, military commission, provost court, or other military tribunal of concurrent jurisdiction with respect to offenders or offenses that by statute or the law of war may be tried by court-martial, military commission, provost court, or other military tribunal (Section 3261(c) of title 18). In some cases, conduct that violates section 3261(a) of the Act may also violate the UCMJ, or the law of war generally. Therefore, for military personnel, military authorities would have concurrent jurisdiction with a U.S. District Court to try the offense. The Act was not intended to divest the military of jurisdiction and recognizes the predominant interest of the military in disciplining its service members, while still allowing for the prosecution of members of the Armed Forces with non-military co-defendants in a U.S. District Court under section 3261(d) of the Act.

(e) This part, including its enclosures, is intended exclusively for the guidance of military personnel and civilian employees of the Department of Defense, and of the United States Coast Guard by agreement with the Department of Homeland Security. Nothing contained herein creates or extends any right, privilege, or benefit to any person or entity. See *United States* v. *Caceres*, 440 U.S. 741 (1979).

### § 153.3 Definitions.

*Accompanying the Armed Forces Outside the United States*. As defined in section 3267 of the Act, the dependent of:

(1) A member of the Armed Forces; or

(2) A civilian employee of the Department of Defense (including a non-appropriated fund instrumentality of the Department); or

(3) A DoD contractor (including a subcontractor at any tier); or

(4) An employee of a DoD contractor (including a subcontractor at any tier); and

(5) Residing with such member, civilian employee, contractor, or contractor employee outside the United States; and

(6) Not a national of or ordinarily resident in the host nation.

*Active Duty*. Full-time duty in the active military service of the United States. It includes full-time training duty, annual training duty, and attendance, while in the active military service, at a school designated as a service school by law or by the Secretary of the Military Department concerned. See section 101(d)(1) of title 10, United States Code.

*Armed Forces*. The Army, the Navy, the Air Force, the Marine Corps, and the Coast Guard. See section 101(a)(4) of title 10, United States Code.

*Arrest*. To be taken into physical custody by law enforcement officials.

*Charged*. As used in the Act and this part, this term is defined as an indictment or the filing of information against a person under the Federal Rules of Criminal Procedure. See the analysis to Section 3264 of the Report Accompanying the Act.

*Civilian Component*. A person or persons employed by the Armed Forces outside the United States, as defined in this section and section 3267(a)(1), as amended, of the Act. A term used in Status of Forces Agreements.

*Dependent*. A person for whom a member of the Armed Forces, civilian employee, contractor (or subcontractor at any tier) has legal responsibility while that person is residing outside the United States with or accompanying that member of the Armed Forces, civilian employee, contractor (or subcontractor at any tier), and while that responsible person is so assigned, employed or obligated to perform a contractual obligation to the Department of Defense. For purposes of this part, a person's ''command sponsorship'' status while outside the United States is not to be considered in determining whether the person is a dependent within the meaning of this part, except that there shall be a rebuttable presumption that a command-sponsored individual is a dependent.

*Designated Commanding Officer (DCO)*. A single military commander in each foreign country where U.S. Forces are stationed and as contemplated by DoD Directive 5525.1, Status of Forces Policy and Information.

*Detention*. To be taken into custody by law enforcement officials and placed under physical restraint.

*District*. A District Court of the United States.

*Employed by the Armed Forces Outside the United States*. Any person employed as:

(1) A civilian employee of the Department of Defense (including a non-appropriated fund instrumentality of the Department); or

(2) A civilian employee of any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas; or

(3) A contractor (including a subcontractor at any tier) of the Department of Defense (including a non-appropriated fund instrumentality of the Department of Defense); or

(4) A contractor (including a subcontractor at any tier) of any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas; or

(5) An employee of a contractor (including a subcontractor at any tier) of the Department of Defense (including a non-appropriated fund instrumentality of the Department of Defense); or

(6) An employee of a contractor (including a subcontractor at any tier) of any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas; and, when the person:

(i) Is present or resides outside the United States in connection with such employment; and

(ii) Is not a national of or ordinarily resident in the host nation.

*Federal Magistrate Judge*. As used in the Act and this part, this term includes both Judges of the United States and U.S. Magistrate Judges, titles that, in general, should be given their respective meanings found in the Federal Rules of Criminal Procedure. (See footnote 32 of the Report Accompanying the Act) The term does not include Military Magistrates or Military Judges, as prescribed by the UCMJ, or regulations of the Military Departments or the Department of Defense.

*Felony Offense*. Conduct that is an offense punishable by imprisonment for more than one year if the conduct had been engaged in the special maritime and territorial jurisdiction of the United States. See sections 3261 of the Act and 18 U.S.C. 7. Although the Act, uses the conditional phrase ''if committed within the special maritime and territorial jurisdiction of the United States,'' acts that would be a Federal crime regardless of where they are committed in the U.S., such as drug crimes contained in chapter 13 of title 21, United States Code, also fall within the scope of section 3261(a) of the Act. See the analysis to section 3261 of the Report Accompanying the Act.

*Host Country National*. A person who is not a citizen of the United States, but who is a citizen of the foreign country in which that person is located.

*Inactive Duty Training*. Duty prescribed for Reservists by the Secretary of the Military Department concerned under section 206 of title 37, United States Code, or any other provision of law; and special additional duties authorized for Reservists by an authority designated by the Secretary of the Military Department concerned and performed by them on a voluntary basis in connection with the prescribed training or maintenance activities of the units to which they are assigned. Inactive Duty Training includes those duties performed by Reservists in their status as members of the National Guard while in Federal service. See section 101(d)(7) of title 10, United States Code.

*Juvenile*. A person who has not attained his or her eighteenth birthday, as defined in section 5031 of title 18, United States Code.

*Military Department*. The Department of the Army, the Department of the Navy, and the Department of the Air Force. See section 101(a)(8) of title 10, United States Code.

*National of the United States*. As defined in section 1101(a)(22), of title 8, United States Code.

*Outside the United States*. Those places that are not within the definition of ''United States'' below and, with the exception of subparagraph

7(9), those geographical areas and locations that are not within the special maritime and territorial jurisdiction of the United States, as defined in sections 7 of title 18, United States Code. The locations defined in subparagraph 7(9) of title 18, United States Code are to be considered ''Outside the United States'' for the purposes of this part. See 3261–3267 of title 18, United States Code.

*Qualified Military Counsel*. Judge advocates assigned to or employed by the Military Services and designated by the respective Judge Advocate General, or a designee, to be professionally qualified and trained to perform defense counsel responsibilities under the Act.

*Staff Judge Advocate*. A judge advocate so designated in the Army, the Air Force, the Marine Corps, or the Coast Guard; the principal legal advisor of a command in the Navy who is a judge advocate, regardless of job title. See Rule for Courts-Martial 103(17), Manual for Courts-Martial, United States (2002 Edition).

*Third Country National*. A person whose citizenship is that of a country other than the U.S. and the foreign country in which the person is located.

*United States*. As defined in section 5 of title 18, United States Code, this term, as used in a territorial sense, includes all places and waters, continental or insular, subject to the jurisdiction of the United States, except for the Panama Canal Zone.

**§ 153.4 Responsibilities.**

(a) The *General Counsel of the Department of Defense* shall provide initial coordination and liaison with the Departments of Justice and State, on behalf of the Military Departments, regarding a case for which investigation and/or Federal criminal prosecution under the Act is contemplated. This responsibility may be delegated entirely, or delegated for categories of cases, or delegated for individual cases. The General Counsel, or designee, shall advise the Domestic Security Section of the Criminal Division, Department of Justice (DSS/DOJ), as soon as practicable, when DoD officials intend to recommend that the DOJ consider the prosecution of a person subject to the Act for offenses committed outside the United States. The Assistant Attorney General, Criminal Division, Department of Justice, has designated the Domestic Security Section (DSS/DOJ) as the Section responsible for the Act.

(b) The *Inspector General of the Department of Defense* shall:

(1) Pursuant to Section 4(d) of the Inspector General Act of 1978, as amended (5 U.S.C. App. 3), ''report expeditiously to the Attorney General whenever the Inspector General has reasonable grounds to believe there has been a violation of Federal criminal law.'' This statutory responsibility is generally satisfied once an official/special agent of the Office of the Inspector General of the Department of Defense notifies either the cognizant Department of Justice representative or the Assistant Attorney General (Criminal Division) of the ''reasonable grounds.''

(2) Pursuant to Section 8(c)(5) of the Inspector General Act of 1978, as amended (5 U.S.C. App. 3), and 10 U.S.C. 141(b), ensure the responsibilities described in DoD Directive 5525.7, ''Implementation of the Memorandum of Understanding Between the Department of Justice and the Department of Defense Relating to the Investigation and Prosecution of Certain Crimes,'' January 22, 1985,[1] to ''implement the investigative policies [,m]onitor compliance by DoD criminal investigative organizations [, and p]rovide specific guidance regarding investigative matters, as appropriate'' are satisfied relative to violations of the Military Extraterritorial Jurisdiction Act of 2000.

(c) The *Heads of Military Law Enforcement Organizations and Military Criminal Investigative Organizations, or their Designees*, shall:

(1) Advise the Commander and Staff Judge Advocate (or Legal Advisor) of the Combatant Command concerned, or designees, of an investigation of an alleged violation of the Act. Such notice shall be provided as soon as practicable. In turn, the General Counsel of the Department of Defense, or designee, shall be advised so as to ensure notification of and consultation with

[1] Available from Internet site *http://www.dtic.mil/whs/directives*.

the Departments of Justice and State regarding information about the potential case, including the host nation's position regarding the case. At the discretion of the General Counsel of the Department of Defense, other agencies and organizations (such as the Legal Counsel to the Chairman of the Joint Chiefs of Staff and Secretary of the Military Department that sponsored the person into the foreign country) shall be informed, as appropriate. Effective investigations lead to successful prosecutions and, therefore, these cases warrant close coordination and cooperation between the Departments of Defense, Justice, and State.

(2) Provide briefings to, and coordinate with, appropriate local law enforcement authorities in advance or, if not possible, as soon thereafter as is practicable, of investigations or arrests in specific cases brought under the Act. If not previously provided to local law enforcement authorities, such briefings about the case shall, at a minimum, describe the Host Nation's position regarding the exercise of jurisdiction under the Act that followed from any briefings conducted pursuant to appendix A of this part.

(d) The *Domestic Security Section, Criminal Division, Department of Justice (DSS/DOJ)* has agreed to:

(1) Provide preliminary liaison with the Department of Defense, coordinate initial notifications with other entities of the Department of Justice and Federal law enforcement organizations; make preliminary decisions regarding proper venue; designate the appropriate U.S. Attorney's Office; and coordinate the further assignment of DOJ responsibilities.

(2) Coordinate with the designated U.S. Attorney's office arrangements for a Federal Magistrate Judge to preside over the initial proceedings required by the Act. Although the assignment of a particular Federal Magistrate Judge shall ordinarily be governed by the jurisdiction where a prosecution is likely to occur, such an assignment does not determine the ultimate venue of any prosecution that may be undertaken. Appropriate venue is determined in accordance with the requirements of section 3238 of title 18, United States Code.

(3) Coordinate the assistance to be provided the Department of Defense with the U.S. Attorney's office in the district where venue for the case shall presumptively lie.

(4) Continue to serve as the primary point of contact for DoD personnel regarding all investigations that may lead to criminal prosecutions and all associated pretrial matters, until such time as DSS/DOJ advises that the case has become the responsibility of a specific U.S. Attorney's Office.

(e) The *Commanders of the Combatant Commands* shall:

(1) Assist the DSS/DOJ on specific cases occurring within the Commander's area of responsibility. These responsibilities include providing available information and other support essential to an appropriate and successful prosecution under the Act with the assistance of the Commanders' respective Staff Judge Advocates (or Legal Advisors), or their designees, to the maximum extent allowed and practicable.

(2) Ensure command representatives are made available, as necessary, to participate in briefings of appropriate host nation authorities concerning the operation of this Act and the implementing provisions of this part.

(3) Determine when military necessity in the overseas theater requires a waiver of the limitations on removal in section 3264(a) of the Act and when the person arrested or charged with a violation of the Act shall be moved to the nearest U.S. military installation outside the United States that is adequate to detain the person and facilitate the initial proceedings prescribed in section 3265(a) of the Act and this part. Among the factors to be considered are the nature and scope of military operations in the area, the nature of any hostilities or presence of hostile forces, and the limitations of logistical support, available resources, appropriate personnel, or the communications infrastructure necessary to comply with the requirements of section 3265 of the Act governing initial proceedings.

(4) Annually report to the General Counsel of the Department of Defense, by the last day of February for the immediately preceding calendar year, all cases involving the arrest of persons

for violations of the Act; persons placed in temporary detention for violations of the Act; the number of requests for Federal prosecution under the Act, and the decisions made regarding such requests.

(5) Determine the suitability of the locations and conditions for the temporary detention of juveniles who commit violations of the Act within the Commander's area of responsibility. The conditions of such detention must, at a minimum, meet the following requirements: Juveniles alleged to be delinquent shall not be detained or confined in any institution or facility in which the juvenile has regular contact with adult persons convicted of a crime or awaiting trial on criminal charges; insofar as possible, alleged juvenile delinquents shall be kept separate from adjudicated delinquents; and every juvenile in custody shall be provided adequate food, heat, light, sanitary facilities, bedding, clothing, recreation, and medical care, including necessary psychiatric, psychological, or other care and treatment.

(6) As appropriate, promulgate regulations consistent with and implementing this part. The Combatant Commander's duties and responsibilities pursuant to this part may be delegated.

(f) The *Secretaries of the Military Departments* shall:

(1) Consistent with the provisions of paragraph (c) of this section, make provision for defense counsel representation at initial proceedings conducted outside the United States pursuant to the Act for those persons arrested or charged with violations of section 3261(a) of the Act.

(2) Issue regulations establishing procedures that, to the maximum extent practicable, provide notice to all persons covered by the Act who are not nationals of the United States but who are employed by or accompanying the Armed Forces outside the United States, with the exception of individuals who are nationals of or ordinarily resident in the host nation, that they are potentially subject to the criminal jurisdiction of the United States under the Act. At a minimum, such regulations shall require that employees and persons accompanying the Armed Forces outside the United States, who are not nationals of the United States, be informed of the jurisdiction of the Act at the time that they are hired for overseas employment, or upon sponsorship into the overseas command, whichever event is earlier applicable. Such notice shall also be provided during employee training and any initial briefings required for these persons when they first arrive in the foreign country. For employees and persons accompanying the Armed Forces outside the United States who are not nationals of the United States, but who have already been hired or are present in the overseas command at the time this part becomes effective, such notice shall be provided within 60 days of the effective date of this part.

(3) Ensure orientation training, as described in paragraph (f)(2) of this section, is also provided for all U.S. nationals who are, or who are scheduled to be, employed by or accompanying the Armed Forces outside the United States, including their dependents, and include information that such persons are potentially subject to the criminal jurisdiction of the United States under the Act.

(i) For members of the Armed Forces, civilian employees of the Department of Defense and civilians accompanying the Armed Forces overseas, notice and briefings on the applicability of the Act shall, at a minimum, be provided to them and their dependents when travel orders are issued and, again, upon their arrival at command military installations or place of duty outside the United States.

(ii) For civilian employees, contractors (including subcontractors at any tier), and employees of contractors (including subcontractors at any tier) of any other Federal agency, or any provisional authority, permit such persons to attend the above-referenced briefings on a voluntary basis. In addition, to the maximum extent practicable, make available to representatives of such other Federal agencies or provisional authorities such notice and briefing materials as is provided to civilian employees, contractors, and contractor employees of the Department of Defense overseas.

(4) Failure to provide notice or orientation training pursuant to paragraphs (f)(2) and (f)(3) of this section shall not create any rights or privileges in the persons referenced and shall not operate to defeat the jurisdiction of a court of the United States or provide a defense or other remedy in any proceeding arising under the Act or this part.

(5) Provide training to personnel who are authorized under the Act and designated pursuant to this part to make arrests outside the United States of persons who allegedly committed a violation of section 3261(a) of the Act. The training, at a minimum, shall include the rights of individuals subject to arrest.

**§ 153.5 Procedures.**

(a) *Applicability*—(1) *Offenses and Punishments.* Section 3261(a) of the Act establishes a separate Federal offense under 18 U.S.C. for an act committed outside the United States that would be a felony crime as if such act had been committed within the special maritime and territorial jurisdiction of the United States, as defined in section 7 of 18 U.S.C. Charged as a violation of section 3261(a) of the Act, the elements of the offense and maximum punishment are the same as the crime committed within the geographical limits of section 7 of 18 U.S.C., but without the requirement that the conduct be committed within such geographical limits. See section 1 of the Section-By-Section Analysis and Discussion to section 3261 in the Report Accompanying the Act.

(2) *Persons subject to this part.* This part applies to certain military personnel, former military service members, and persons employed by or accompanying the Armed Forces outside the United States, and their dependents, as those terms are defined in section 153.3 of this part, alleged to have committed an offense under the Act while outside the United States. For purposes of the Act and this part, persons employed by or accompanying the Armed Forces outside the U.S. are subject to the ''military law'' of the U.S., but only to the extent to which this term has been used and its meaning and scope have been understood within the context of a SOFA or any other similar form of international agreement.

(3) *Military Service Members.* Military service members subject to the Act's jurisdiction are:

(i) Only those active duty service members who, by Federal indictment or information, are charged with committing an offense with one or more defendants, at least one of whom is not subject to the UCMJ. See section 3261(d)(2) of the Act.

(ii) Members of a Reserve component with respect to an offense committed while the member was not on active duty or inactive duty for training (in the case of members of the Army National Guard of the United States or the Air National Guard of the United States, only when in Federal service), are not subject to UCMJ jurisdiction for that offense and, as such, are amenable to the Act's jurisdiction without regard to the limitation of section 3261(d)(2) of the Act.

(4) *Former Military Service Members.* Former military service members subject to the Act's jurisdiction are:

(i) Former service members who were subject to the UCMJ at the time the alleged offenses were committed, but are no longer subject to the UCMJ with respect to the offense due to their release or separation from active duty.

(ii) Former service members, having been released or separated from active duty, who thereafter allegedly commit an offense while in another qualifying status, such as while a civilian employed by or accompanying the Armed Forces outside the United States, or while the dependent of either or of a person subject to the UCMJ.

(5) *Civilians Employed by the Armed Forces.* Civilian employees employed by the U.S. Armed Forces outside the United States (as defined in section 153.3), who commit an offense under the Act while present or residing outside the U.S. in connection with such employment, are subject to the Act and the provisions of this part. Such civilian employees include:

(i) Persons employed by the Department of Defense (including a non-appropriated fund instrumentality of the Department of Defense).

(ii) Persons employed as a DoD contractor (including a subcontractor at any tier).

(iii) Employees of a DoD contractor (including a subcontractor at any tier).

(iv) Civilian employees, contractors (including subcontractors at any tier), and civilian employees of a contractor (or subcontractor at any tier) of any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas.

(6) *Civilians Accompanying the Armed Forces*. Subject to the requirements of paragraph (a)(6)(ii) of this section, the following persons are civilians accompanying the Armed Forces outside the United States who are covered by the Act and the provisions of this part:

(i) Dependents of:

(A) An active duty service member.

(B) A member of the reserve component while the member was on active duty or inactive duty for training, but in the case of members of the Army National Guard of the United States or the Air National Guard of the United States, only when in Federal service.

(C) A former service member who is employed by or is accompanying the Armed Forces outside the United States.

(D) A civilian employee of the Department of Defense (including non-appropriated fund instrumentalities of the Department of Defense).

(E) A contractor (including a subcontractor at any tier) of the Department of Defense.

(F) An employee of a contractor (including a subcontractor at any tier) of the Department of Defense.

(ii) In addition to the person being the dependent of a person who is listed in paragraph (a)(6)(i) of this section, jurisdiction under the Act requires that the dependent also:

(A) Reside with one of the persons listed in paragraph (a)(6)(i) of this section.

(B) Allegedly commit the offense while outside the United States; and

(C) Not be a national of, or ordinarily resident in, the host nation where the offense is committed.

(iii) Command sponsorship of the dependent is not required for the Act and this part to apply.

(iv) If the dependent is a juvenile, as defined in section 153.3, who engaged in conduct that is subject to prosecution under section 3261(a) of the Act, then the provisions of chapter 403 of title 18, United States Code would apply to U.S. District Court prosecutions.

(7) *Persons NOT Subject to the Act or the Procedures of this part*. (i) Persons who are the nationals of, or ordinarily resident in, the host nation where the offense is committed, regardless of their employment or dependent status.

(ii) Persons, including citizens of the United States, whose presence outside the United States at the time the offense is committed, is not then as a member of the Armed Forces, a civilian employed by the Armed Forces outside the United States, or accompanying the Armed Forces outside the United States.

(A) Persons (including members of a Reserve component) whose presence outside the United States at the time the offense is committed, is solely that of a tourist, a student, or a civilian employee or civilian accompanying any other non-federal agency, organization, business, or entity (and thereby can not be said to be employed by or accompanying the Armed Forces within the definitions of those terms as established by the Act, as modified) are not subject to the Act. Civilian employees of an agency, organization, business, or entity accompanying the Armed Forces outside the U.S. may, by virtue of the agency, organization, business, or entity relationship with the Armed Forces, be subject to the Act and this part.

(B) Persons who are subject to the Act and this part remain so while present, on official business or otherwise (e.g., performing temporary duty or while in leave status), in a foreign country other than the foreign country to which the person is regularly assigned, employed, or accompanying the Armed Forces outside the United States.

(iii) Persons who have recognized dual citizenship with the United States and who are the nationals of, or ordinarily resident in, the host nation where the alleged conduct took place

are not persons ''accompanying the Armed Forces outside the United States'' within the meaning of the Act and this part.

(iv) Juveniles whose ages are below the minimum ages authorized for the prosecution of juveniles in U.S. District Court under the provisions of chapter 403 of title 18, United States Code.

(v) Persons subject to the UCMJ (See sections 802 and 803 of title 10, United States Code) are not subject to prosecution under the Act unless, pursuant to section 3261(d) of the Act, the member ceases to be subject to the UCMJ or an indictment or information charges that the member committed the offense with one or more other defendants, at least one of whom is not subject to the UCMJ. A member of a Reserve component who is subject to the UCMJ at the time the UCMJ offense was committed is not relieved from amenability to UCMJ jurisdiction for that offense. Such reserve component members are not subject to the Act unless section 3261(d)(2) of the Act applies. Retired members of a regular component who are entitled to pay remain subject to the UCMJ after retiring from active duty. Such retired members are not subject to prosecution under the Act unless section 3261(d)(2) of the Act applies.

(vi) Whether Coast Guard members and civilians employed by or accompanying the Coast Guard outside the United States, and their dependents, are subject to the Act and this part depends on whether at the time of the offense the Coast Guard was operating as a separate Service in the Department of Homeland Security or as a Service in the Department of the Navy.

(8) *Persons Having a Tenuous Nexus to the United States.* Third Country Nationals who are not ordinarily resident in the host nation, and who meet the definition of ''a person accompanying the Armed Forces outside the United States,'' may have a nexus to the United States that is so tenuous that it places into question whether the Act's jurisdiction should be applied and whether such persons should be subject to arrest, detention, and prosecution by U.S. authorities. Depending on the facts and circumstances involved, and the relationship or connection of the foreign national with the U.S. Armed Forces, it may be advisable to consult first with the DSS/DOJ before taking action with a view toward prosecution. In addition, to facilitate consultation with the government of the nation of which the Third Country National is a citizen, the State Department should be notified of any potential investigation or arrest of a Third Country National.

(b) *Investigation, Arrest, Detention, And Delivery Of Persons To Host Nation Authorities*—(1) *Investigation.* (i) Investigations of conduct reasonably believed to constitute a violation of the Act committed outside the United States must respect the sovereignty of the foreign nation in which the investigation is conducted. Such investigations shall be conducted in accordance with recognized practices with host nation authorities and applicable international law, SOFA and other international agreements. After general coordination with appropriate host nation authorities, as referenced in Appendix A of this part, specific investigations shall, to the extent practicable, be coordinated with appropriate local law enforcement authorities, unless not required by agreement with host nation authorities.

(ii) When a Military Criminal Investigative Organization is the lead investigative organization, the criminal investigator, in order to assist DSS/DOJ and the designated U.S. Attorney representative in making a preliminary determination of whether the case warrants prosecution under the Act, shall provide a copy of the Investigative Report, or a summary thereof, to the Office of the Staff Judge Advocate of the Designated Commanding Officer (DCO) at the location where the offense was committed for review and transmittal, through the Combatant Commander, to the DSS/DOJ and the designated U.S. Attorney representative. The Office of the Staff Judge Advocate shall also furnish the DSS/DOJ and the designated U.S. Attorney representative an affidavit or declaration from the criminal investigator or other appropriate law enforcement official that sets forth the probable cause basis for believing that a violation of the Act

has occurred and that the person identified in the affidavit or declaration has committed the violation.

(iii) When the Defense Criminal Investigative Service (DCIS) is the lead investigative organization, the criminal investigator, in order to assist the DSS/DOJ and the designated U.S. Attorney representative in making a preliminary determination of whether the case warrants prosecution under the Act, shall provide a copy of the Investigative Report, or a summary thereof, to the DSS/DOJ and the designated U.S. Attorney representative. The criminal investigator shall also furnish the DSS/DOJ and the designated U.S. Attorney representative, an affidavit or declaration that sets forth the probable cause basis for believing that a violation of the Act has occurred and that the person identified in the affidavit or declaration has committed the violation. Within the parameters of 10 U.S.C. Chapter 47, the Inspector General may also notify the General Counsel of the Department of Defense and the DCO's Office of the Staff Judge Advocate at the location where the offense was committed, as appropriate.

(2) *Residence Information*. To the extent that it can be determined from an individual's personnel records, travel orders into the overseas theater, passport, or other records, or by questioning upon arrest or detention, as part of the routine ''booking'' information obtained, an individual's last known residence in the United States shall be determined and forwarded promptly to the DSS/DOJ and the designated U.S. Attorney representative. See *Pennsylvania* v. *Muniz,* 496 U.S. 582, at 601 (1990) and *United States* v. *D'Anjou*, 16 F. 3d 604 (4th Cir. 1993). The information is necessary to assist in determining what law enforcement authorities and providers of pretrial services, including those who issue probation reports, shall ultimately have responsibility for any case that may develop. Determination of the individual's ''last known address'' in the United States is also important in determining what Federal district would be responsible for any possible future criminal proceedings.

(i) Due to the venue provisions of section 3238 of 18 U.S.C. Chapter 212, Sections 3261–3267, the DSS/DOJ and the designated U.S. Attorney representative shall be consulted prior to removal of persons arrested or charged with a violation of the Act by U.S. law enforcement officials. The venue for Federal criminal jurisdiction over offenses committed on the high seas or elsewhere beyond the jurisdiction of a particular State or District (as would be required under the Act), is in the Federal district in which the offender is arrested or first brought. However, if the individual is not so arrested in or brought into any Federal district in the United States (i.e., is to be indicted, or information obtained, prior to the individual's return to the United States), then an indictment or information may be sought in the district of the person's last known residence. If no such residence is known, the indictment or information may be filed in the District of Columbia.

(ii) ''First brought'' connotes the location within the U.S. to which the person is returned in a custodial status.

(iii) ''Last known residence'' refers to that U.S. location where the person lived or resided. It is not necessarily the same as the person's legal domicile or home of record.

(iv) Prompt transmittal of venue information to the DSS/DOJ and the designated U.S. Attorney representative in the United States may prove helpful in determining whether a particular case may be prosecuted, and may ultimately be a pivotal factor in determining whether the host nation or the U.S. shall exercise its jurisdiction over the matter.

(v) The Investigative Report, and any affidavit or declaration, as well as all other documents associated with a case shall be transmitted promptly by the command Staff Judge Advocate to the DSS/DOJ and the designated U.S. Attorney representative. This may be accomplished through the use of facsimile or other means of electronic communication.

(3) *Notice of Complaint or Indictment*. Upon receipt of information from command authorities or Defense Criminal Investigation Organizations (the Defense Criminal Investigation Service, the Army's Criminal Investigation

Command, the Naval Criminal Investigative Service, and the Air Force Office of Special Investigations) that a person subject to jurisdiction under this Act has violated section 3261(a), the U.S. Attorney for the District in which there would be venue for a prosecution may, if satisfied that probable cause exists to believe that a crime has been committed and that the person identified has committed this crime, file a complaint under Federal Rule of Criminal Procedure 3. As an alternative, the U.S. Attorney may seek the indictment of the person identified. In either case, a copy of the complaint or indictment shall be provided to the Office of the Staff Judge Advocate of the overseas command that reported the offense. The DSS/DOJ and the designated U.S. Attorney representative will ordinarily be the source from which the command's Staff Judge Advocate is able to obtain a copy of any complaint or indictment against a person outside the United States who is subject to the jurisdiction under the Act. This may be accomplished through the use of facsimile or other means of electronic communication.

(4) *Arrest*. (i) Federal Rule of Criminal Procedure 4 takes the jurisdiction of the Act into consideration in stating where arrest warrants may be executed: ''Location. A warrant may be executed, or a summons served, within the jurisdiction of the United States or anywhere else a federal statute authorizes an arrest.'' The Advisory Committee Note explains that the new language reflects the enactment of the Military Extraterritorial Jurisdiction Act permitting arrests of certain military and Department of Defense personnel overseas.

(ii) The Act specifically authorizes persons in DoD law enforcement positions, as designated by the Secretary of Defense, to make arrests outside the United States, upon probable cause and in accordance with recognized practices with host nation authorities and applicable international agreements, those persons subject to the Act who violate section 3261(a) of the Act. Section 3262(a) of the Act constitutes authorization by law to conduct such functions pursuant to 10 U.S.C. 801–946 and therefore avoids possible restrictions of the Posse Comitatus Act regarding military personnel supporting civilian law enforcement agencies.

(iii) When the host nation has interposed no objections after becoming aware of the Act, arrests in specific cases shall, to the extent practicable, be first coordinated with appropriate local law enforcement authorities, unless not required by agreement with host nation authorities.

(iv) Military and civilian special agents assigned to the Defense Criminal Investigative Organizations are hereby authorized by the Secretary of Defense to make an arrest, outside the United States, of a person who has committed an offense under section 3261(a) of the Act. Civilian special agents assigned to Defense Criminal Investigative Organizations while performing duties outside the U.S. shall make arrests consistent with the standardized guidelines established for such agents, as approved in accordance with sections 1585a, 4027, 7480, and 9027 of title 10, United States Code.

(v) Military personnel and DoD civilian employees (including local nationals, either direct hire or indirect hire) assigned to security forces, military police, shore patrol, or provost offices at military installations and other facilities located outside the United States are also authorized to make an arrest, outside the United States, of a person who has committed an offense under section 3261(a) of the Act. This authority includes similarly-assigned members of the Coast Guard law enforcement community, but only when the Coast Guard is operating at such locations as a Service of the Department of the Navy.

(vi) Law enforcement personnel thus designated and authorized by the Secretary of Defense in this part may arrest a person, outside the United States, who is suspected of committing a felony offense in violation of section 3261(a) of the Act, when the arrest is based on probable cause to believe that such person violated section 3261(a) of the Act, and when made in accordance with applicable international agreements. Because the location of the offense and offender is outside the United States, it is not normally expected that the arrest would be based on a

previously-issued Federal arrest warrant. Law enforcement personnel authorized to make arrests shall follow the Secretaries of the Military Departments' guidelines for making arrests without a warrant, as prescribed by 10 U.S.C. 1585a, 4027, 7480, and 9027. Authorizations issued by military magistrates under the UCMJ may not be used as a substitute for Federal arrest warrant requirements.

(vii) The foregoing authorization to DoD law enforcement personnel to arrest persons subject to Chapter 212 of title 18, United States Code, for violations of the Act is not intended as a limitation upon the authority of other Federal law enforcement officers to effect arrests when authorized to do so. (E.g., see 18 U.S.C. 3052 authorizing agents of the Federal Bureau of Investigation to make arrests ''for any felony cognizable under the laws of the United States, 21 U.S.C. 878(a)(3) for the same authority for Drug Enforcement Administration agents, and 18 U.S.C. 3053 for the same authority for U.S. Marshals and their deputies.)

(5) *Temporary Detention.* (i) The Commander of a Combatant Command, or designee, may order the temporary detention of a person, within the Commander's area of responsibility outside the United States, who is arrested or charged with a violation of the Act. The Commander of the Combatant Command, or designee, may determine that a person arrested need not be held in custody pending the commencement of the initial proceedings required by section 3265 of the Act and paragraph (d) of this section. The Commander of the Combatant Command may designate those component commanders or DCO commanders who are also authorized to order the temporary detention of a person, within the commanding officer's area of responsibility outside the United States, who is arrested or charged with a violation of the Act.

(ii) A person arrested may be temporarily detained in military detention facilities for a reasonable period, in accordance with regulations of the Military Departments and subject to the following:

(A) Temporary detention should be ordered only when a serious risk is believed to exist that the person shall flee and not appear, as required, for any pretrial investigation, pretrial hearing or trial proceedings, or the person may engage in serious criminal misconduct (e.g., the intimidation of witnesses or other obstructions of justice, causing injury to others, or committing other offenses that pose a threat to the safety of the community or to the national security of the United States). The decision as to whether temporary detention is appropriate shall be made on a case-by-case basis. Section 3142 of title 18, United States Code provides additional guidance regarding conditions on release and factors to be considered.

(B) A person arrested or charged with a violation of the Act who is to be detained temporarily shall, to the extent practicable, be detained in areas that separate them from sentenced military prisoners and members of the Armed Forces who are in pretrial confinement pending trial by courts-martial.

(C) Separate temporary detention areas shall be used for male and female detainees.

(D) Generally, juveniles should not be ordered into temporary detention. However, should circumstances warrant temporary detention, the conditions of such temporary detention must, at a minimum, meet the following requirements: juveniles alleged to be delinquent shall not be detained or confined in any institution or facility in which the juvenile has regular contact with adult persons convicted of a crime or awaiting trial on criminal charges; insofar as possible, alleged juvenile delinquents shall be kept separate from adjudicated delinquents; and every juvenile in custody shall be provided with adequate food, heat, light, sanitary facilities, bedding, clothing, recreation, and medical care, including necessary psychiatric, psychological, or other care and treatment. Appointment of a guardian ad litem may be required under 18 U.S.C. 5034 to represent the interests of the juvenile when the juvenile's parents are not present or when the parents' interests may be adverse to that of the juvenile.

(iii) Persons arrested or charged with a violation of the Act, upon being ordered into temporary detention and

processed into the detention facility, shall, as part of the processing procedures, be required to provide the location address of their last U.S. residence as part of the routine booking questions securing ''biographical data necessary to complete booking or pretrial services.'' See *United States* v. *D'Anjou*, 16 F. 3d 604 (4th Cir.1993). This information shall be recorded in the detention documents and made available to the DCO's Office of the Staff Judge Advocate. This information shall be forwarded with other case file information, including affidavits in support of probable cause supporting the arrest and detention, to the DSS/DOJ. The information is provided so that the DSS/DOJ may make appropriate preliminary decisions about venue. See paragraph (b)(2) of this section.

(A) Notice of the temporary detention of any person for a violation of the Act shall be forwarded through command channels, without unnecessary delay, to the Combatant Commander, who shall advise the General Counsel of the Department of Defense, as the representative of the Secretary of Defense, of all such detentions. At the discretion of the General Counsel of the Department of Defense, other agencies and organizations (such as the Legal Counsel to the Chairman of the Joint Chiefs of Staff and Secretary of the Military Department that sponsored the person into the foreign country) shall be informed, as appropriate.

(B) Such notice shall include a summary of the charges, facts and circumstances surrounding the offenses, information regarding any applicable SOFA or other international agreements affecting jurisdiction in the case, and the reasons warranting temporary detention.

(iv) If military command authorities at the military installation outside the United States intend to request a person's detention by order of the Federal Magistrate Judge, the military representative assigned to the case shall gather the necessary information setting forth the reasons in support of a motion to be brought by the attorney representing the government at the initial proceeding conducted pursuant to section 3265 of the Act.

(v) This part is not intended to eliminate or reduce existing obligations or authorities to detain persons in foreign countries as required or permitted by agreements with host countries. See generally, *United States* v. *Murphy*, 18 M.J. 220 (CMA 1984).

(6) *Custody and Transport of Persons While in Temporary Detention*. (i) The Department of Defense may only take custody of and transport the person as specifically set forth in the Act. This is limited to delivery as soon as practicable to the custody of U.S. civilian law enforcement authorities for removal to the United States for judicial proceedings; delivery to appropriate authorities of the foreign country in which the person is alleged to have committed the violation of section 3261(a) of the Act in accordance with section 3263; or, upon a determination by the Secretary of Defense, or the Secretary's designee, that military necessity requires it, removal to the nearest U.S. military installation outside the United States adequate to detain the person and to facilitate the initial appearance described in 3265(a) of the Act.

(ii) Responsibility for a detained person's local transportation, escort, and custody requirements remains with the command that placed the person in temporary detention for a violation of section 3261(a) of the Act. This responsibility includes:

(A) Attendance at official proceedings and other required health and welfare appointments (e.g., appointments with counsel, medical and dental appointments, etc.).

(B) Delivery to host nation officials under section 3263 of the Act.

(C) Attendance at Initial Proceedings conducted under section 3265 of the Act.

(D) Delivery under the Act to the custody of U.S. civilian law enforcement authorities for removal to the United States.

(iii) A person who requires the continued exercise of custody and transportation to appointments and locations away from the detention facility, including delivery of the person to host nation officials under section 3263 of the Act, may be transferred under the custody of command authorities or

those law enforcement officers authorized to make arrests in paragraphs (b)(4)(iv) and (b)(4)(v) of this section. Transportation of a detainee outside an installation shall be coordinated with the host nation's local law enforcement, as appropriate and in accordance with recognized practices.

(iv) Military authorities retain responsibility for the custody and transportation of a person arrested or charged with a violation of the Act who is to be removed from one military installation outside the United States to another military installation outside the United States, including when the person is transferred under the provisions of section 3264(b)(5) of the Act. Unless otherwise agreed to between the sending and receiving commands, it shall be the responsibility of the sending command to make arrangements for the person's transportation and custody during the transport or transfer to the receiving command.

(v) In coordination with appropriate host nation authorities, U.S. civilian law enforcement authorities shall be responsible for taking custody of a person arrested or charged with a violation of the Act and for the removal of that person to the United States for any pretrial or trial proceedings. DoD officials shall consult with the DSS/DOJ to determine which civilian law enforcement authority (i.e., U.S. Marshals Service, Federal Bureau of Investigations, Drug Enforcement Agency, or other Federal agency) shall dispatch an officer to the overseas' detention facility to assume custody of the person for removal to the United States. Until custody of the person is delivered to such U.S. civilian law enforcement authorities, military authorities retain responsibility for the custody and transportation of the person arrested or charged with a violation of the Act, to include transportation within the host nation to help facilitate the removal of the person to the United States under the Act.

(7) *Release From Temporary Detention.* When a person subject to the Act has been placed in temporary detention, in the absence of a Criminal Complaint or Indictment pursuant to the Federal Rules of Criminal Procedure, only the Commander who initially ordered detention, or a superior Commander, or a Federal Magistrate Judge, may order the release of the detained person. If a Criminal Complaint or Indictment exists, or if a Federal Magistrate Judge orders the person detained, only a Federal Magistrate Judge may order the release of the person detained. If a Federal Magistrate Judge orders the person temporarily detained to be released from detention, the Commander who ordered detention, or a superior Commander, shall cause the person to be released. When a person is released from detention under this provision, the Commander shall implement, to the extent practicable within the commander's authority, any conditions on liberty directed in the Federal Magistrate Judge's order. When the commander who independently ordered the person's temporary detention without reliance on a Federal Magistrate Judge's order, or a superior commander, orders a person's release before a Federal Magistrate Judge is assigned to review the matter, the commander may, within the commander's authority, place reasonable conditions upon the person's release from detention.

(i) A person's failure to obey the conditions placed on his or her release from detention, in addition to subjecting that person to the commander's, or Federal Magistrate Judge's order to be returned to detention, may consistent with the commander's authority and applicable policy, laws, and regulations, subject the person to potential criminal sanctions, or to administrative procedures leading to a loss of command sponsorship to the foreign country, as well as the possibility of additional disciplinary or adverse action.

(ii) A copy of all orders issued by a Federal Magistrate Judge concerning initial proceedings, detention, conditions on liberty, and removal to the United States shall promptly be provided to the Commander of the Combatant Command concerned and the Commander of the detention facility at which the person is being held in temporary detention.

(8) *Delivery of Persons to Host Nation Authorities.* (i) Persons arrested may be

delivered to the appropriate authorities of the foreign country in which the person is alleged to have violated section 3261(a) of the Act, when:

(A) Authorities of a foreign country request that the person be delivered for trial because the conduct is also a violation of that foreign country's laws, and

(B) Delivery of the person is authorized or required by treaty or another international agreement to which the United States is a party.

(ii) Coast Guard personnel authorized to make arrests pursuant to paragraph (b)(4)(v) of this section are also authorized to deliver persons to foreign country authorities, as provided in section 3263 of the Act.

(iii) Section 3263(b) of the Act calls upon the Secretary of Defense, in consultation with the Secretary of State, to determine which officials of a foreign country constitute appropriate authorities to which persons subject to the Act may be delivered. For purposes of the Act, those authorities are the same foreign country law enforcement authorities as are customarily involved in matters involving foreign criminal jurisdiction under an applicable SOFA or other international agreement or arrangement between the United States and the foreign country.

(iv) No action may be taken under this part with a view toward the prosecution of a person for a violation of the Act if a foreign government, in accordance with jurisdiction recognized by the United States, has prosecuted or is prosecuting such person for the conduct constituting such offense(s), except upon the approval of the Attorney General or the Deputy Attorney General (or a person acting in either such capacity). See section 3261(b) of the Act. Requests for an exception shall be written and forwarded to the Combatant Commander. The Combatant Commander shall forward the request to the General Counsel of the Department of Defense, as representative for the Secretary of Defense, for review and transmittal to the Attorney General of the United States. At the discretion of the General Counsel of the Department of Defense, other agencies and organizations (such as the Legal Counsel to the Chairman of the Joint Chiefs of Staff and the Secretary of the Military Department that sponsored the person into the foreign country) shall be informed, as appropriate.

(v) Except for persons to be delivered to a foreign country, and subject to the limitations of section 3264 of the Act and paragraph (e)(5) of this section, persons arrested for conduct in violation of the Act shall, upon the issuance of a removal order by a Federal Magistrate Judge under section 3264(b) of the Act, be delivered, as soon as practicable, to the custody of U.S. civilian law enforcement authorities. See paragraph (b)(6)(iv) of this section.

(c) *Representation*. (1) *Civilian Defense Counsel*. (i) Civilian defense counsel representation shall not be at the expense of the Department of Defense or the Military Departments.

(ii) The Act contemplates that a person arrested or charged with a violation of the Act shall be represented by a civilian attorney licensed to practice law in the United States. However, it is also recognized that in several host nations where there has been a longstanding military presence, qualified civilian attorneys (including lawyers who are U.S. citizens) have established law practices in these host nations to assist assigned U.S. personnel and to represent service members in courts-martial, or before host nation courts. With the consent of the person arrested or charged with a violation of the Act who wishes to remain in the foreign country, these lawyers can provide adequate representation for the limited purpose of any initial proceedings required by the Act. When the person entitled to an attorney or requests counsel, staff judge advocates at such locations should assemble a list of local civilian attorneys for the person's consideration. The list shall contain a disclaimer stating that no endorsement by the United States government or the command is expressed or implied by the presence of an attorney's name on the list.

(A) To the extent practicable, military authorities shall establish procedures by which persons arrested or charged with a violation of the Act may seek the assistance of civilian defense counsel by telephone. Consultation with such civilian counsel shall be

in private and protected by the attorney-client privilege.

(B) Civilian defense counsel, at no expense to the Department of Defense, shall be afforded the opportunity to participate personally in any initial proceedings required by the Act that are conducted outside the United States. When civilian defense counsel cannot reasonably arrange to be personally present for such representation, alternative arrangements shall be made for counsel's participation by telephone or by such other means that enables voice communication among the participants.

(C) When at least one participant cannot arrange to meet at the location outside the United States where initial proceedings required by the Act are to be conducted, whenever possible arrangements should be made to conduct the proceedings by video teleconference or similar means. Command video teleconference communication systems should be used for this purpose, if resources permit, and if such systems are not otherwise unavailable due to military mission requirements. When these capabilities are not reasonably available, the proceedings shall be conducted by telephone or such other means that enables voice communication among the participants. See section 3265 of the Act.

(D) The above provisions regarding the use of teleconference communication systems apply to any detention proceedings that are conducted outside the United States under section 3265(b) of the Act.

(E) Civilian defense counsel practicing in host nations do not gain Department of Defense sponsorship, nor any diplomatic status, as a result of their role as defense counsel. To the extent practicable, notice to this effect shall be provided to the civilian defense counsel when the civilian defense counsel's identity is made known to appropriate military authorities.

(2) *Qualified Military Counsel.* (i) Counsel representation also includes qualified military counsel that the Judge Advocate General of the Military Department concerned determines is reasonably available for the purpose of providing limited representation at initial proceedings required by the Act and conducted outside the United States. By agreement with the Department of Homeland Security, Coast Guard commands and activities located outside the United States shall seek to establish local agreements with military commands for qualified military counsel from the Military Departments to provide similar limited representation in cases arising within the Coast Guard. The Secretaries of the Military Departments shall establish regulations governing representation by qualified military counsel. These regulations, at a minimum, shall require that the command's Staff Judge Advocate:

(ii) Prepare, update as necessary, and make available to a Federal Magistrate Judge upon request, a list of qualified military counsel who are determined to be available for the purpose of providing limited representation at initial proceedings.

(iii) Ensure that the person arrested or charged under the Act is informed that any qualified military counsel shall be made available only for the limited purpose of representing that person in any initial proceedings that are to be conducted outside the United States, and that such representation does not extend to further legal proceedings that may occur either in a foreign country or the United States. The person arrested or charged shall also be required, in writing, to acknowledge the limited scope of qualified military counsel's representation and therein waive that military counsel's further representation in any subsequent legal proceedings conducted within a foreign country or the United States. The ''Acknowledgement of Limited Representation,'' at appendix B of this part, may be used for this purpose. A copy of the ''Acknowledgement of Limited Representation'' shall be provided to the person arrested or charged under the Act, as well as to the qualified military counsel. The original acknowledgment shall be kept on file in the DCO's Office of the Staff Judge Advocate.

(iv) Provide available information that would assist the Federal Magistrate Judge make a determination that qualified civilian counsel are unavailable, and that the person arrested

or charged under the Act is unable financially to retain civilian defense counsel, before a qualified military counsel who has been made available is assigned to provide limited representation. See Analysis and Discussion of Section 3265 (c), Report Accompanying the Act.

(3) *Union Representation*. Agency law enforcement officials shall comply with applicable Federal civilian employee rights and entitlements, if any, regarding collective bargaining unit representation under Chapter 71 of title 5, United States Code, during pretrial questioning and temporary detention procedures under this part.

(4) *Military Representative*. (i) To assist law enforcement officers and the U.S. Attorney's representative assigned to a case, a judge advocate, legal officer, or civilian attorney-advisor may be appointed as a military representative to represent the interests of the United States. As appropriate, the military representative may be appointed as a Special Assistant U.S. Attorney. The military representative shall be responsible for assisting the command, law enforcement, and U.S. Attorney representatives during pretrial matters, initial proceedings, and other procedures required by the Act and this part. These responsibilities include assisting the U.S. Attorney representative determine whether continued detention is warranted, and to provide information to the presiding Federal Magistrate Judge considering the following:

(ii) If there is probable cause to believe that a violation of the Act has been committed and that the person arrested or charged has committed it,

(iii) If the person being temporarily detained should be kept in detention or released from detention, and, if released, whether any conditions practicable and reasonable under the circumstances, should be imposed.

(d) *Initial Proceedings*. (1) A person arrested for or charged with a violation of the Act may be entitled to an initial appearance before a judge and/or a detention hearing (collectively, the ''initial proceedings''). The initial proceedings are intended to meet the requirements of the Federal Rules of Criminal Procedure. The initial proceedings are not required when the person under investigation for violating the Act has not been arrested or temporarily detained by U.S. military authorities, or the person's arrest or temporary detention by U.S. law enforcement authorities occurs after the person ceases to accompany or be employed by the Armed Forces outside the United States, or the arrest or detention takes place within the United States.

(2) The initial proceedings to be conducted pursuant to the Act and this part shall not be initiated for a person delivered to foreign country authorities and against whom the foreign country is prosecuting or has prosecuted the person for the conduct constituting such offense, except when the Attorney General or Deputy Attorney General (or a person acting in either such capacity) has approved an exception that would allow for prosecution in the United States may initial proceedings under the Act be conducted, under these circumstances. Requests for approval of such an exception shall be forwarded through the Commander of the Combatant Command to the General Counsel of the Department of Defense, in accordance with paragraph (b)(8)(iv) of this section.

(3) Initial proceedings required by the Act and this part shall be conducted, without unnecessary delay. In accordance with the U.S. Supreme Court decision in *County of Riverside* v. *McLaughlin*, 500 U.S. 44 (1991), the initial appearance shall be conducted within 48 hours of the arrest. The initial proceedings required by the Act shall be conducted when:

(i) The person arrested has not been delivered to foreign country authorities under the provisions of section 3263 of the Act; or

(ii) The foreign country authorities having custody of the person delivers the person to U.S. military authorities without first prosecuting the person for such conduct as an offense under the laws of that foreign country.

(4) A Federal Magistrate Judge shall preside over the initial proceedings that are required by the Act and this part. The proceedings should be conducted from the United States using

video teleconference methods, if practicable, and with all parties to the proceedings participating. In the event that there is no video teleconference capability, or the video teleconference capability is unavailable due to military requirements or operations, the parties to the proceeding shall, at a minimum, be placed in contact by telephone.

(5) Initial proceedings conducted pursuant to the Act and this part shall include the requirement for the person's initial appearance under the Federal Rules of Criminal Procedure. The Federal Magistrate Judge shall determine whether probable cause exists to believe that an offense under section 3261(a) of the Act has been committed and that the identified person committed it. This determination is intended to meet the due process requirements to which the person is entitled, as determined by the U.S. Supreme Court in *Gerstein* v. *Pugh,* 420 U.S. 103 (1975).

(6) Initial proceedings shall also include a detention hearing where required under 18 U.S.C. 3142 and the Federal Rules of Criminal Procedure. A detention hearing may be required when:

(i) The person arrested or charged with a violation of the Act has been placed in temporary detention and the intent is to request continued detention; or

(ii) The United States seeks to detain a person arrested or charged with a violation of the Act who has not previously been detained.

(7) A detention hearing shall be conducted by a Federal Magistrate Judge. When the person arrested or charged requests, the detention hearing be conducted while the person remains outside the United States, detention hearing shall be conducted by the same Federal Magistrate Judge presiding over the initial proceeding and shall be conducted by telephone or other means that allow for voice communication among the participants, including the person's defense counsel. If the person does not so request, or if the Federal Magistrate Judge so orders, the detention hearing shall be held in the United States after the removal of the person to the United States.

(8) In the event that the Federal Magistrate Judge orders the person's release prior to trial, and further directs the person's presence in the district in which the trial is to take place, the U.S. Attorney Office's representative responsible for prosecuting the case shall inform the military representative and the DCO's Office of the Staff Judge Advocate.

(9) Under circumstances where the person suspected of committing an offense in violation of the Act has never been detained or an initial proceeding conducted, the presumption is that a trial date shall be established at which the defendant would be ordered to appear. Such an order would constitute an order under section 3264(b)(4) of the Act that ''otherwise orders the person to be removed.'' The person's failure to appear as ordered shall be addressed by the Court as with any other failure to comply with a valid court order.

(10) The DCO's Office of the Staff Judge Advocate shall assist in arranging for the conduct of initial proceedings required by the Act and this part, and shall provide a military representative to assist the U.S. Attorney's Office representative in presenting the information for the Federal Magistrate Judge's review. The military representative shall also provide any administrative assistance the Federal Magistrate Judge requires at the location outside the United States where the proceedings shall be conducted.

(e) *Removal Of Persons To The United States Or Other Countries.* (1) In accordance with the limitation established by section 3264 of the Act, military authorities shall not remove, to the United States or any other foreign country, a person suspected of violating section 3261(a) of the Act, except when:

(i) The person's removal is to another foreign country in which the person is believed to have committed a violation of section 3261(a) of the Act; or

(ii) The person is to be delivered, upon request, to authorities of a foreign country under section 3263 of the Act and paragraph (b)(8) of this section; or

(iii) The person is arrested or charged with a violation of the Act and the person is entitled to, and does not waive, a preliminary examination under Federal Rule of Criminal Procedure 5.1, in which case the person shall be removed to the U.S. for such examination; or

(iv) The person's removal is ordered by a Federal Magistrate Judge. See paragraph (e)(2) of this section; or

(v) The Secretary of Defense, or the Secretary's designee, directs the person be removed, as provided in section 3264(b)(5) of the Act and paragraph (e)(3) of this section.

(2) *Removal By Order Of A Federal Magistrate Judge*. Military authorities may remove a person suspected of violating section 3261(a) of the Act to the United States, when:

(i) A Federal Magistrate Judge orders that the person be removed to the United States to be present at a detention hearing; or

(ii) A Federal Magistrate Judge orders the detention of the person prior to trial (See 18 U.S.C. 3142(e)) in which case the person shall be promptly removed to the United States for such detention; or

(iii) A Federal Magistrate Judge otherwise orders the person be removed to the United States.

(3) *Removal By Direction of the Secretary of Defense or Designee*. The Secretary of Defense, or designee, may order a person's removal from a foreign country within the Combatant Command's geographic area of responsibility when, in his sole discretion, such removal is required by military necessity. See section 3264(b)(5) of the Act. Removal based on military necessity may be authorized in order to take into account any limiting factors that may result from military operations, as well as the capabilities and conditions associated with a specific location.

(i) When the Secretary of Defense, or designee, determines that a person arrested or charged with a violation of the Act should be removed from a foreign country, the person shall be removed to the nearest U.S. military installation outside the United States where the limiting conditions requiring such a removal no longer apply, and where there are available facilities and adequate resources to temporarily detain the person and conduct the initial proceedings required by the Act and this part.

(ii) The relocation of a person under this paragraph does not authorize the further removal of the person to the United States, unless that further removal is authorized by an order issued by a Federal Magistrate Judge under paragraph (e)(2) of this section.

(iii) *Delegation*. The Commander of a Combatant Command, and the Commander's principal assistant, are delegated authority to make the determination, based on the criteria stated in paragraph (e)(3) of this section, that a person arrested or charged with a violation of the Act shall be removed from a foreign country under section 3264(b)(5) of the Act and this part. Further delegation is authorized, but the delegation of authority is limited to a subordinate commander within the command who is designated as a general court-martial convening authority under the UCMJ.

(4) A person who is removed to the United States under the provisions of the Act and this part and who is thereafter released from detention, and otherwise at liberty to return to the location outside the United States from which he or she was were removed, shall be subject to any requirements imposed by a Federal District Court of competent jurisdiction.

(5) Where a person has been removed to the United States for a detention hearing or other judicial proceeding and a Federal Magistrate Judge orders the person's release and permits the person to return to the overseas location, the Department of Defense (including the Military Department originally sponsoring the person to be employed or to accompany the Armed Forces outside the United States) shall not be responsible for the expenses associated with the return of the person to the overseas location, or the person's subsequent return travel to the United States for further court proceedings that may be required.

## APPENDIX A TO PART 153—GUIDELINES

(a) Civilians employed by the Armed Forces outside the United States who commit felony offenses while outside the U.S. are subject to U.S. criminal jurisdiction

under the Act, and shall be held accountable for their actions, as appropriate.

(b) Civilians accompanying the Armed Forces outside the United States who commit felony offenses while outside the U.S. are subject to U.S. criminal jurisdiction under the Act, and shall be held accountable for their actions, as appropriate.

(c) Former members of the Armed Forces who commit felony offenses while serving as a member of the Armed Forces outside the U.S., but who ceased to be subject to UCMJ court-martial jurisdiction without having been tried by court-martial for such offenses, are subject to U.S. criminal jurisdiction under the Act and shall be held accountable for their actions, as appropriate.

(d) The procedures of this part and DoD actions to implement the Act shall comply with applicable Status of Forces Agreements, and other international agreements affecting relationships and activities between the respective host nation countries and the U.S. Armed Forces. These procedures may be employed outside the United States only if the foreign country concerned has been briefed or is otherwise aware of the Act and has not interposed an objection to the application of these procedures. Such awareness may come in various forms, including but not limited to Status of Forces Agreements containing relevant language, Diplomatic Notes or other acknowledgements of briefings, or case-by-case arrangements, agreements, or understandings with appropriate host nation officials.

(e) Consistent with the long-standing policy of maximizing U.S. jurisdiction over its citizens, the Act and this part provide a mechanism for furthering this objective by closing a jurisdictional gap in U.S. law and thereby permitting the criminal prosecution of covered persons for offenses committed outside the United States. In so doing, the Act and this part provide, in appropriate cases, an alternative to a host nation's exercise of its criminal jurisdiction should the conduct that violates U.S. law also violate the law of the host nation, as well as a means of prosecuting covered persons for crimes committed in areas in which there is no effective host nation criminal justice system.

(f) In addition to the limitations imposed upon prosecutions by section 3261(b) of the Act, the Act and these procedures should be reserved generally for serious misconduct for which administrative or disciplinary remedies are determined to be inadequate or inappropriate. Because of the practical constraints and limitations on the resources available to bring these cases to successful prosecution in the United States, initiation of action under this part would not generally be warranted unless serious misconduct were involved.

(g) The procedures set out in the Act and this part do not apply to cases in which the return of fugitive offenders is sought through extradition and similar proceedings, nor are extradition procedures applicable to cases under the Act.

## APPENDIX B TO PART 153—ACKNOWLEDGMENT OF LIMITED LEGAL REPRESENTATION (SAMPLE)

1. I, _____, have been named as a suspect or defendant in a matter to which I have been advised is subject to the jurisdiction of the Military Extraterritorial Jurisdiction Act of 2000 (section 3261, *et seq.*, of title 18, United States Code.); hereinafter referred to as ''the Act''). I have also been informed that certain initial proceedings under 18 U.S.C. 3265 may be required under this Act, for which I am entitled to be represented by legal counsel.

2. I acknowledge and understand that the appointment of military counsel for the limited purpose of legal representation in proceedings conducted pursuant to the Act is dependent upon my being unable to retain civilian defense counsel representation for such proceedings, due to my indigent status, and that qualified military defense counsel has been made available.

3. Pursuant to the Act, _____, a Federal Magistrate Judge, has issued the attached Order and has directed that that military counsel be made available:

____ For the limited purpose of representing me at an initial proceeding to be conducted outside the United States pursuant to 18 U.S.C. 3265,

____ For the limited purpose of representing me in an initial detention hearing to be conducted outside the United States pursuant to 18 U.S.C. 3265(b),

4. _____, military counsel, has been made available in accordance with Department of Defense Instruction 5525.bb, and as directed by the attached Order of a Federal Magistrate Judge.

5. I (do) (do not) wish to be represented by _____, military counsel ____ (initials).

6. I understand that the legal representation of _____, military counsel, is limited to:

a. Representation at the initial proceedings conducted outside the United States pursuant to 18 U.S.C. 3265.

____ (Initials)

b. The initial detention hearing to be conducted outside the United States pursuant to the Military Extraterritorial Jurisdiction Act of 2000 (18 U.S.C. 3261, *et seq.*).

____ (Initials)

c. Other proceedings (Specify):

_____. ____ (Initials)

Signature of Person To Be Represented By Military Counsel

_____

Signature of Witness*

Attachment:

Federal Magistrate Judge Order

(*NOTE: The witness must be a person other than the defense counsel to be made available for this limited legal representation.)

# SUBCHAPTER F—SECURITY

## PART 154—DEPARTMENT OF DEFENSE PERSONNEL SECURITY PROGRAM REGULATION

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APPENDIX J TO PART 154—ADP POSITION CATEGORIES AND CRITERIA FOR DESIGNATING POSITIONS

AUTHORITY: E.O. 10450, 18 FR 2489, 3 CFR, 1949–1953 Comp., p. 936; E.O. 12356, 47 FR 14874 and 15557, 3 CFR, 1982 Comp., p. 166; E.O. 10865, 25 FR 1583, 3 CFR, 1959–1963 Comp., p. 398; E.O. 12333, 46 FR 59941, 3 CFR, 1981 Comp., p. 200.

SOURCE: 52 FR 11219, Apr. 8, 1987, unless otherwise noted.

## Subpart A—General Provisions

### § 154.1 Purpose.

(a) To establish policies and procedures to ensure that acceptance and retention of personnel in the Armed Forces, acceptance and retention of civilian employees in the Department of Defense (DoD), and granting members of the Armed Forces, DoD civilian employees, DoD contractors, and other affiliated persons access to classified information are clearly consistent with the interests of national security.

(b) This part: (1) Establishes DoD personnel security policies and procedures;

(2) Sets forth the standards, criteria and guidelines upon which personnel security determinations shall be based;

(3) Prescribes the kinds and scopes of personnel security investigations required;

(4) Details the evaluation and adverse action procedures by which personnel security determinations shall be made; and

(5) Assigns overall program management responsibilities.

### § 154.2 Applicability.

(a) This part implements the Department of Defense Personnel Security Program and takes precedence over all other departmental issuances affecting that program.

(b) All provisions of this part apply to DoD civilian personnel, members of the Armed Forces, excluding the Coast Guard in peacetime, contractor personnel and other personnel who are affiliated with the Department of Defense except that the unfavorable administrative action procedures pertaining to contractor personnel requiring access to classified information are contained in DoD 5220.22–R and in 32 CFR part 155.

(c) The policies and procedures which govern the National Security Agency are prescribed by Public Laws 88–290 and 86–36, Executive Orders 10450 and 12333, DoD Directive 5210.45[1], Director of Central Intelligence Directive (DCID) 1/14[2] and regulations of the National Security Agency.

(d) Under combat conditions or other military exigencies, an authority in paragraph A, Appendix E, may waive such provisions of this part as the circumstances warrant.

[52 FR 11219, Apr. 8, 1987, as amended at 58 FR 61024, Nov. 19, 1993]

### § 154.3 Definitions.

(a) *Access*. The ability and opportunity to obtain knowledge of classified information. An individual, in fact, may have access to classified information by being in a place where such information is kept, if the security measures that are in force do not prevent him from gaining knowledge of such information.

(b) *Adverse action*. A removal from employment, suspension from employment of more than 14 days, reduction in grade, reduction in pay, or furlough of 30 days or less.

(c) *Background Investigation (BI)*. A personnel security investigation consisting of both record reviews and interviews with sources of information as prescribed in paragraph 3, Appendix A, this part, covering the most recent 5 years of an individual's life or since the 18th birthday, whichever is shorter, provided that at least the last 2 years are covered and that no investigation will be conducted prior to an individual's 16th birthday.

(d) *Classified information*. Official information or material that requires protection in the interests of national security and that is classified for such

[1] Copies may be obtained, at cost, from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161.

[2] Copies may be obtained, if needed from Central Intelligence Agency (CCISCMS/ICS), 1225 Ames Building, Washington, DC 20505.

purpose by appropriate classifying authority in accordance with the provisions of Executive Order 12356.

(e) *Defense Clearance and Investigative Index (DCII).* The DCII is the single, automated, central DoD repository which identifies investigations conducted by DoD investigative agencies, and personnel security determinations made by DoD adjudicative authorities.

(f) *DoD component.* Includes the Office of the Secretary of Defense; the Military Departments; Chairman of the Joint Chiefs of Staff; Directors of Defense Agencies and the Unified and Specified Commands.

(g) *Entrance National Agency Check (ENTNAC).* A personnel security investigation scoped and conducted in the same manner as a National Agency Check except that a technical fingerprint search of the files of the Federal Bureau of Investigation is not conducted.

(h) *Head of DoD component.* The Secretary of Defense; the Secretaries of the Military Departments; the Chairman of Joint Chiefs of Staff; and the Commanders of Unified and Specified Commands; and the Directors of Defense Agencies.

(i) *Immigrant alien.* Any alien lawfully admitted into the United States under an immigration visa for permanent residence.

(j) *Interim security clearance.* A security clearance based on the completion of minimum investigative requirements, which is granted on a temporary basis, pending the completion of the full investigative requirements.

(k) *Limited access authorization.* Authorization for access to Confidential or Secret information granted to non-US. citizens and immigrant aliens, which is limited to only that information necessary to the successful accomplishment of their assigned duties and based on a background investigation scoped for 10 years (paragraph 3, Appendix A).

(l) *Minor derogatory information.* Information that, by itself, is not of sufficient importance or magnitude to justify an unfavorable administrative action in a personnel security determination.

(m) *National Agency check (NAC).* A personnel security investigation consisting of a records review of certain national agencies as prescribed in paragraph 1, Appendix A, this part, including a technical fingerprint search of the files of the Federal Bureau of Investigation (FBI).

(n) *National Agency Check Plus Written Inquiries (NACI).* A personnel security investigation conducted by the Office of Personnel Management, combining a NAC and written inquiries to law enforcement agencies, former employers and supervisors, references and schools.

(o) *National security.* National security means the national defense and foreign relations of the United States.

(p) *Need-to-know.* A determination made by a possessor of classified information that a prospective recipient, in the interest of national security, has a requirement for access to, knowledge, or possession of the classified information in order to perform tasks or services essential to the fulfillment of an official U.S. Government program. Knowledge, possession of, or access to, classified information shall not be afforded to any individual solely by virtue of the individual's office, position, or security clearance.

(q) *Periodic Reinvestigation (PR).* An investigation conducted every five years for the purpose of updating a previously completed background investigation, special background investigation, single scope background investigation or PR on persons occupying positions referred to in §154.19. Investigative requirements are as prescribed in appendix A to part 154, section 5. The period of investigation will not normally exceed the most recent 5-year period.

(r) *Personnel Security Investigation (PSI).* Any investigation required for the purpose of determining the eligibility of DoD military and civilian personnel, contractor employees, consultants, and other persons affiliated with the Department of Defense, for access to classified information, acceptance or retention in the Armed Forces, assignment or retention in sensitive duties, or other designated duties requiring such investigation. PSIs include investigations of affiliations with subversive organizations, suitability information, or hostage situations (see §154.9(d)) conducted for the purpose of

making personnel security determinations. They also include investigations of allegations that arise subsequent to adjudicative action and require resolution to determine an individual's current eligibility for access to classified information or assignment or retention in a sensitive position.

(s) *Scope*. The time period to be covered and the sources of information to be contacted during the prescribed course of a PSI.

(t) *Security clearance*. A determination that a person is eligible under the standards of this part for access to classified information.

(u) *Senior Officer of the Intelligence Community (SOIC)*. The DoD Senior Officers of the Intelligence Community include: the Director, National Security Agency/Central Security Service; Director, Defense Intelligence Agency; Assistant Chief of Staff for Intelligence, U.S. Army; Assistant Chief of Staff for Intelligence, U.S. Air Force; and the Director of Naval Intelligence, U.S. Navy.

(v) *Sensitive position*. Any position so designated within the Department of Defense, the occupant of which could bring about, by virtue of the nature of the position, a materially adverse effect on the national security. All civilian positions are either critical-sensitive, noncritical-sensitive, or nonsensitive as described in §154.13(b).

(w) *Significant derogatory information*. Information that could, in itself, justify an unfavorable administrative action, or prompt an adjudicator to seek additional investigation or clarification.

(x) *Special access program*. Any program imposing ''need-to-know'' or access controls beyond those normally provided for access to Confidential, Secret, or Top Secret information. Such a program may include, but not be limited to, special clearance, adjudication, investigative requirements, material dissemination restrictions, or special lists of persons determined to have a need-to-know.

(y) *Special Background Investigation (SBI)*. A personnel security investigation consisting of all of the components of a BI plus certain additional investigative requirements as prescribed in paragraph 4, Appendix B, this part. The period of investigation for an SBI is the last 15 years or since the 18th birthday, whichever is shorter, provided that the last 2 full years are covered and that no investigation will be conducted prior to an individual's 16th birthday.

(z) *Special Investigative Inquiry (SII)*. A supplemental personnel security investigation of limited scope conducted to prove or disprove relevant allegations that have arisen concerning a person upon whom a personnel security determination has been previously made and who, at the time of the allegation, holds a security clearance or otherwise occupies a position that requires a personnel security determination under the provisions of this part.

(aa) *Service*. Honorable active duty (including attendance at the military academies), membership in ROTC Scholarship Program, Army and Air Force National Guard, Military Reserve Force (including active status and ready reserve), civilian employment in Government service, or civilian employment with a DoD contractor or as a consultant involving access under the DoD Industrial Security Program. Continuity of service is maintained with change from one status to another as long as there is no single break in service greater than 12 months.

(bb) *Unfavorable administrative action*. Adverse action taken as the result of personnel security determinations and unfavorable personnel security determinations as defined in this part.

(cc) *Unfavorable personnel security determination*. A denial or revocation of clearance for access to classified information; denial or revocation of access to classified information; denial or revocation of a Special Access authorization (including access to SCI); nonappointment to or nonselection for appointment to a sensitive position; nonappointment to or nonselection for any other position requiring a trustworthiness determination under this part; reassignment to a position of lesser sensitivity or to a nonsensitive position; and nonacceptance for or discharge from the Armed Forces when any of the foregoing actions are based on derogatory information of personnel security significance.

(dd) *United States Citizen (Native Born).* A person born in one of the 50 United States, Puerto Rico, Guam, American Samoa, Northern Mariana Islands, U.S. Virgin Islands; or Panama Canal Zone (if the father or mother (or both) was or is, a citizen of the United States).

[52 FR 11219, Apr. 8, 1987, as amended at 58 FR 61024, Nov. 19, 1993]

## Subpart B—Policies

### § 154.6 Standards for access to classified information or assignment to sensitive duties.

(a) *General.* Only U.S. citizens shall be granted a personnel security clearance, assigned to sensitive duties, or granted access to classified information unless an authority designated in Appendix E has determined that, based on all available information, there are compelling reasons in furtherance of the Department of Defense mission, including, special expertise, to assign an individual who is not a citizen to sensitive duties or grant a Limited Access Authorization to classified information. Non-U.S. citizens may be employed in the competitive service in sensitive civilian positions only when specifically approved by the Office of Personnel Management, pursuant to E.O. 11935. Exceptions to these requirements shall be permitted only for compelling national security reasons.

(b) *Clearance and sensitive position standard.* The personnel security standard that must be applied to determine whether a person is eligible for access to classified information or assignment to sensitive duties is whether, based on all available information, the person's loyalty, reliability, and trustworthiness are such that entrusting the person with classified information or assigning the person to sensitive duties is clearly consistent with the interests of national security.

(c) *Military service standard.* The personnel security standard that must be applied in determining whether a person is suitable under national security criteria for appointment, enlistment, induction, or retention in the Armed Forces is that, based on all available information, there is no reasonable basis for doubting the person's loyalty to the Government of the United States.

### § 154.7 Criteria for application of security standards.

The ultimate decision in applying either of the security standards set forth in § 154.6 (b) and (c) must be an overall common sense determination based upon all available facts. The criteria for determining eligibility for a clearance under the security standard shall include, but not be limited to the following:

(a) Commission of any act of sabotage, espionage, treason, terrorism, anarchy, sedition, or attempts thereat or preparation therefor, or conspiring with or aiding or abetting another to commit or attempt to commit any such act.

(b) Establishing or continuing a sympathetic association with a saboteur, spy, traitor, seditionist, anarchist, terrorist, revolutionist, or with an espionage or other secret agent or similar representative of a foreign nation whose interests may be inimical to the interests of the United States, or with any person who advocates the use of force or violence to overthrow the Government of the United States or to alter the form of Government of the United States by unconstitutional means.

(c) Advocacy or use of force or violence to overthrow the Government of the United States or to alter the form of Government of the United States by unconstitutional means.

(d) Knowing membership with the specific intent of furthering the aims of, or adherence to and active participation in any foreign or domestic organization, association, movement, group or combination of persons (hereafter referred to as organizations) which unlawfully advocates or practices the commission of acts of force or violence to prevent others from exercising their rights under the Constitution or laws of the U.S. or of any State or which seeks to overthrow the Government of the U.S. or any State or subdivision thereof by unlawful means.

(e) Unauthorized disclosure to any person of classified information, or of other information, disclosure of which

is prohibited by statute, Executive Order or regulation.

(f) Performing or attempting to perform one's duties, acceptance and active maintenance of dual citizenship, or other acts conducted in a manner which serve or which could be expected to serve the interests of another government in preference to the interests of the United States.

(g) Disregard of public law, statutes, Executive Orders or regulations including violation of security regulations or practices.

(h) Criminal or dishonest conduct.

(i) Acts of omission or commission that indicate poor judgment, unreliability or untrustworthiness.

(j) Any behavior or illness, including any mental condition, which, in the opinion of competent medical authority, may cause a defect in judgment or reliability with due regard to the transient or continuing effect of the illness and the medical findings in such case.

(k) Vulnerability to coercion, influence, or pressure that may cause conduct contrary to the national interest. This may be

(1) The presence of immediate family members or other persons to whom the applicant is bonded by affection or obligation in a nation (or areas under its domination) whose interests may be inimical to those of the United States, or

(2) Any other circumstances that could cause the applicant to be vulnerable.

(l) Excessive indebtedness, recurring financial difficulties, or unexplained affluence.

(m) Habitual or episodic use of intoxicants to excess.

(n) Illegal or improper use, possession, transfer, sale or addiction to any controlled or psychoactive substance, narcotic, cannabis or other dangerous drug.

(o) Any knowing and willful falsification, coverup, concealment, misrepresentation, or omission of a material fact from any written or oral statement, document, form or other representation or device used by the Department of Defense or any other Federal agency.

(p) Failing or refusing to answer or to authorize others to answer questions or provide information required by a congressional committee, court, or agency in the course of an official inquiry whenever such answers or information concern relevant and material matters pertinent to an evaluation of the individual's trustworthiness, reliability, and judgment.

(q) Acts of sexual misconduct or perversion indicative of moral turpitude, poor judgment, or lack of regard for the laws of society.

## § 154.8 Types and scope of personnel security investigations.

(a) *General.* The types of personnel security investigations authorized below vary in scope of investigative effort required to meet the purpose of the particular investigation. No other types are authorized. The scope of a PSI may be neither raised nor lowered without the approval of the Deputy Under Secretary of Defense for Policy.

(b) *National Agency Check.* Essentially, a NAC is a records check of designated agencies of the Federal Government that maintain record systems containing information relevant to making a personnel security determination. An ENTNAC is a NAC (scope as outlined in paragraph 1, Appendix A) conducted on inductees and first-term enlistees, but lacking a technical fingerprint search. A NAC is also an integral part of each BI, SBI, and Periodic Reinvestigation (PR). Subpart C prescribes when an NAC is required.

(c) *National Agency Check plus written inquiries.* The Office of Personnel Management (OPM) conducts a NAC plus Written Inquiries (NACIs) on civilian employees for all departments and agencies of the Federal Government, pursuant to E.O. 10450. NACIs are considered to meet the investigative requirements of this regulation for a nonsensitive or noncritical sensitive position and/or up to a Secret clearance and, in addition to the NAC, include coverage of law enforcement agencies, former employers and supervisors, references, and schools covering the last 5 years.

(d) *DoD National Agency check plus written inquiries.* DIS will conduct a DNACI, consisting of the scope contained in paragraph 2, Appendix A, for DoD military and contractor personnel

for access to Secret information. Subpart C prescribes when a DNACI is required.

(e) *Background investigation*. The BI is the principal type of investigation conducted when an individual requires Top Secret clearance or is to be assigned to a critical sensitive position. The BI normally covers a 5-year period and consists of a subject interview, NAC, LACs, credit checks, developed character references (3), employment records checks, employment references (3), and select scoping as required to resolve unfavorable or questionable information. (See paragraph 3, Appendix A). Subpart C prescribes when a BI is required.

(f) *Special background investigation*. (1) An SBI is essentially a BI providing additional coverage both in period of time as well as sources of information, scoped in accordance with the provisions of DCID 1/14 but without the personal interview. While the kind of coverage provided for by the SBI determines eligibility for access to SCI, DoD has adopted this coverage for certain other Special Access programs. Subpart C prescribes when an SBI is required.

(2) The OPM, FBI, Central Intelligence Agency (CIA), Secret Service, and the Department of State conduct specially scoped BIs under the provisions of DCID 1/14. Any investigation conducted by one of the above-cited agencies under DCID 1/14 standards is considered to meet the SBI investigative requirements of this part.

(3) The detailed scope of an SBI is set forth in paragraph 4, Appendix A.

(g) *Special investigative inquiry*. (1) A Special Investigative Inquiry is a personnel security investigation conducted to prove or disprove allegations relating to the criteria outlined in §154.7(a) of this part except current criminal activities (see §154.9(c)(4)), that have arisen concerning an individual upon whom a personnel security determination has been previously made and who, at the time of the allegation, holds a security clearance or otherwise occupies a position that requires a trustworthiness determination.

(2) Special Investigative Inquiries are scoped as necessary to address the specific matters requiring resolution in the case concerned and generally consist of record checks and/or interviews with potentially knowledgeable persons. An SII may include an interview with the subject of the investigation when necessary to resolve conflicting information and/or to provide an opportunity to refute or mitigate adverse information.

(3) In those cases when there is a disagreement between Defense Investigative Service (DIS) and the requester as to the appropriate scope of the investigation, the matter may be referred to the Deputy Under Secretary of Defense for Policy for resolution.

(h) *Periodic reinvestigation*. As referred to in §154.19(a) and other national directives, certain categories of duties, clearance, and access require the conduct of a PR every five years according to the scope outlined in paragraph 5, Appendix A. The PR scope applies to military, civilian, contractor, and foreign national personnel.

(i) *Personal interview*. Investigative experience over the years has demonstrated that, given normal circumstances, the subject of a personnel security investigation is the best source of accurate and relevant information concerning the matters under consideration. Further, restrictions imposed by the Privacy Act of 1974 dictate that Federal investigative agencies collect information to the greatest extent practicable directly from the subject when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs. Accordingly, personal interviews are an integral part of the DoD personnel security program and shall be conducted in accordance with the requirements set forth in the following paragraphs of this section.

(1) *BI/PR*. A personal interview shall be conducted by a trained DIS agent as part of each BI and PR.

(2) *Resolving adverse information*. A personal interview of the subject shall be conducted by a DIS agent (or, when authorized, by investigative personnel of other DoD investigative organizations designated in this Regulation to conduct personnel security investigations), when necessary, as part of each

Special Investigative Inquiry, as well as during the course of initial or expanded investigations, to resolve or clarify any information which may impugn the subject's moral character, threaten the subject's future Federal employment, raise the question of subject's security clearability, or be otherwise stigmatizing.

(3) *Hostage situation*. A personal interview shall be conducted by a DIS agent (or, when authorized, by investigative personnel of other DoD investigative organizations designated in this Regulation to conduct personnel security investigations) in those instances in which an individual has immediate family members or other persons bound by ties of affection or obligation who reside in a nation whose interests are inimical to the interests of the United States. (See § 154.9(d).

(4) *Applicants/potential nominees for DoD military or civilian positions requiring access to SCI or other positions requiring an SBI*. A personal interview of the individual concerned shall be conducted, to the extent feasible, as part of the selection process for applicants/potential nominees for positions requiring access to SCI or completion of an SBI. The interview shall be conducted by a designee of the Component to which the applicant or potential nominee is assigned. Clerical personnel are not authorized to conduct these interviews. Such interviews shall be conducted utilizing resources in the order of priority indicated below:

(i) Existing personnel security screening systems (e.g., Air Force Assessment Screening Program, Naval Security Group Personnel Security Interview Program, U.S. Army Personnel Security Screening Program); or

(ii) Commander of the nominating organization or such official as he or she has designated in writing (e.g., Deputy Commander, Executive Officer, Security Officer, Security Manager, S–2, Counterintelligence Specialist, Personnel Security Specialist, or Personnel Officer); or

(iii) Agents of investigative agencies in direct support of the Component concerned.

(5) *Administrative procedures*. (i) The personal interview required by paragraph (i)(4) of this section shall be conducted in accordance with Appendix F.

(ii) For those investigations requested subsequent to the personal interview requirements of paragraph (i)(4) of this section the following procedures apply:

(A) The DD Form 1879 (Request for Personnel Security Investigation) shall be annotated under Item 20 (Remarks) with the statement ''Personal Interview Conducted by (cite the duty assignment of the designated official (e.g., Commander, Security Officer, Personnel Security Specialist, etc.))'' in all cases in which an SBI is subsequently requested.

(B) Unfavorable information developed through the personal interview required by paragraph (i)(4) of this section, will be detailed in a written report attached to the DD Form 1879 to include full identification of the interviewer. Failure to provide such information may result in conduct of an incomplete investigation by DIS.

(C) Whenever it is determined that it is not feasible to conduct the personal interview required by paragraph (i)(4) of this section prior to requesting the SBI, the DD Form 1879 shall be annotated under Item 20 citing the reason for not conducting the interview.

(j) *Expanded investigation*. If adverse or questionable information relevant to a security determination is developed during the conduct of a personnel security investigation, regardless of type, the investigation shall be expanded, consistent with the restrictions in § 154.10(e) to the extent necessary to substantiate or disprove the adverse or questionable information.

### § 154.9 Authorized personnel security investigative agencies.

(a) *General*. The DIS provides a single centrally directed personnel security investigative service to conduct personnel security investigations within the 50 States, District of Columbia, and Commonwealth of Puerto Rico for DoD Components, except as provided for in DoD Directive 5100.23.[1] DIS will request the Military Departments or other appropriate Federal Agencies to

[1] See footnote 1 to § 154.2(c).

accomplish DoD investigative requirements in other geographic areas beyond their jurisdiction. No other DoD Component shall conduct personnel security investigations unless specifically authorized by the Deputy Under Secretary of Defense for Policy. In certain instances provided for below, the DIS shall refer an investigation to other investigative agencies.

(b) *Subversive affiliations*—(1) *General*. In the context of DoD investigative policy, subversion refers only to such conduct as is forbidden by the laws of the United States. Specifically, this is limited to information concerning the activities of individuals or groups that involve or will involve the violation of Federal law, for the purpose of:

(i) Overthrowing the Government of the United States or the government of a State;

(ii) Substantially impairing for the purpose of influencing U.S. Government policies or decisions:

(A) The functions of the Government of the United States, or

(B) The functions of the government of a State;

(iii) Depriving persons of their civil rights under the Constitution or laws of the United States.

(2) *Military Department/FBI jurisdiction*. Allegations of activities covered by §154.7 (a) through (f) are in the exclusive investigative domain of either the counterintelligence agencies of the Military Departments or the FBI, depending on the circumstances of the case and the provisions of the Agreement Governing the Conduct of Defense Department Counterintelligence Activities in Conjunction with the FBI. Whenever allegations of this nature are developed, whether before or after a security clearance has been issued or during the course of a personnel security investigation conducted by DIS, they shall be referred immediately to either the FBI or to a military department counterintelligence agency, as appropriate.

(3) *DIS jurisdiction*. Allegations of activities limited to those set forth in §154.7 (g) through (j) of this part shall be investigated by DIS.

(c) *Suitability information*—(1) *General*. Most derogatory information developed through personnel security investigations of DoD military or civilian personnel is so-called suitability information, that is, information pertaining to activities or situations covered by §154.7 (g) through (q). Almost all unfavorable personnel security determinations made by DoD authorities are based on derogatory suitability information, although such information is often used as a basis for unfavorable administrative actions not of a security nature, such as action under the Uniform Code of Military Justice or removal from Federal employment under OPM regulations.

(2) *Pre-clearance investigation*. Derogatory suitability information, except that covered in paragraph (c)(4) of this section, developed during the course of a personnel security investigation, prior to the issuance of an individual's personnel security clearance, shall be investigated by DIS to the extent necessary to confirm or refute its applicability to §154.7 (g) through (q).

(3) *Postadjudication investigation*. Derogatory suitability allegations, except those covered by paragraph (c)(4) of this section arising subsequent to clearance requiring investigation to resolve and to determine the individual's eligibility for continued access to classified information, reinstatement of clearance/access, or retention in a sensitive position shall be referred to DIS to conduct a Special Investigative Inquiry. Reinvestigation of individuals for adjudicative reconsideration due to the passage of time or evidence of favorable behavior shall also be referred to DIS for investigation. In such cases, completion of the appropriate statement of personal history by the individual constitutes consent to be investigated. Individual consent or completion of a statement of personal history is not required when §154.19(b) applies. Postadjudication investigation of allegations of a suitability nature required to support other types of unfavorable personnel security determinations or disciplinary procedures independent of a personnel security determination shall be handled in accordance with applicable Component administrative regulations. These latter categories of allegations lie outside the DoD personnel security program and are not a

proper investigative function for departmental counterintelligence organizations, Component personnel security authorities, or DIS.

(4) *Allegations of criminal activity*. Any allegations of conduct of a nature indicating possible criminal conduct, including any arising during the course of a personnel security investigation, shall be referred to the appropriate DoD, military department or civilian criminal investigative agency. Military department investigative agencies have primary investigative jurisdiction in cases where there is probable cause to believe that the alleged conduct will be the basis for prosecution under the Uniform Code of Military Justice.

(d) *Hostage situations*—(1) *General*. A hostage situation exists when a member of an individual's immediate family or such other person to whom the individual is bound by obligation or affection resides in a country whose interests are inimical to the interests of the United States. The rationale underlying this category of investigation is based on the possibility that an individual in such a situation might be coerced, influenced, or pressured to act contrary to the best interests of national security.

(2) *DIS jurisdiction*. In the absence of evidence of any coercion, influence or pressure, hostage investigations are exclusively a personnel security matter, rather than counterintelligence, and all such investigations shall be conducted by DIS.

(3) *Military Department and/or FBI jurisdiction*. Should indications be developed that hostile intelligence is taking any action specifically directed against the individual concerned—or should there exist any other evidence that the individual is actually being coerced, influenced, or pressured by an element inimical to the interests of national security—then the case becomes a counterintelligence matter (outside of investigative jurisdiction of DIS) to be referred to the appropriate military department or the FBI for investigation.

(e) *Overseas personnel security investigations*. Personnel security investigations requiring investigation overseas shall be conducted under the direction and control of DIS by the appropriate military department investigative organization. Only postadjudication investigations involving an overseas subject may be referred by the requester directly to the military department investigative organization having investigative responsibility in the overseas area concerned (see Appendix I) with a copy of the investigative request sent to DIS. In such cases, the military department investigative agency will complete the investigation, forward the completed report of investigation directly to DIS, with a copy to the requester.

### § 154.10 Limitations and restrictions.

(a) *Authorized requesters and personnel security determination authorities*. Personnel security investigations may be requested and personnel security clearances (including Special Access authorizations as indicated) granted only by those authorities designated in § 154.31 and Appendix E.

(b) *Limit investigations and access*. The number of persons cleared for access to classified information shall be kept to a minimum, consistent with the requirements of operations. Special attention shall be given to eliminating unnecessary clearances and requests for personnel security investigations.

(c) *Collection of investigative data*. To the greatest extent practicable, personal information relevant to security determinations shall be obtained directly from the subject of a personnel security investigation. Such additional information required to make the necessary personnel security determination shall be obtained as appropriate from knowledgeable personal sources, particularly the subject's peers, and through checks of relevant records including school, employment, credit, medical, and law enforcement records.

(d) *Privacy Act notification*. Whenever personal information is solicited from an individual preparatory to the initiation of a personnel security investigation, the individual must be informed of—

(1) The authority (statute or Executive order that authorized solicitation);

(2) The principal purpose or purposes for which the information is to be used;

(3) The routine uses to be made of the information;

(4) Whether furnishing such information is mandatory or voluntary;

(5) The effect on the individual, if any, of not providing the information and

(6) That subsequent use of the data may be employed as part of an aperiodic, random process to screen and evaluate continued eligibility for access to classified information.

(e) *Restrictions on investigators.* Investigation shall be carried out insofar as possible to collect only as much information as is relevant and necessary for a proper personnel security determination. Questions concerning personal and domestic affairs, national origin, financial matters, and the status of physical health thus should be avoided unless the question is relevant to the criteria of §154.7. Similarly, the probing of a person's thoughts or beliefs and questions about conduct that have no personnel security implications are unwarranted. When conducting investigations under the provisions of this part, investigators shall:

(1) Investigate only cases or persons assigned within their official duties.

(2) Interview sources only where the interview can take place in reasonably private surroundings.

(3) Always present credentials and inform sources of the reasons for the investigation. Inform sources of the subject's accessibility to the information to be provided and to the identity of the sources providing the information. Restrictions on investigators relating to Privacy Act advisements to subjects of personnel security investigations are outlined in paragraph (d) of this section.

(4) Furnish only necessary identity data to a source, and refrain from asking questions in such a manner as to indicate that the investigator is in possession of derogatory information concerning the subject of the investigation.

(5) Refrain from using, under any circumstances, covert or surreptitious investigative methods, devices, or techniques including mail covers, physical or photographic surveillance, voice analyzers, inspection of trash, paid informants, wiretap, or eavesdropping devices.

(6) Refrain from accepting any case in which the investigator knows of circumstances that might adversely affect his fairness, impartiality, or objectivity.

(7) Refrain, under any circumstances, from conducting physical searches of the subject or his property.

(8) Refrain from attempting to evaluate material contained in medical files. Medical files shall be evaluated for personnel security program purposes only by such personnel as are designated by DoD medical authorities. However, review and collection of medical record information may be accomplished by authorized investigative personnel.

(f) *Polygraph restrictions.* The polygraph may be used as a personnel security screening measure only in those limited instances authorized by the Secretary of Defense in DoD Directive 5210.48. [1]

## Subpart C—Personnel Security Investigative Requirements

### § 154.13 Sensitive positions.

(a) *Designation of sensitive positions.* Certain civilian positions within the Department of Defense entail duties of such a sensitive nature, including access to classified information, that the misconduct, malfeasance, or nonfeasance of an incumbent in any such position could result in an unacceptably adverse impact upon the national security. These positions are referred to in this part as sensitive positions. It is vital to the national security that great care be exercised in the selection of individuals to fill such positions. Similarly, it is important that only positions which truly meet one or more of the criteria set forth in paragraph (b) of this section be designated as sensitive.

(b) *Criteria for security designation of positions.* Each civilian position within the Department of Defense shall be categorized, with respect to security sensitivity, as either nonsensitive, noncritical-sensitive, or critical-sensitive.

(1) The criteria to be applied in designating a position as sensitive are:

(i) Critical-sensitive.

[1] See footnote 1 to §154.2(c).

(A) Access to Top Secret information.

(B) Development or approval of plans, policies, or programs that affect the overall operations of the Department of Defense or of a DoD Component.

(C) Development or approval of war plans, plans or particulars of future major or special operations of war, or critical and extremely important items of war.

(D) Investigative and certain investigative support duties, the issuance of personnel security clearances or access authorizations, or the making of personnel security determinations.

(E) Fiduciary, public contact, or other duties demanding the highest degree of public trust.

(F) Duties falling under Special Access programs.

(G) Category I automated data processing (ADP) positions.

(H) Any other position so designated by the head of the Component or designee.

(ii) Noncritical-sensitive.

(A) Access to Secret or Confidential information.

(B) Security police/provost marshal-type duties involving the enforcement of law and security duties involving the protection and safeguarding of DoD personnel and property.

(C) Category II automated data processing positions.

(D) Duties involving education and orientation of DoD personnel.

(E) Duties involving the design, operation, or maintenance of intrusion detection systems deployed to safeguard DoD personnel and property.

(F) Any other position so designated by the head of the Component or designee.

(2) All other positions shall be designated as nonsensitive.

(c) *Authority to designate sensitive positions.* The authority to designate sensitive positions is limited to those authorities designated in paragraph G, Appendix E. These authorities shall designate each position within their jurisdiction as to its security sensitivity and maintain these designations current vis-a-vis the specific duties of each position.

(d) *Limitation of sensitive positions.* It is the responsibility of those authorities authorized to designate sensitive positions to insure that only those positions are designated as sensitive that meet the criteria of paragraph (b) and (c) of this section that the designation of sensitive positions is held to a minimum consistent with mission requirements. Designating authorities shall maintain an accounting of the number of sensitive positions by category, i.e., critical or non-critical sensitive. Such information will be included in annual report required in subpart K.

(e) *Billet control system for Top Secret.* (1) To standardize and control the issuance of Top Secret clearances within the Department of Defense, a specific designated billet must be established and maintained for all DoD military and civilian positions requiring access to Top Secret information. Only persons occupying these billet positions will be authorized a Top Secret clearance. If an individual departs from a Top Secret billet to a billet/position involving a lower level clearance, the Top Secret clearance will be administratively rescinded. This Top Secret billet requirement is in addition to the existing billet structure maintained for SCI access.

(2) Each request to DIS for a BI or SBI that involves access to Top Secret or SCI information will require inclusion of the appropriate billet reference, on the request for investigation. Each Component head should in corporate, to the extent feasible, the Top Secret billet structure into the component Manpower Unit Manning Document. Such a procedure should minimize the time and effort required to maintain such a billet structure.

(3) A report on the number of established Top Secret billets will be submitted each year to the DUSD(P) as part of the annual clearance report referred to in subpart K.

### § 154.14 Civilian employment.

(a) *General.* The appointment of each civilian employee in any DoD Component is subject to investigation, except for reappointment when the break in employment is less than 12 months. The type of investigation required is set forth in this section according to position sensitivity.

(b) *Nonsensitive positions.* In accordance with the OPM Federal Personnel Manual, a NACI shall be requested not later than 3 working days after a person is appointed to a nonsensitive position. Although there is normally no investigation requirement for per diem, intermittent, temporary or seasonal employees in nonsensitive positions provided such employment does not exceed an aggregate of 120 days in either a single continuous or series of appointments, a NAC may be requested of DIS where deemed appropriate by the employing activity.

(c) *Noncritical-sensitive positions.* (1) An NACI shall be requested and the NAC portion favorably completed before a person is appointed to a noncritical-sensitive position (for exceptions see paragraph (e) (1) and (2) of this section). An ENTNAC, NAC or DNACI conducted during military or contractor employment may also be used for appointment provided a NACI has been requested from OPM and there is no more than 12 months break in service since completion of the investigation.

(2) Seasonal employees (including summer hires) normally do not require access to classified information. For those requiring access to classified information the appropriate investigation is required. The request for the NAC (or NACI) should be submitted to DIS by entering ''SH'' (summer hire) in red letters approximately one inch high on the DD Form 398–2, Personnel Security Questionnaire (National Agency Checklist). Additionally, to ensure expedited processing by DIS, summer hire requests should be assembled and forwarded to DIS in bundles, when appropriate.

(d) *Critical-sensitive positions.* A BI shall be favorably completed prior to appointment to critical-sensitive positions (for exceptions see paragraph (e) (1) and (2) of this section. Certain critical-sensitive positions require a preappointment SBI in accordance with § 154.17. Preappointment BIs and SBIs will be conducted by DIS.

(e) *Exceptions*—(1) *Noncritical-sensitive.* In an emergency, a noncritical-sensitive position may be occupied pending the completion of the NACI if the head of the requesting organization finds that the delay in appointment would be harmful to the national security and such finding is reduced to writing and made part of the record. In such instances, the position may be filled only after the NACI has been requested.

(2) *Critical-sensitive.* In an emergency, a critical-sensitive position may be occupied pending completion of the BI (or SBI, as appropriate) if the head of the requesting organization finds that the delay in appointment would be harmful to the national security and such finding is reduced to writing and made a part of the record. In such instances, the position may be filled only when the NAC portion of the BI (or SBI) or a previous valid NACI, NAC or ENTNAC has been completed and favorably adjudicated.

(f) *Mobilization of DoD civilian retirees.* The requirements contained in paragraph (a) of this section, regarding the type of investigation required by position sensitivity for DoD civilian retirees temporary appointment when the break in employment is greater than 12 months, should either be expedited or waived for the purposes of mobilizing selected reemployed annuitants under the provisions of title 5, United States Code, depending upon the degree of sensitivity of the position to which assigned. Particular priority should be afforded to newly assigned personnel assigned to the defense intelligence and security agencies with respect to granting security clearances in an expeditious manner under paragraph (a) of this section.

### § 154.15 Military appointment, enlistment, and induction.

(a) *General.* The appointment, enlistment, and induction of each member of the Armed Forces or their Reserve Components shall be subject to the favorable completion of a personnel security investigation. The types of investigation required are set forth in this section.

(b) *Entrance investigation.* (1) An ENTNAC shall be conducted on each enlisted member of the Armed Forces at the time of initial entry into the service. A DNACI shall be conducted on each commissioned officer, except as

permitted by paragraph (d) of this section, warrant officer, cadet, midshipman, and Reserve Officers Training Candidate, at the time of appointment. A full NAC shall be conducted upon reentry of any of the above when there has been a break in service greater than 12 months.

(2) If an officer or warrant officer candidate has been the subject of a favorable NAC or ENTNAC and there has not been a break in service of more than 12 months, a new NAC is not authorized. This includes ROTC graduates who delay entry onto active duty pending completion of their studies.

(3) All derogatory information revealed during the enlistment or appointment process that results in a moral waiver will be fully explained on a written summary attached to the DD Form 398–2.

(c) *Reserve Components and National Guard*. Reserve Component and National Guard personnel not on active duty are subject to the investigative requirements of this section.

(d) *Exceptions for certain commissioned officers of Reserve Components*. The requirements for entrance investigation shall be rigidly adhered to except as follows. Health professionals, chaplains, and attorneys may be commissioned in the Reserve Components prior to completion of a DNACI provided that:

(1) A DNACI is initiated at the time an application for a commission is received; and

(2) The applying health professional, chaplain, or attorney agrees in writing that, if the results of the investigation are unfavorable, he or she will be subject to discharge if found to be ineligible to hold a commission. Under this exception, commissions in Reserve Components other than the National Guard may be tendered to immigrant alien health professionals, chaplains, and attorneys.

(e) *Mobilization of military retirees*. The requirements contained in paragraph (c) of this section, regarding a full NAC upon reentry to active duty of any officer or enlisted regular/reserve military retiree or Individual Ready Reserve who has been separated from service for a period of greater than 12 months, should be waived for the purposes of partial or full mobilization under provisions of title 10, (title 14, pertaining to the U.S. Coast Guard as an element of the Navy) U.S. Code, to include the period of prescribed service refresher training. Particular priority should be afforded to military retirees mobilized and assigned to the defense intelligence and security agencies communities.

### § 154.16 Security clearance.

(a) *General*. (1) The authorities designated in paragraph A, Appendix E are the only authorities authorized to grant, deny or revoke DoD personnel security clearances. The granting of such clearances shall be limited to only those persons who require access to classified information for mission accomplishment.

(2) Military, DoD civilian, and contractor personnel who are employed by or serving in a consultant capacity to the DoD, may be considered for access to classified information only when such access is required in connection with official duties. Such individuals may be granted either a final or interim personnel security clearance provided the investigative requirements set forth below are complied with, and provided further that all available information has been adjudicated and a finding made that such clearance would be clearly consistent with the interests of national security.

(b) *Investigative requirements for clearance*—(1) *Top Secret*. (i) Final Clearance:

(A) BI.

(B) Established billet per § 154.13(e) (1) through (3) (except contractors).

(ii) Interim Clearance:

(A) Favorable NAC, ENTNAC, DNACI, or NACI completed

(B) Favorable review of DD Form 398/SF–86/SF–171/DD Form 49

(C) BI or SBI has been initiated

(D) Favorable review of local personnel, base/military police, medical, and other security records as appropriate.

(E) Established billet per § 154.13(e) (1) through (3) (except contractors)

(F) Provisions of paragraph § 154.14(e) (1) and (2) have been met regarding civilian personnel.

(2) *Secret*. (i) Final Clearance:

(A) DNACI: Military (except first-term enlistees) and contractor employees

(B) NACI: Civilian employees

(C) ENTNAC: First-term enlistees

(ii) Interim Clearance:

(A) When a valid need to access Secret information is established, an interim Secret clearance may be issued in every case, provided that the steps outlined in paragraphs (b)(2)(ii) (B) through (E) of this section have been complied with.

(B) Favorable review of DD Form 398–2/SF–85/SF–171/DD Form 48.

(C) NACI, DNACI, or ENTNAC initiated.

(D) Favorable review of local personnel, base military police, medical, and security records as appropriate.

(E) Provisions of § 154.14(e) have been complied with regarding civilian personnel.

(3) *Confidential*. (i) Final Clearance:

(A) NAC or ENTNAC: Military and contractor employees (except for Philippine national members of the United States Navy on whom a BI shall be favorably completed.)

(B) NACI: Civilian employees (except for summer hires who may be granted a final clearance on the basis of a NAC).

(ii) Interim Clearance:

(A) Favorable review of DD Form 398–2/SF 85/SF 171/ DD Form 48.

(B) NAC, ENTNAC or NACI initiated.

(C) Favorable review of local personnel, base military police, medical, and security records as appropriate.

(D) Provisions of § 154.14(e) (1) and (2) have been complied with regarding civilian personnel.

(4) *Validity of previously granted clearances*. Clearances granted under less stringent investigative requirements retain their validity; however, if a higher degree of clearance is required, investigative requirements of this directive will be followed.

(c) *Access to classified information by non-U.S. citizens*. (1) Only U.S. citizens are eligible for a security clearance. Therefore, every effort shall be made to ensure that non-United States citizens are not employed in duties that may require access to classified information. However, when there are compelling reasons to grant access to classified information to an immigrant alien or a foreign national in furtherance of the mission of the Department of Defense, such individuals may be granted a ''Limited Access Authorization'' (LAA) under the following conditions:

(i) LAAs will be limited to Secret and Confidential level only; LAAs for Top Secret are prohibited.

(ii) Access to classified information is not inconsistent with that determined releasable by designated disclosure authorities, in accordance with DoD Directive 5230.11[1] to the country of which the individual is a citizen.

(iii) Access to classified information must be limited to information relating to a specific program or project.

(iv) Favorable completion of an BI (scoped for 10 years); where the full investigative coverage cannot be completed, a counterintelligence scope polygraph examination will be required in accordance with the provisions of DoD Directive 5210.48.

(v) Security clearances previously issued to immigrant aliens will be reissued as LAAs.

(vi) The Limited Access Authorization determination shall be made only by an authority designated in paragraph B, Appendix E.

(vii) LAAs issued by the Unified and Specified Commands shall be reported to the central adjudicative facility of the appropriate military department in accordance with the assigned responsibilities in DoD Directive 5100.3[1] for inclusion in the Defense Central Index of Investigation (DCII).

(2) In each case of granting a Limited Access Authorization, a record shall be maintained as to:

(i) The identity (including current citizenship) of the individual to whom the Limited Access Authorization is granted, to include name and date and place of birth;

(ii) Date and type of most recent investigation to include the identity of the investigating agency;

(iii) The nature of the specific program material(s) to which access is authorized (delineated as precisely as possible);

[1] See footnote 1 to § 154.2(c).

(iv) The classification level to which access is authorized; and

(v) The compelling reasons for granting access to the materials cited in (iii).

(vi) Status of the individual (i.e., immigrant alien or foreign national).

(3) Individuals granted LAAs under the foregoing provisions shall be the subject of a 5-year periodic reinvestigation as set forth in paragraph 5, Appendix A.

(4) Foreign nationals who are LAA candidates must agree to submit to a counterintelligence-scope polygraph examination prior to being granted access in accordance with DoD Directive 5210.48.

(5) If geographical and political situations prevent the full completion of the BI (and/or counterintelligence-scope polygraph) issuance of an LAA shall not be authorized; exceptions to the policy may only be authorized by the DUSD(P).

(6) A report on all LAAs in effect, including the data required in paragraphs (d)(2) (i) through (vi) of this section shall be furnished to the Deputy Under Secretary of Defense for Policy within 60 days after the end of each fiscal year. (See § 154.77).

(d) *Access by persons outside the Executive Branch*. (1) Access to classified information by persons outside the Executive Branch shall be accomplished in accordance with 32 CFR part 159. The investigative requirement shall be the same as for the appropriate level of security clearance, except as indicated below.

(2) Members of the U.S. Senate and House of Representatives do not require personnel security clearances. They may be granted access to DoD classified information which relates to matters under the jurisdiction of the respective Committees to which they are assigned and is needed to perform their duties in connection with such assignments.

(3) Congressional staff members requiring access to DoD classified information shall be processed for a security clearance in accordance with 32 CFR part 353 and the provisions of this part. The Director, Washington Headquarters Services (WHS) will initiate the required investigation (initial or reinvestigation) to DIS, adjudicate the results and grant, deny or revoke the security clearance, as appropriate. The Assistant Secretary of Defense (Legislative Affairs) will be notified by WHS of the completed clearance action.

(4) State governors do not require personnel security clearances. They may be granted access to specifically designated classified information, on a ''need-to-know'' basis, based upon affirmation by the Secretary of Defense or the head of a DoD Component or single designee, that access, under the circumstances, serves the national interest. Staff personnel of a governor's office requiring access to classified information shall be investigated and cleared in accordance with the prescribed procedures of this part when the head of a DoD Component, or single designee, affirms that such clearance serves the national interest. Access shall also be limited to specifically designated classified information on a ''need-to-know'' basis.

(5) Members of the U.S. Supreme Court, the Federal judiciary and the Supreme Courts of the individual States do not require personnel security clearances. They may be granted access to DoD classified information to the extent necessary to adjudicate cases being heard before these individual courts.

(6) Attorneys representing DoD military, civilian or contractor personnel, requiring access to DoD classified information to properly represent their clients, shall normally be investigated by DIS and cleared in accordance with the prescribed procedures in paragraph (b) of this section. This shall be done upon certification of the General Counsel of the DoD Component involved in the litigation that access to specified classified information, on the part of the attorney concerned, is necessary to adequately represent his or her client. In exceptional instances, when the exigencies of a given situation do not permit timely compliance with the provisions of § 154.16(b), access may be granted with the written approval of an authority designated in Appendix E provided that as a minimum: a favorable name check of the FBI and the DCII has been completed, and a DoD Non-

Disclosure Agreement has been executed. In post-indictment cases, after a judge has invoked the security procedures of the Classified Information Procedures Act (CIPA) the Department of Justice may elect to conduct the necessary background investigation and issue the required security clearance, in coordination with the affected DoD Component.

(e) *Restrictions on issuance of personnel security clearances.* Personnel security clearances must be kept to the absolute minimum necessary to meet mission requirements. Personnel security clearances shall *not* be issued:

(1) To persons in nonsensitive positions.

(2) To persons whose regular duties do not require authorized access to classified information.

(3) For ease of movement of persons within a restricted, controlled, or industrial area, whose duties do not require access to classified information.

(4) To persons who may only have inadvertent access to sensitive information or areas, such as guards, emergency service personnel, firemen, doctors, nurses, police, ambulance drivers, or similar personnel.

(5) To persons working in shipyards whose duties do not require access to classified information.

(6) To persons who can be prevented from accessing classified information by being escorted by cleared personnel.

(7) To food service personnel, vendors and similar commercial sales or service personnel whose duties do not require access to classified information.

(8) To maintenance or cleaning personnel who may only have inadvertent access to classified information unless such access cannot be reasonably prevented.

(9) To persons who perform maintenance on office equipment, computers, typewriters, and similar equipment who can be denied classified access by physical security measures.

(10) To perimeter security personnel who have no access to classified information.

(11) To drivers, chauffeurs and food service personnel.

(f) *Dual citizenship.* Persons claiming both U.S. and foreign citizenship shall be processed under §154.16(b) and adjudicated in accordance with the ''Foreign Preference'' standard in Appendix I.

(g) *One-time access.* Circumstances may arise where an urgent operational or contractual exigency exists for cleared DoD personnel to have one-time or short duration access to classified information at a higher level than is authorized by the existing security clearance. In many instances, the processing time required to upgrade the clearance would preclude timely access to the information. In such situations, and only for compelling reasons in furtherance of the DoD mission, an authority referred to in paragraph (h)(1) of this section, may grant higher level access on a temporary basis subject to the terms and conditions prescribed below. This special authority may be revoked for abuse, inadequate record keeping, or inadequate security oversight. These procedures do not apply when circumstances exist which would permit the routine processing of an individual for the higher level clearance. Procedures and conditions for effecting emergency one-time access to the next higher classification level are as follows:

(1) Authorization for such one-time access shall be granted by a flag or general officer, a general court-martial convening authority or equivalent Senior Executive Service member, after coordination with appropriate security officials.

(2) The recipient of the one-time access authorization must be a U.S. citizen, possess a current DoD security clearance, and the access required shall be limited to classified information one level higher than the current clearance.

(3) Such access, once granted, shall be cancelled promptly when no longer required, at the conclusion of the authorized period of access, or upon notification from the granting authority.

(4) The employee to be afforded the higher level access shall have been continuously employed by a DoD Component or a cleared DoD contractor for the preceding 24-month period. Higher level access is not authorized for part-time employees.

(5) Pertinent local records concerning the employee concerned shall be reviewed with favorable results.

(6) Whenever possible, access shall be confined to a single instance or at most, a few occasions. The approval for access shall automatically expire 30 calendar days from date access commenced. If the need for access is expected to continue for a period in excess of 30 days, written approval of the granting authority is required. At such time as it is determined that the need for access is expected to extend beyond 90 days, the individual concerned shall be promptly processed for the level of clearance required. When extended access has been approved, such access shall be cancelled at or before 90 days from original date of access.

(7) Access at the higher level shall be limited to information under the control and custody of the authorizing official and shall be afforded under the general supervision of a properly cleared employee. The employee charged with providing such supervision shall be responsible for:

(i) Recording the higher-level information actually revealed,

(ii) The date(s) such access is afforded; and

(iii) The daily retrieval of the material accessed.

(8) Access at the next higher level shall not be authorized for COMSEC, SCI, NATO, or foreign government information.

(9) The exercise of this provision shall be used sparingly and repeat use within any 12 month period on behalf of the same individual is prohibited. The approving authority shall maintain a record containing the following data with respect to each such access approved:

(i) The name, and SSN of the employee afforded higher level access.

(ii) The level of access authorized.

(iii) Justification for the access, to include an explanation of the compelling reason to grant the higher level access and specifically how the DoD mission would be furthered.

(iv) An unclassified description of the specific information to which access was authorized and the duration of access along with the date(s) access was afforded.

(v) A listing of the local records reviewed and a statement that no significant adverse information concerning the employee is known to exist.

(vi) The approving authority's signature certifying (h)(9) (i) through (v) of this section.

(vii) Copies of any pertinent briefing/debriefings administered to the employee.

(h) *Access by retired flag/general officers.* (1) Upon determination by an active duty flag/general officer that there are compelling reasons, in furtherance of the Department of Defense mission, to grant a retired flag/general officer access to classified information in connection with a specific DoD program or mission, for a period not greater than 90 days, the investigative requirements of this part may be waived. The access shall be limited to classified information at a level commensurate with the security clearance held at the time of retirement—not including access to SCI.

(2) The flag/general officer approving issuance of the clearance shall, provide the appropriate DoD Component central clearance facility a written record to be incorporated into the DCII detailing:

(i) Full identifying data pertaining to the cleared subject;

(ii) The classification of the information to which access was authorized.

(3) Such access may be granted only after the compelling reason and the specific aspect of the DoD mission which is served by granting such access has been detailed and under the condition that the classified materials involved are not removed from the confines of a government installation or other area approved for storage of DoD classified information.

[52 FR 11219, Apr. 8, 1987, as amended at 55 FR 3223, Jan. 31, 1990]

### § 154.17 Special access programs.

(a) *General.* It is the policy of the Department of Defense to establish, to the extent possible, uniform and consistent personnel security investigative requirements. Accordingly, investigations exceeding established requirements are authorized only when mandated by statute, national regulations, or international agreement. In this

connection, there are certain Special Access programs originating at the national or international level that require personnel security investigations and procedures of a special nature. These programs and the special investigative requirements imposed by them are described in this section. A Special Access program is any program designed to control access, distribution, and protection of particularly sensitive information established pursuant to section 4–2 of Executive Order 12356 and prior Orders. Title 32 CFR part 159 governs the establishment of Departmental Special Access Programs.

(b) *Sensitive Compartmented Information (SCI).* (1) The investigative requirements for access to SCI is an SBI (See paragraph 4, appendix A) including a NAC on the individual's spouse or cohabitant. When conditions indicate, additional investigation shall be conducted on the spouse of the individual and members of the immediate family (or other persons to whom the individual is bound by affection or obligation) to the extent necessary to permit a determination by the adjudication agency that the Personnel Security standards of DCID 1/14 are met.

(2) A previous investigation conducted within the past five years which substantially meets the investigative requirements prescribed by this section may serve as a basis for granting access approval provided that there has been no break in the individual's military service, DoD civilian employment, or access to classified information under the Industrial Security Program greater than 12 months. The individual shall submit one copy of an updated PSQ covering the period since the completion of the last SBI.

(c) *Single Integrated Operation Plan—Extremely Sensitive Information (SIOP-ESI).* The investigative requirement for access to SIOP-ESI is an SBI, including a NAC on the spouse and the individual's immediate family who are 18 years of age or over and who are U.S. citizens other than by birth or who are resident aliens.

(d) *Presidential support activities.* (1) DoD Directive 5210.55[1] prescribes the policies and procedures for the nomination, screening, selection, and continued evaluation of DoD military and civilian personnel and contractor employees assigned to or utilized in Presidential Support activities. The type of investigation of individuals assigned to Presidential Support activities varies according to whether the person investigated qualifies for Category One or Category Two as indicated below:

(i) *Category one.* (A) Personnel assigned on a permanent or full-time basis to duties in direct support of the President (including the office staff of the Director, White House Military Office, and all individuals under his control):

(*1*) Presidential aircrew and associated maintenance and security personnel.

(*2*) Personnel assigned to the White House communications activities and the Presidential retreat.

(*3*) White House transportation personnel.

(*4*) Presidential mess attendants and medical personnel.

(*5*) Other individuals filling administrative positions at the White House.

(B) Personnel assigned on a temporary or part-time basis to duties supporting the President:

(*1*) Military Social Aides.

(*2*) Selected security, transportation, flight-line safety, and baggage personnel.

(*3*) Others with similar duties.

(C) Personnel assigned to the Office of the Military Aide to the Vice President.

(ii) *Category two.* (A) Personnel assigned to honor guards, ceremonial units, and military bands who perform at Presidential functions and facilities.

(B) Employees of contractors who provide services or contractors employees who require unescorted access to Presidential Support areas, activities, or equipment—including maintenance of the Presidential retreat, communications, and aircraft.

(C) Individuals in designated units requiring a lesser degree of access to the President or Presidential Support activities.

(2) Personnel nominated for Category One duties must have been the subject of an SBI, including a NAC on the

[1] See footnote 1 to §154.2(c).

spouse and all members of the individual's immediate family of 18 years of age or over who are U.S. citizens other than by birth or who are resident aliens. The SBI must have been completed within the 12 months preceding selection for Presidential Support duties. If such an individual marries subsequent to the completion of the SBI, the required spouse check shall be made at that time.

(3) Personnel nominated for Category Two duties must have been the subject of a BI, including a NAC on the spouse and all members of the individual's immediate family of 18 years of age or over who are U.S. citizens other than by birth or who are resident aliens. The BI must have been completed within the 12 months preceding selection for Presidential Support duties. It should be noted that duties (separate and distinct from their Presidential Support responsibilities) of some Category Two personnel may make it necessary for them to have special access clearances which require an SBI.

(4) The U.S. citizenship of foreign-born immediate family members of all Presidential Support nominees must be verified by investigation.

(5) A limited number of Category One personnel having especially sensitive duties have been designated by the Director, White House Military Office as ''Category A.'' These personnel shall be investigated under special scoping in accordance with the requirements of the Memorandum of Understanding between the Director, White House Military Office and the Special Assistant to the Secretary and Deputy Secretary of Defense, July 30, 1980.

(e) *Nuclear Weapon Personnel Reliability Program (PRP).* (1) DoD Directive 5210.42[1] sets forth the standards of individual reliability required for personnel performing duties associated with nuclear weapons and nuclear components. The investigative requirement for personnel performing such duties is:

(i) *Critical position: BI.* In the event that it becomes necessary to consider an individual for a critical position and the required BI has not been completed, interim certification may be made under carefully controlled conditions as set forth below.

(A) The individual has had a favorable DNACI, NAC (or ENTNAC) within the past 5 years without a break in service or employment in excess of 1 year.

(B) The BI has been requested.

(C) All other requirements of the PRP screening process have been fulfilled.

(D) The individual is identified to supervisory personnel as being certified on an interim basis.

(E) The individual is not used in a two-man team with another such individual.

(F) Justification of the need for interim certification is documented by the certifying official.

(G) Should the BI not be completed within 150 days from the date of the request, the certifying official shall query the Component clearance authority, who shall ascertain from DIS the status of the investigation. On the basis of such information, the certifying official shall determine whether to continue or to withdraw the interim certification.

(ii) *Controlled position: DNACI/NACI.* (A) An ENTNAC completed for the purpose of first term enlistment or induction into the Armed Forces does not satisfy this requirement.

(B) Interim certification is authorized for an individual who has not had a DNACI/NACI completed within the past 5 years, subject to the following conditions:

(*1*) The individual has had a favorable ENTNAC/NAC, or higher investigation, that is more than 5 years old and has not had a break in service or employment in excess of 1 year.

(*2*) A DNACI/NACI has been requested at the time of interim certification.

(*3*) All other requirements of the PRP screening process have been fulfilled.

(*4*) Should the DNACI/NACI not be completed within 90 days from the date of the request, the procedures set forth in paragraph (e)(1)(i)(G) of this section for ascertaining the delay of the investigation in the case of a critical position shall apply.

[1] See footnote 1 to §154.2(c).

(iii) *Additional requirements apply*. (A) The investigation upon which certification is based must have been completed within the last 5 years from the date of initial assignment to a PRP position and there must not have been a break in service or employment in excess of 1 year between completion of the investigation and initial assignment.

(B) In those cases in which the investigation was completed more than 5 years prior to initial assignment or in which there has been a break in service or employment in excess of 1 year subsequent to completion of the investigation, a reinvestigation is required.

(C) Subsequent to initial assignment to the PRP, reinvestigation is not required so long as the individual remains in the PRP.

(D) A medical evaluation of the individual as set forth in DoD Directive 5210.42.

(E) Review of the individual's personnel file and other official records and information locally available concerning behavior or conduct which is relevant to PRP standards.

(F) A personal interview with the individual for the purpose of informing him of the significance of the assignment, reliability standards, the need for reliable performance, and of ascertaining his attitude with respect to the PRP.

(G) Service in the Army, Navy and Air Force Reserve does not constitute active service for PRP purposes.

(f) *Access to North Atlantic Treaty Organization (NATO) classified information*. (1) Personnel assigned to a NATO staff position requiring access to NATO Cosmic (Top Secret), Secret, or Confidential information shall have been the subject of a favorably adjudicated BI (10 year scope), DNACI/NACI or NAC/ENTNAC, current within five years prior to the assignment, in accordance with USSAN Instruction 1–69 and § 154.19(f).

(2) Personnel *not* assigned to a NATO staff position, but requiring access to NATO Cosmic, Secret or Confidential information in the normal course of their duties, must possess the equivalent final U.S. security clearance based upon the appropriate personnel security investigation (appendix A) required by §§ 154.16(b) and 154.19(j) of this part.

(g) *Other special access programs*. Special investigative requirements for Special Access programs not provided for in this paragraph may not be established without the written approval of the Deputy Under Secretary of Defense for Policy.

### § 154.18 Certain positions not necessarily requiring access to classified information.

(a) *General*. DoD Directive 5200.8[1] outlines the authority of military commanders under the Internal Security Act of 1950 to issue orders and regulations for the protection of property or places under their command. Essential to carrying out this responsibility is a commander's need to protect the command against the action of untrustworthy persons. Normally, the investigative requirements prescribed in this part should suffice to enable a commander to determine the trustworthiness of individuals whose duties require access to classified information or appointment to positions that are sensitive and do not involve such access. However, there are certain categories of positions or duties which, although not requiring access to classified information, if performed by untrustworthy persons, could enable them to jeopardize the security of the command or otherwise endanger the national security. The investigative requirements for such positions or duties are detailed in this section.

(b) *Access to restricted areas, sensitive information or equipment not involving access to classified information*. (1) Access to restricted areas, sensitive information or equipment by DoD military, civilian or contractor personnel shall be limited to those individuals who have been determined trustworthy as a result of the favorable completion of a NAC (or ENTNAC) or who are under the escort of appropriately cleared personnel. Where escorting such persons is not feasible, a NAC shall be conducted and favorably reviewed by the appropriate component agency or activity prior to permitting such access. DoD Components shall not request, and

[1] See footnote 1 to § 154.2(c).

shall not direct or permit their contractors to request, security clearances to permit access to areas when access to classified information is not required in the normal course of duties or which should be precluded by appropriate security measures. In determining trustworthiness under this paragraph, the provisions of § 154.7 and appendix H will be utilized.

(2) In meeting the requirements of this paragraph, approval shall be obtained from one of the authorities designated in paragraph A, appendix E of this part, for authority to request NACs on DoD military, civilian or contractor employees. A justification shall accompany each request which shall detail the reasons why escorted access would not better serve the national security. Requests for investigative requirements beyond a NAC shall be forwarded to the Deputy Under Secretary of Defense for Policy for approval.

(3) NAC requests shall—

(i) Be forwarded to DIS in accordance with the provisions of paragraph B, appendix C,

(ii) Contain a reference to this paragraph on the DD Form 398–2, and

(iii) List the authority in appendix E who approved the request.

(4) Determinations to deny access under the provisions of this paragraph must not be exercised in an arbitrary, capricious, or discriminatory manner and shall be the responsibility of the military or installation commander as provided for in DoD Directive 5200.8.

(c) *Nonappropriated fund employees.* Each Nonappropriated Fund employee who is employed in a position of trust as designated by an official authorized in paragraph H, appendix E, shall have been the subject of a NAC completed no longer than 12 months prior to employment or a prior personnel security investigation with no break in Federal service or employment greater than 12 months in accordance with DoD Manual 1401.1–M. An individual who does not meet established suitability requirements may not be employed without prior approval of the authorizing official. Issuance of a Confidential or Secret clearance will be based on a DNACI or NACI in accordance with § 154.16(b).

(d) *Customs inspectors.* DoD employees appointed as customs inspectors, under waivers approved in accordance with DoD 5030.49–R shall have undergone a favorably adjudicated NAC completed within the past 5 years unless there has been a break in DoD employment greater than 1 year in which case a current NAC is required.

(e) *Red Cross/United Service Organizations personnel.* A favorably adjudicated NAC shall be accomplished on Red Cross or United Service Organizations personnel as prerequisite for assignment with the Armed Forces overseas (32 CFR part 253).

(f) *Officials authorized to issue security clearances.* Any person authorized to adjudicate personnel security clearances shall have been the subject of a favorably adjudicated BI.

(g) *Personnel security clearance adjudication officials.* Any person selected to serve with a board, committee, or other group responsible for adjudicating personnel security cases shall have been the subject of a favorably adjudicated BI.

(h) *Persons requiring DoD building passes.* Pursuant to DoD Directive 5210.46[1] each person determined by the designated authorities of the Components concerned as having an official need for access to DoD buildings in the National Capital Region shall be the subject of a favorably, adjudicated NAC prior to issuance of a DoD building pass. Conduct of a BI for this purpose is prohibited unless approved in advance by ODUSD(P).

(i) *Foreign national employees overseas not requiring access to classified information.* Foreign nationals employed by DoD organizations overseas, whose duties do not require access to classified information, shall be the subject of the following record checks, initiated by the appropriate military department investigative organization consistent with § 154.9(e) prior to employment:

(1) Host government law enforcement and security agency checks at the city, state (province), and national level, whenever permissible by the laws of the host government; and

(2) DCII.

[1] See footnote 1 to § 154.2(c).

(3) FBI-HQ/ID. (Where information exists regarding residence by the foreign national in the United States for one year or more since age 18).

(j) *Special agents and investigative support personnel*. Special agents and those noninvestigative personnel assigned to investigative agencies whose official duties require continuous access to complete investigative files and material require an SBI.

(k) *Persons requiring access to chemical agents*. Personnel whose duties involve access to or security of chemical agents shall be screened initially for suitability and reliability and shall be evaluated on a continuing basis at the supervisory level to ensure that they continue to meet the high standards required. At a minimum, all such personnel shall have had a favorably adjudicated NAC completed within the last 5 years prior to assignment in accordance with the provisions of DoD Directive 5210.65.[1]

(l) *Education and orientation personnel*. Persons selected for duties in connection with programs involving the education and orientation of military personnel shall have been the subject of a favorably adjudicated NAC prior to such assignment. This does not include teachers/administrators associated with university extension courses conducted on military installations in the United States. Non-US citizens from a country listed in appendix G shall be required to undergo a BI if they are employed in a position covered by this paragraph.

(m) *Contract guards*. Any person performing contract guard functions shall have been the subject of a favorably adjudicated NAC prior to such assignment.

(n) *Transportation of arms, ammunition and explosives (AA&E)*. Any DoD military, civilian or contract employee (including commercial carrier) operating a vehicle or providing security to a vehicle transporting Category I, II or Confidential AA&E shall have been the subject of a favorably adjudicated NAC or ENTNAC.

(o) *Personnel occupying information systems positions designated ADP-I, ADP-II & ADP-III*. DoD military, civilian personnel, consultants, and contractor personnel performing on unclassified automated information systems may be assigned to one of three position sensitivity designations (in accordance with appendix J) and investigated as follows:

ADP-I: BI
ADP-II: DNACI/NACI
ADP-III: NAC/ENTNAC

Those personnel falling in the above categories who require access to classified information will, of course, be subject to the appropriate investigative scope contained in § 154.16(b).

(p) *Others*. Requests for approval to conduct an investigation on other personnel, not provided for in § 154.18 (b) through (o) considered to fall within the general provisions of § 154.18(a) shall be submitted, detailing the justification therefor, for approval to the Deputy Under Secretary of Defense for Policy. Approval of such requests shall be contingent upon an assurance that appropriate review procedures exist and that adverse determinations will be made at no lower than major command level.

### § 154.19 Reinvestigation.

(a) *General*. DoD policy prohibits unauthorized and unnecessary investigations. There are, however, certain situations and requirements that necessitate reinvestigation of an individual who has already been investigated under the provisions of this part. It is the policy to limit reinvestigation of individuals to the scope contained in paragraph 5, appendix A to meet overall security requirements. Reinvestigation, generally, is authorized only as follows:

(1) To prove or disprove an allegation relating to the criteria set forth in § 154.7 of this part with respect to an individual holding a security clearance or assigned to a position that requires a trustworthiness determination;

(2) To meet the periodic reinvestigation requirements of this part with respect to those security programs enumerated below; and

(3) Upon individual request, to assess the current eligibility of individuals

[1] See footnote 1 to § 154.2(c).

who did not receive favorable adjudicative action after an initial investigation, if a potential clearance need exists and there are reasonable indications that the factors upon which the adverse determination was made no longer exists.

(b) *Allegations related to disqualification*. Whenever questionable behavior patterns develop, derogatory information is discovered, or inconsistencies arise related to the disqualification criteria outlined in §154.7 that could have an adverse impact on an individual's security status, a Special Investigative Inquiry (SII), psychiatric, drug or alcohol evaluation, as appropriate, may be requested to resolve all relevant issues in doubt. If it is essential that additional relevant personal data is required from the investigative subject, and the subject fails to furnish the required data, the subject's existing security clearance or assignment to sensitive duties shall be terminated in accordance with §154.56(b).

(c) *Access to Sensitive Compartmented Information (SCI)*. Each individual having current access to SCI shall be the subject of a PR conducted on a 5-year recurring basis scoped as set forth in paragraph 5, appendix A.

(d) *Critical-sensitive positions*. Each DoD civilian employee occupying a critical sensitive position shall be the subject of a PR conducted on a 5-year recurring basis scoped as set forth in paragraph 5, appendix A.

(e) *Presidential support duties*. Each individual assigned Presidential Support duties shall be the subject of a PR conducted on a 5-year recurring basis scoped as set forth in paragraph 5, appendix A.

(f) *NATO staff*. Each individual assigned to a NATO staff position requiring a COSMIC clearance shall be the subject of a PR conducted on a 5-year recurring basis scoped as set forth in paragraph 5, appendix A. Those assigned to a NATO staff position requiring a NATO SECRET clearance shall be the subject of a new NAC conducted on a 5-year recurring basis.

(g) *Extraordinarily sensitive duties*. In extremely limited instances, extraordinary national security implications associated with certain SCI duties may require very special compartmentation and other special security measures. In such instances, a Component SOIC may, with the approval of the Deputy Under Secretary of Defense for Policy, request PR's at intervals of less than 5 years as outlined in paragraph 5, appendix A. Such requests shall include full justification and a recommendation as to the desired frequency. In reviewing such requests, the Deputy Under Secretary of Defense for Policy shall give due consideration to:

(1) The potential damage that might result from the individual's defection or abduction.

(2) The availability and probable effectiveness of means other than reinvestigation to evaluate factors concerning the individual's suitability for continued SCI access.

(h) *Foreign nationals employed by DoD organizations overseas*. Foreign nationals employed by DoD organizations overseas who have been granted a ''Limited Access Authorization'' pursuant to §154.16(d) shall be the subject of a PR, as set forth in paragraph 5, appendix A, conducted under the auspices of DIS by the appropriate military department or other U.S. Government investigative agency consistent with §154.9(e) and appendix I of this part.

(i) *Persons accessing very sensitive information classified Secret*. (1) Heads of DoD Components shall submit a request to the Deputy Under Secretary of Defense for Policy for approval to conduct periodic reinvestigations on persons holding Secret clearances who are exposed to very sensitive Secret information.

(2) Generally, the Deputy Under Secretary of Defense for Policy will only approve periodic reinvestigations of persons having access to Secret information if the unauthorized disclosure of the information in question could reasonably be expected to:

(i) Jeopardize human life or safety.

(ii) Result in the loss of unique or uniquely productive intelligence sources or methods vital to U.S. security.

(iii) Compromise technologies, plans, or procedures vital to the strategic advantage of the United States.

(3) Each individual accessing very sensitive Secret information who has been designated by an authority listed

in paragraph A, appendix E as requiring periodic reinvestigation, shall be the subject of a PR conducted on a 5-year recurring basis scoped as stated in paragraph 5, appendix A.

(j) *Access to Top Secret information.* Each individual having current access to Top Secret information shall be the subject of a PR conducted on a 5-year recurring basis scoped as outlined in paragraph 5, appendix A.

(k) *Personnel occupying computer positions designated ADP–1.* All DoD military, civilians, consultants, and contractor personnel occupying computer positions designated ADP-I, shall be the subject of a PR conducted on a 5-year recurring basis as set forth in paragraph 5, appendix A.

### § 154.20 Authority to waive investigative requirements.

*Authorized officials.* Only an official designated in paragraph G, appendix E, is empowered to waive the investigative requirements for appointment to a sensitive position, assignment to sensitive duties or access to classified information pending completion of the investigation required by this section. Such waiver shall be based upon certification in writing by the designated official that such action is necessary to the accomplishment of a DoD mission. A minor investigative element that has not been met should not preclude favorable.

## Subpart D—Reciprocal Acceptance of Prior Investigations and Personnel Security Determinations

### § 154.23 General.

Previously conducted investigations and previously rendered personnel security determinations shall be accepted within DoD in accordance with the policy set forth below.

### § 154.24 Prior investigations conducted by DoD investigative organizations.

As long as there is no break in military service/civilian employment greater than 12 months, any previous personnel security investigation conducted by DoD investigative organizations that essentially is equivalent in scope to an investigation required by this part will be accepted without requesting additional investigation. There is no time limitation as to the acceptability of such investigations, subject to the provisions of §§ 154.8(h) and 154.25(b) of this part.

### § 154.25 Prior personnel security determinations made by DoD authorities.

(a) Adjudicative determinations for appointment in sensitive positions, assignment to sensitive duties or access to classified information (including those pertaining to SCI) made by designated DoD authorities will be mutually and reciprocally accepted by all DoD Components without requiring additional investigation, unless there has been a break in the individual's military service/civilian employment of greater than 12 months or unless derogatory information that occurred subsequent to the last prior security determination becomes known. A check of the DCII should be conducted to accomplish this task.

(b) Whenever a valid DoD security clearance or Special Access authorization (including one pertaining to SCI) is on record, Components shall not request DIS or other DoD investigative organizations to forward prior investigative files for review unless:

(1) Significant derogatory information or investigation completed subsequent to the date of last clearance or Special Access authorization, is known to the requester; or

(2) The individual concerned is being considered for a higher level clearance (e.g., Secret or Top Secret) or the individual does not have a Special Access authorization and is being considered for one; or

(3) There has been a break in the individual's military service/civilian employment of greater than 12 months subsequent to the issuance of a prior clearance.

(4) The most recent SCI access authorization of the individual concerned was based on a waiver.

(c) Requests for prior investigative files authorized by this part shall be made in writing, shall cite the specific justification for the request (i.e., upgrade of clearance, issue Special Access

authorization, etc.), and shall include the date, level, and issuing organization of the individual's current or most recent security clearance or Special Access authorization.

(d) All requests for non-DoD investigative files, authorized under the criteria prescribed by paragraphs (a), (b)(1), (2), (3), and (4) and (c) of this section shall be:

(1) Submitted on DD Form 398–2 to DIS;

(2) Annotated as a ''Single Agency Check'' of whichever agency or agency developed the investigative file or to obtain the check of a single national agency.

(e) When further investigation is desired, in addition to an existing non-DoD investigative file, a DD Form 1879 will be submitted to DIS with the appropriate security forms attached. The submission of a Single Agency Check via DD Form 398–2 will be used to obtain an existing investigative file or check a single national agency.

(f) Whenever a civilian or military member transfers from one DoD activity to another, the losing organization's security office is responsible for advising the gaining organization of any pending action to suspend, deny or revoke the individual's security clearance as well as any adverse information that may exist in security, personnel or other files. In such instances the clearance shall not be reissued until the questionable information has been adjudicated.

### § 154.26 Investigations conducted and clearances granted by other agencies of the Federal government.

(a) Whenever a prior investigation or personnel security determination (including clearance for access to information classified under E.O. 12356 of another agency of the Federal Government meets the investigative scope and standards of this part, such investigation or clearance may be accepted for the investigative or clearance purposes of this part, provided that the employment with the Federal agency concerned has been continuous and there has been no break longer than 12 months since completion of the prior investigation, and further provided that inquiry with the agency discloses no reason why the clearance should not be accepted. If it is determined that the prior investigation does not meet the provisions of this paragraph, supplemental investigation shall be requested.

(b) A NACI conducted by OPM shall be accepted and considered equivalent to a DNACI for the purposes of this part.

(c) Department of Defense policy on reciprocal acceptance of clearances with the Nuclear Regulatory Commission and the Department of Energy is set forth in DoD Directive 5210.2.[1]

## Subpart E—Requesting Personnel Security Investigations

### § 154.30 General.

Requests for personnel security investigations shall be limited to those required to accomplish the Defense mission. Such requests shall be submitted only by the authorities designated in § 154.31. These authorities shall be held responsible for determining if persons under their jurisdiction require a personnel security investigation. Proper planning must be effected to ensure that investigative requests are submitted sufficiently in advance to allow completion of the investigation before the time it is needed to grant the required clearance or otherwise make the necessary personnel security determination.

### § 154.31 Authorized requesters.

Requests for personnel security investigation shall be accepted only from the requesters designated below:

(a) *Military Departments.* (1) Army.

(i) Central Clearance Facility.

(ii) All activity commanders.

(iii) Chiefs of recruiting stations.

(2) Navy (including Marine Corps).

(i) Central Adjudicative Facility.

(ii) Commanders and commanding officers of organizations listed on the Standard Navy Distribution List.

(iii) Chiefs of recruiting stations.

(3) Air Force.

(i) Air Force Security Clearance Office.

(ii) Assistant Chief of Staff for Intelligence.

[1] See footnote 1 to § 154.2(c).

(iii) All activity commanders.

(iv) Chiefs of recruiting stations.

(b) Defense Agencies—Directors of Security and activity commanders.

(c) Organization of the Joint Chiefs of Staff—Chief, Security Division.

(d) Office of the Secretary of Defense—Director for Personnel and Security, Washington Headquarters Services.

(e) Commanders of Unified and Specified Commands or their designees.

(f) Such other requesters approved by the Deputy Under Secretary of Defense for Policy.

### § 154.32 Criteria for requesting investigations.

Authorized requesters shall use the tables set forth in appendix C to determine the type of investigation that shall be requested to meet the investigative requirement of the specific position or duty concerned.

### § 154.33 Request procedures.

To insure efficient and effective completion of required investigations, all requests for personnel security investigations shall be prepared and forwarded in accordance with Appendix B and the investigative jurisdictional policies set forth in § 154.9.

### § 154.34 Priority requests.

To insure that personnel security investigations are conducted in an orderly and efficient manner, requests for priority for individual investigations or categories of investigations shall be kept to a minimum. DIS shall not assign priority to any personnel security investigation or categories of investigations without written approval of the Deputy Under Secretary of Defense for Policy.

### § 154.35 Personal data provided by the subject of the investigation.

(a) To conduct the required investigation, it is necessary that the investigative agency be provided certain relevant data concerning the subject of the investigation. The Privacy Act of 1974 requires that, to the greatest extent practicable, personal information shall be obtained directly from the subject individual when the information may result in adverse determinations affecting an individual's rights, benefits, and privileges under Federal programs.

(b) Accordingly, it is incumbent upon the subject of each personnel security investigation to provide the personal information required by this part. At a minimum, the individual shall complete the appropriate investigative forms, provide fingerprints of a quality acceptable to the FBI, and execute a signed release, as necessary, authorizing custodians of police, credit, education, employment, and medical and similar records, to provide relevant record information to the investigative agency. When the FBI returns a fingerprint card indicating that the quality of the fingerprints is not acceptable, an additional set of fingerprints will be obtained from the subject. In the event the FBI indicates that the additional fingerprints are also unacceptable, no further attempt to obtain more fingerprints need be made; this aspect of the investigation will then be processed on the basis of the name check of the FBI files. As an exception, a minimum of three attempts will be made for all Presidential Support cases, for SCI access nominations if the requester so indicates, and in those cases in which more than minor derogatory information exists. Each subject of a personnel security investigation conducted under the provisions of this part shall be furnished a Privacy Act Statement advising of the authority for obtaining the personal data, the principal purpose(s) for obtaining it, the routine uses, whether disclosure is mandatory or voluntary, the effect on the individual if it is not provided, and that subsequent use of the data may be employed as part of an aperiodic review process to evaluate continued eligibility for access to classified information.

(c) Failure to respond within the time limit prescribed by the requesting organization with the required security forms or refusal to provide or permit access to the relevant information required by this part shall result in termination of the individual's security clearance or assignment to sensitive duties utilizing the procedures of § 154.59 or further administrative processing of the investigative request.

## Subpart F—Adjudication

### § 154.40 General.

(a) The standard which must be met for clearance or assignment to sensitive duties is that, based on all available information, the person's loyalty, reliability, and trustworthiness are such that entrusting the person with classified information or assigning the person to sensitive duties is clearly consistent with the interests of national security.

(b) The principal objective of the DoD personnel security adjudicative function, consequently, is to assure selection of persons for sensitive positions who meet this standard. The adjudication process involves the effort to assess the probability of future behavior which could have an effect adverse to the national security. Since few, if any, situations allow for positive, conclusive evidence of certain future conduct, it is an attempt to judge whether the circumstances of a particular case, taking into consideration prior experience with similar cases, reasonably suggest a degree of probability of prejudicial behavior not consistent with the national security. It is invariably a subjective determination, considering the past but necessarily anticipating the future. Rarely is proof of trustworthiness and reliability or untrustworthiness and unreliability beyond all reasonable doubt.

(c) Establishing relevancy is one of the key objectives of the personnel security adjudicative process in evaluating investigative material. It involves neither the judgment of criminal guilt nor the determination of general suitability for a given position; rather, it is the assessment of a person's trustworthiness and fitness for a responsibility which could, if abused, have unacceptable consequences for the national security.

(d) While equity demands optimal uniformity in evaluating individual cases, assuring fair and consistent assessment of circumstances from one situation to the next, each case must be weighed on its own merits, taking into consideration all relevant facts, and prior experience in similar cases. All information of record, both favorable and unfavorable, must be considered and assessed in terms of accuracy, completeness, relevance, seriousness, and overall significance. In all adjudications the protection of the national security shall be the paramount determinant.

### § 154.41 Central adjudication.

(a) To ensure uniform application of the requirement of this part and to ensure that DoD personnel security determinations are effected consistent with existing statutes and Executive orders, the head of each Military Department and Defense Agencies shall establish a single Central Adjudication Facility for his/her component. The function of such facility shall be limited to evaluating personnel security investigations and making personnel security determinations. The chief of each Central Adjudication Facility shall have the authority to act on behalf of the head of the Component concerned with respect to personnel security determinations. All information relevant to determining whether a person meets the appropriate personnel security standard prescribed by this part shall be reviewed and evaluated by personnel security specialists specifically designated by the head of the Component concerned, or designee.

(b) In view of the significance each adjudicative decision can have on a person's career and to ensure the maximum degree of fairness and equity in such actions, a minimum level of review shall be required for all clearance/access determinations related to the following categories of investigations:

(1) BI/SBI/PR/ENAC/SII:

(i) *Favorable:* Completely favorable investigations shall be reviewed and approved by an adjudicative official in the civilian grade of GS–7/9 or the military rank of O–3.

(ii) *Unfavorable:* Investigations that are not completely favorable shall undergo at least two levels of review by adjudicative officials, the second of which must be at the civilian grade of GS–11/12 or the military rank of O–4. When an unfavorable administrative action is contemplated under § 154.56(b), the letter of intent (LOI) to deny or revoke must be approved and signed by an adjudicative official at the civilian grade of GS–13/14 or the military rank

of O–5. A final notification of unfavorable administrative action, subsequent to the issuance of the LOI, must be approved and signed at the civilian grade of GS–14/15 or the military rank of O–6.

(2) *NACI/DNACI/NAC/ENTNAC:*

(i) *Favorable:* A completely favorable investigation may be finally adjudicated after one level of review provided that the decisionmaking authority is at the civilian grade of GS–5/7 or the military rank of 0–2.

(ii) *Unfavorable:* Investigations that are not completely favorable must be reviewed by an adjudicative official in the civilian grade of GS–7/9 or the military rank of 0–3. When an unfavorable administrative action is contemplated under § 154.56(b), the letter of intent to deny/revoke must be signed by an adjudicative official at the civilian grade of GS–11/12 or the military rank of 0–4. A final notification of unfavorable administrative action subsequent to the issuance of the LOI must be signed by an adjudicative official at the civilian grade of GS–13 or the military rank of 0–5 or above.

(c) Exceptions to the above policy may only be granted by the Deputy Under Secretary of Defense for Policy.

### § 154.42 Evaluation of personnel security information.

(a) The criteria and adjudicative policy to be used in applying the principles at § 154.40 are set forth in § 154.7(a) and appendix H of this part. The ultimate consideration in making a favorable personnel security determination is whether such determination is clearly consistent with the interests of national security and shall be an overall common sense evaluation based on all available information. Such a determination shall include consideration of the following factors:

(1) The nature and seriousness of the conduct;

(2) The circumstances surrounding the conduct;

(3) The frequency and recency of the conduct;

(4) The age of the individual;

(5) The voluntariness of participation; and

(6) The absence or presence of rehabilitation.

(b) Detailed adjudication policy guidance to assist adjudicators in determining whether a person is eligible for access to classified information or assignment to sensitive duties is contained in appendix H. Adjudication policy for access to SCI is contained in DCID 1/14.

### § 154.43 Adjudicative record.

(a) Each adjudicative determinations, whether favorable or unfavorable, shall be entered into the Defense Clearance and Investigations Index (DCII) on a daily basis, but in no case to exceed 5 working days from the date of determination.

(b) The rationale underlying each unfavorable personnel security determination, to include the appeal process, and each favorable personnel security determination where the investigation or information upon which the determination was made included significant derogatory information of the type set forth in § 154.7 and appendix H to part 154, shall be maintained in written or automated form and is subject to the provisions of 32 CFR part 285 and 32 CFR part 310. This information shall be maintained for a minimum of 5 years from the date of determination.

[58 FR 61025, Nov. 19, 1993]

## Subpart G—Issuing Clearance and Granting Access

### § 154.47 General.

(a) The issuance of a personnel security clearance (as well as the function of determining that an individual is eligible for access to Special Access program information, or is suitable for assignment to sensitive duties or such other duties that require a trustworthiness determination) is a function distinct from that involving the granting of access to classified information. Clearance determinations are made on the merits of the individual case with respect to the subject's suitability for security clearance. Access determinations are made solely on the basis of the individual's need for access to classified information in order to

perform official duties. Except for suspension of access pending final adjudication of a personnel security clearance, access may not be finally denied for cause without applying the provisions of § 154.56(b).

(b) Only the authorities designated in paragraph A, appendix E are authorized to grant, deny or revoke personnel security clearances or Special Access authorizations (other than SCI). Any commander or head of an organization may suspend access for cause when there exists information raising a serious question as to the individual's ability or intent to protect classified information, provided that the procedures set forth in § 154.55(b) of this part are complied.

(c) All commanders and heads of DoD organizations have the responsibility for determining those position functions in their jurisdiction that require access to classified information and the authority to grant access to incumbents of such positions who have been cleared under the provisions of this part.

**§ 154.48 Issuing clearance.**

(a) Authorities designated in paragraph A, appendix E shall record the issuance, denial or revocation of a personnel security clearance in the DCII (see § 154.43). A record of the clearance issued shall also be recorded in an individual's personnel/security file or official personnel folder, as appropriate.

(b) A personnel security clearance remains valid until the individual is separated from the Armed Forces, separated from DoD civilian employment, has no further official relationship with DoD, official action has been taken to deny, revoke or suspend the clearance or access, or regular access to the level of classified information for which the individual holds a clearance is no longer necessary in the normal course of his or her duties. If an individual resumes his or her affiliation with DoD no single break in the individual's relationship with DoD exists greater than 24 months and/or, the need for regular access to classified information at or below the previous level recurs, and no record of an unfavorable administrative action exists, the appropriate clearance shall be reissued without further investigation or adjudication provided there has been no additional investigation or development of derogatory information.

(c) Personnel security clearances of DoD military personnel shall be granted denied or revoked only by the designated authority of the parent Military Department. Issuance, reissuance, denial, or revocation of a personnel security clearance by any DoD Component concerning personnel who have been determined to be eligible for clearance by another component is expressly prohibited. Investigations conducted on Army, Navy, and Air Force personnel by DIS will be returned only to the parent service of the subject for adjudication regardless of the source of the original request. The adjudicative authority will be responsible for expeditiously transmitting the results of the clearance determination. As an exception, the employing DoD Component may issue an interim clearance to personnel under their administrative jurisdiction pending a final eligibility determination by the individual's parent Component. Whenever an employing DoD Component issues an interim clearance to an individual from another Component, written notice of the action shall be provided to the parent Component.

(d) When a Defense agency, to include Chairman of the Joint Chiefs of Staff, initiates an SBI (or PR) for access to SCI on a military member, DIS will return the completed investigation to the appropriate Military Department adjudicative authority in accordance with paragraph (c) of this section for issuance (or reissuance) of the Top Secret clearance. Following the issuance of the security clearance, the military adjudicative authority will forward the investigative file to the Defense agency identified in the ''Return Results To'' block of the DD Form 1879. The receiving agency will then forward the completed SBI on to DIA for the SCI adjudication in accordance with DCID 1/14.

(e) The interim clearance shall be recorded in the DCSI (§ 154.43) by the parent DoD Component in the same manner as a final clearance.

[52 FR 11219, Apr. 8, 1987, as amended at 58 FR 61025, Nov. 19, 1993]

### § 154.49 Granting access.

(a) Access to classified information shall be granted to persons whose official duties require such access and who have the appropriate personnel security clearance. Access determinations (other than for Special Access programs) are not an adjudicative function relating to an individual's suitability for such access. Rather they are decisions made by the commander that access is officially required.

(b) In the absence of derogatory information on the individual concerned, DoD commanders and organizational managers shall accept a personnel security clearance determination, issued by any DoD authority authorized by this part to issue personnel security clearances, as the basis for granting access, when access is required, without requesting additional investigation or investigative files.

(c) The access level of cleared individuals will, wherever possible, be entered into the Defense Clearance and Investigations Index (DCII), along with clearance eligibility. However, completion of the DCII Access field is required effective October 1, 1993 in all instances where the adjudicator with a personnel security investigation. Agencies are encouraged to start completing this field as soon as possible.

[52 FR 11219, Apr. 8, 1987, as amended at 58 FR 61025, Nov. 19, 1993]

### § 154.50 Administrative withdrawal.

As set forth in § 154.48 the personnel security clearance and access eligibility must be withdrawn when the events described therein occur. When regular access to a prescribed level of classified information is no longer required in the normal course of an individual's duties, the previously authorized access eligibility level must be administratively downgraded or withdrawn, as appropriate.

## Subpart H—Unfavorable Administrative Actions

### § 154.55 Requirements.

(a) *General*. For purposes of this part, an unfavorable administrative action includes any adverse action which is taken as a result of a personnel security determination, as defined at § 154.3 and any unfavorable personnel security determination, as defined at § 154.3. This subpart is intended only to provide guidance for the internal operation of the Department of Defense and is not intended to, does not, and may not be relied upon, to create or enlarge the jurisdiction or review authority of any court or administrative tribunal, including the Merit Systems Protection Board.

(b) *Referral for action*. (1) Whenever derogatory information relating to the criteria and policy set forth in § 154.7(a) and appendix H of this part is developed or otherwise becomes available to any DoD element, it shall be referred by the most expeditious means to the commander or the security officer of the organization to which the individual is assigned for duty. The commander or security officer of the organization to which the subject of the information is assigned shall review the information in terms of its security significance and completeness. If further information is needed to confirm or disprove the allegations, additional investigation should be requested. The commander of the duty organization shall insure that the parent Component of the individual concerned is informed promptly concerning the derogatory information developed and any actions taken or anticipated with respect thereto. However, referral of derogatory information to the commander or security officer shall in no way affect or limit the responsibility of the central adjudication facility to continue to process the individual for denial or revocation of clearance or access to classified information, in accordance with § 154.56(b), if such action is warranted and supportable by the criteria and policy contained in § 154.7(a) and appendix H. No unfavorable administrative action as defined in § 154.3 may be taken by the organization to which the individual is assigned for duty without affording the person the full range of protections contained in § 154.56(b) or, in the case of SCI, Annex B, DCID 1/14.

(2) The Director DIS shall establish appropriate alternative means whereby information with potentially serious security significance can be reported

other than through DoD command or industrial organization channels. Such access shall include utilization of the DoD Inspector General ''hotline'' to receive such reports for appropriate follow-up by DIS. DoD Components and industry will assist DIS in publicizing the availability of appropriate reporting channels. Additionally, DoD Components will augment the system when and where necessary. Heads of DoD Components will be notified immediately to take action if appropriate.

(c) *Suspension*. (1) The commander or head of the organization shall determine whether, on the basis of all facts available upon receipt of the initial derogatory information, it is in the interests of national security to continue subject's security status unchanged or to take interim action to suspend subject's access to classified information or assignment to sensitive duties (or other duties requiring a trustworthiness determination), if information exists which raises serious questions as to the individual's ability to intent to protect classified information or execute sensitive duties (or other duties requiring a trustworthiness determination) until a final determination is made by the appropriate authority designated in appendix F to this part.

(2) Whenever a determination is made to suspend a security clearance for access to classified information or assignment to sensitive duties (or other duties requiring a trustworthiness determination), the individual concerned must be notified of the determination in writing by the commander, or head of the component or adjudicative authority, to include a brief statement of the reason(s) for the suspension action consistent with the interests of national security.

(3) Component field elements must promptly report all suspension actions to the appropriate central adjudicative authority, but not later than 10 working days from the date of the suspension action. The adjudicative authority will immediately update the DCII Eligibility and Access fields to alert all users to the individual's changed status.

(4) Every effect shall be made to resolve suspension cases as expeditiously as circumstances permit. Suspension cases exceeding 180 days shall be closely monitored and managed by the DoD Component concerned until finally resolved. Suspension cases pending in excess of 12 months will be reported to the DASD(CI&SCM) for review and appropriate action.

(5) A final security clearance eligibility determination shall be made for all suspension actions and the determination entered in the DCII. If, however, the individual under suspension leaves the jurisdiction of the Department of Defense and no longer requires a clearance (or trustworthiness determination), entry of the ''Z'' Code (adjudication action incomplete due to loss of jurisdiction) if the clearance eligibility field is appropriate. In no case shall a ''suspension'' code (Code Y) remain as a permanent record in the DCII.

(6) A clearance or access entry in the DCII shall not be suspended or downgraded based solely on the fact that a periodic reinvestigation was not conducted precisely within the 5 year time period for TOP SECRET/SCI or within the period prevailing for SECRET clearances under departmental policy. While every effort should be made to ensure that PRs are conducted within the prescribed time frame, agencies must be flexible in their administration of this aspect of the personnel security program so as not to undermine the ability of the Department of Defense to accomplish its mission.

(d) *Final unfavorable administrative actions*. The authority to make personnel security determinations that will result in an unfavorable administrative action is limited to those authorities designated in appendix E, except that the authority to terminate the employment of a civilian employee of a military department or Defense agency is vested solely in the head of the DoD component concerned and in such other statutory official as may be designated. Action to terminate civilian employees of the Office of the Secretary of Defense and DoD Components, on the basis of criteria listed in §154.7 (a) through (f), shall be coordinated with the Deputy Under Secretary

of Defense for Policy prior to final action by the head of the DoD Component. DoD civilian employees or members of the Armed Forces shall not be removed from employment or separated from the Service under provisions of this part if removal or separation can be effected under OPM regulations or administrative (nonsecurity) regulations of the military departments. However, actions contemplated in this regard shall not affect or limit the responsibility of the central adjudication facility to continue for process the individual for denial or revocation of a security clearance, access to classified information on or assignment to a sensitive position if warranted and supportable by the criteria and standards contained in this part.

[52 FR 11219, Apr. 8, 1987, as amended at 58 FR 61025, Nov. 19, 1993]

**§ 154.56 Procedures.**

(a) *General.* No final personnel security determination shall be made on a member of the Armed Forces, an employee of the Department of Defense, a consultant to the Department of Defense, or any other person affiliated with the Department of Defense without granting the individual concerned the procedural benefits set forth in paragraph (b) of this section when such determination results in an unfavorable administrative action (see § 154.55(a)). As an exception, Red Cross/United Service Organizations employees shall be afforded the procedures prescribed by 32 CFR part 253.

(b) *Unfavorable administrative action procedures.* Except as provided for below, no unfavorable administrative action shall be taken under the authority of this part unless the person concerned has been given:

(1) A written statement of the reasons why the unfavorable administrative action is being taken. The statement shall be as comprehensive and detailed as the protection of sources afforded confidentiality under the provisions of the Privacy Act of 1974 (5 U.S.C. 552a) and national security permit. The statement will also provide the name and address of the agencies (agencies) to which the individual may write to obtain a copy of the investigative file(s) upon which the unfavorable administrative action is being taken. Prior to issuing a statement of reasons to a civilian employee for suspension or removal action, the issuing authority must comply with the provisions of Federal Personnel Manual, chapter 732, subchapter 1, paragraph 1–6b. The signature authority must be as provided for in § 154.41(b) (1)(ii) and (2)(ii).

(2) An opportunity to reply in writing to such authority as the head of the Component concerned may designate;

(3) A written response to any submission under subparagraph b. stating the final reasons therefor, which shall be as specific as privacy and national security considerations permit. The signature authority must be as provided for in § 154.41(b) (1)(ii) and (2)(ii). Such response shall be as prompt as individual circumstances permit, not to exceed 60 days from the date of receipt of the appeal submitted under paragraph (b)(2) of this section provided no additional investigative action is necessary. If a final response cannot be completed within the time frame allowed, the subject must be notified in writing of this fact, the reasons therefor, and the date a final response is expected, which shall not, in any case, exceed a total of 90 days from the date of receipt of the appeal under paragraph (b) of this section.

(4) An opportunity to appeal to a higher level of authority designated by the Component concerned.

(c) *Exceptions to policy.* Notwithstanding paragraph (b) of this section or any other provision of this part, nothing in this part shall be deemed to limit or affect the responsibility and powers of the Secretary of Defense to find that a person is unsuitable for entrance or retention in the Armed Forces, or is ineligible for a security clearance or assignment to sensitive duties, if the national security so requires, pursuant to section 7532, title 5, U.S. Code. Such authority may not be delegated and may be exercised only when it is determined that the procedures prescribed in paragraph (b) of this section are not appropriate. Such determination shall be conclusive.

[52 FR 11219, Apr. 8, 1987, as amended at 58 FR 61025, Nov. 19, 1993]

### § 154.57 Reinstatement of civilian employees.

(a) *General*. Any person whose civilian employment in the Department of Defense is terminated under the provisions of this part shall not be reinstated or restored to duty or reemployed in the Department of Defense unless the Secretary of Defense, or the head of a DoD Component, finds that such reinstatement, restoration, or reemployment is clearly consistent with the interests of national security. Such a finding shall be made a part of the personnel security record.

(b) *Reinstatement benefits*. A DoD civilian employee whose employment has been suspended or terminated under the provisions of this part and who is reinstated or restored to duty under the provisions of section 3571 of title 5 U.S. Code is entitled to benefits as provided for by section 3 of Pub. L. 89–380.

## Subpart I—Continuing Security Responsibilities

### § 154.60 Evaluating continued security eligibility.

(a) *General*. A personnel security determination is an effort to assess the future trustworthiness of an individual in terms of the likelihood of the individual preserving the national security. Obviously it is not possible at a given point to establish with certainty that any human being will remain trustworthy. Accordingly the issuance of a personnel security clearance or the determination that a person is suitable for assignment to sensitive duties cannot be considered as a final personnel security action. Rather, there is the clear need to assure that, after the personnel security determination is reached, the individual's trustworthiness is a matter of continuing assessment. The responsibility for such assessment must be shared by the organizational commander or manager, the individual's supervisor and, to a large degree, the individual himself. Therefore, the heads of DoD Components shall establish and maintain a program designed to evaluate on a continuing basis the status of personnel under their jurisdiction with respect to security eligibility. This program should insure close coordination between security authorities and personnel, medical, legal and supervisory personnel to assure that all pertinent information available within a command is considered in the personnel security process.

(b) *Management responsibility*. (1) Commanders and heads of organizations shall insure that personnel assigned to sensitive duties (or other duties requiring a trustworthiness determination under the provisions of this part) are initially indoctrinated and periodically instructed thereafter on the national security implication of their duties and on their individual responsibilities.

(2) The heads of all DoD components are encouraged to develop programs designed to counsel and assist employees in sensitive positions who are experiencing problems in their personal lives with respect to such areas as financial, medical or emotional difficulties. Such initiatives should be designed to identify potential problem areas at an early stage so that any assistance rendered by the employing activity will have a reasonable chance of precluding long term, job-related security problems.

(c) *Supervisory responsibility*. Security programs shall be established to insure that supervisory personnel are familiarized with their special responsibilities in matters pertaining to personnel security with respect to personnel under their supervision. Such programs shall provide practical guidance as to indicators that may signal matters of personnel security concern. Specific instructions should be disseminated concerning reporting procedures to enable the appropriate authority to take timely corrective action to protect the interests of national security as well as to provide any necessary help to the individual concerned to correct any personal problem which may have a bearing upon the individual's continued eligibility for access.

(1) In conjunction with the submission of PRs stated in § 154.19, and paragraph 5, appendix A, supervisors will be required to review an individual's DD Form 398 to ensure that no significant adverse information of which they are aware and that may have a bearing on

subject's continued eligibility for access to classified information is omitted.

(2) If the supervisor is not aware of any significant adverse information that may have a bearing on the subject's continued eligibility for access, then the following statement must be documented, signed and dated, and forwarded to DIS with the investigative package.

I am aware of no information of the type contained at Appendix D, 32 CFR part 154, relating to subject's trustworthiness, reliability, or loyalty that may reflect adversely on his/her ability to safeguard classified information.

(3) If the supervisor is aware of such significant adverse information, the following statement shall be documented, signed and dated and forwarded to DIS with the investigative package, and a written summary of the derogatory information forwarded to DIS with the investigative package:

I am aware of information of the type contained in Appendix D, 32 CFR part 154, relating to subject's trustworthiness, reliability, or loyalty that may reflect adversely on his/her ability to safeguard classified information and have reported all relevant details to the appropriate security official(s).

(4) In conjunction with regularly scheduled fitness and performance reports of military and civilian personnel whose duties entail access to classified information, supervisors will include a comment in accordance with paragraphs (c) (2) and (3) of this section as well as a comment regarding an employee's discharge of security responsibilities, pursuant to their Component guidance.

(d) *Individual responsibility*. (1) Individuals must familiarize themselves with pertinent security regulations that pertain to their assigned duties. Further, individuals must be aware of the standards of conduct required of persons holding positions of trust. In this connection, individuals must recognize and avoid the kind of personal behavior that would result in rendering one ineligible for continued assignment in a position of trust. In the final analysis, the ultimate responsibility for maintaining continued eligibility for a position of trust rests with the individual.

(2) Moreover, individuals having access to classified information must report promptly to their security office:

(i) Any form of contact, intentional or otherwise, with individuals of any nationality, whether within or outside the scope of the employee's official activities, in which:

(A) Illegal or unauthorized access is sought to classified or otherwise sensitive information.

(B) The employee is concerned that he or she may be the target of exploitation by a foreign entity.

(ii) Any information of the type referred to in § 154.7 or appendix H to this part.

(e) *Co-worker responsibility*. Co-workers have an equal obligation to advise their supervisor or appropriate security official when they become aware of information with potentially serious security significance regarding someone with access to classified information or employed in a sensitive position.

[52 FR 11219, Apr. 8, 1987, as amended at 58 FR 61025, Nov. 19, 1993]

### § 154.61 Security education.

(a) *General*. The effectiveness of an individual in meeting security responsibilities is proportional to the degree to which the individual understands them. Thus, an integral part of the DoD security program is the indoctrination of individuals on their security responsibilities. Moreover, such indoctrination is essential to the efficient functioning of the DoD personnel security program. Accordingly, heads of DoD Components shall establish procedures in accordance with this chapter whereby persons requiring access to classified information, or being assigned to positions that require the occupants to be determined trustworthy are periodically briefed as to their security responsibilities.

(b) *Initial briefing*. (1) All persons cleared for access to classified information or assigned to duties requiring a trustworthiness determination under this part shall be given an initial security briefing. The briefing shall be in accordance with the requirements of 32 CFR part 159 and consist of the following elements:

(i) The specific security requirements of their particular job.

(ii) The techniques employed by foreign intelligence activities in attempting to obtain classified information and their responsibility for reporting such attempts.

(iii) The prohibition against disclosing classified information, by any means, to unauthorized persons or discussing or handling classified information in a manner that would make it accessible to unauthorized persons.

(iv) The penalties that may be imposed for security violations.

(2) If an individual declines to execute Standard Form 312, ''Classified Information Nondisclosure Agreement'' (replaced the Standard Form 189), the DoD Component shall initiate action to deny or revoke the security clearance of such person in accordance with § 154.56(b).

(c) *Refresher briefing*. Programs shall be established to provide, at a minimum, annual security training for personnel having continued access to classified information. The elements outlined in 32 CFR part 159 shall be tailored to fit the needs of experienced personnel.

(d) Foreign travel briefing. While world events during the past several years have diminished the threat to our national security from traditional cold-war era foreign intelligence services, foreign intelligence service continue to pursue the unauthorized acquisition of classified or otherwise sensitive U.S. Government information, through the recruitment of U.S. Government employees with access to such information. Through security briefings and education, the Department of Defense continues to provide for the protection of information and technology considered vital to the national security interests from illegal or unauthorized acquisition by foreign intelligence services.

(1) DoD Components will establish appropriate internal procedures requiring all personnel possessing a DoD security clearance to report to their security office all contacts with individuals of any nationality, whether within or outside the scope of the employee's official activities, in which:

(i) Illegal or unauthorized access is sought to classified or otherwise sensitive information.

(ii) The employee is concerned that he or she may be the target of exploitation by a foreign entity.

(2) The DoD security manager, security specialist or other qualified individual will review and evaluate the reported information. Any facts or circumstances of a reported contact with a foreign national that appear to:

(i) Indicate an attempt or intention to obtain unauthorized access to proprietary, sensitive, or classified information or technology;

(ii) Offer a reasonable potential for such; or

(iii) Indicate the possibility of continued contact with the foreign national for such purposes, shall be promptly reported to the appropriate counterintelligence agency.

(e) *Termination briefing*. (1) Upon termination of employment administrative withdrawal of security clearance, or contemplated absence from duty or employment for 60 days or more, DoD military personnel and civilian employees shall be given a termination briefing, return all classified material, and execute a Security Termination Statement. This statement shall include:

(i) An acknowledgment that the individual has read the appropriate provisions of the Espionage Act, other criminal statutes, DoD Regulations applicable to the safeguarding of classified information to which the individual has had access, and understands the implications thereof;

(ii) A declaration that the individual no longer has any documents or material containing classified information in his or her possession;

(iii) An acknowledgment that the individual will not communicate or transmit classified information to any unauthorized person or agency; and

(iv) An acknowledgment that the individual will report without delay to the FBI or the DoD Component concerned any attempt by any unauthorized person to solicit classified information.

(2) When an individual refuses to execute a Security Termination Statement, that fact shall be reported immediately to the security manager of the cognizant organization concerned. In any such case, the individual involved shall be debriefed orally. The fact of a refusal to sign a Security Termination Statement shall be reported to the Director, Defense Investigative Service who shall ensure that it is recorded in the Defense Clearance and Investigations Index.

(3) The Security Termination Statement shall be retained by the DoD Component that authorized the individual access to classified information for the period specified in the Component's records retention schedules, but for a minimum of 2 years after the individual is given a termination briefing.

(4) In addition to the provisions of paragraphs (e)(1), (e)(2), and (e)(3) of this section, DoD Components shall establish a central authority to be responsible for ensuring that Security Termination Statements are executed by senior personnel (general officers, flag officers and GS–16s and above). Failure on the part of such personnel to execute a Security Termination Statement shall be reported immediately to the Deputy Under Secretary of Defense for Policy.

[52 FR 11219, Apr. 8, 1987, as amended at 58 FR 61026, Nov. 19, 1993]

## Subpart J—Safeguarding Personnel Security Investigative Records

### § 154.65 General.

In recognition of the sensitivity of personnel security reports and records, particularly with regard to individual privacy, it is Department of Defense policy that such personal information shall be handled with the highest degree of discretion. Access to such information shall be afforded only for the purpose cited herein and to persons whose official duties require such information. Personnel security investigative reports may be used only for the purposes of determining eligibility of DoD military and civilian personnel, contractor employees, and other persons affiliated with the Department of Defense, for access to classified information, assignment or retention in sensitive duties or other specifically designated duties requiring such investigation, or for law enforcement and counterintelligence investigations. Other uses are subject to the specific written authorization of the Deputy Under Secretary of Defense for Policy.

### § 154.66 Responsibilities.

DoD authorities responsible for administering the DoD personnel security program and all DoD personnel authorized access to personnel security reports and records shall ensure that the use of such information is limited to that authorized by this part and that such reports and records are safeguarded as prescribed herein. The heads of DoD Components and the Deputy Under Secretary of Defense for Policy for the Office of the Secretary of Defense shall establish internal controls to ensure adequate safeguarding and limit access to and use of personnel security reports and records as required by §§ 154.67 and 154.68.

### § 154.67 Access restrictions.

Access to personnel security investigative reports and personnel security clearance determination information shall be authorized only in accordance with 32 CFR parts 286 and 286a and with the following:

(a) DoD personnel security investigative reports shall be released outside of the DoD only with the specific approval of the investigative agency having authority over the control and disposition of the reports.

(b) Within DoD, access to personnel security investigative reports shall be limited to those designated DoD officials who require access in connection with specifically assigned personnel security duties, or other activities specifically identified under the provisions of § 154.65.

(c) Access by subjects of personnel security investigative reports shall be afforded in accordance with 32 CFR part 286a.

(d) Access to personnel security clearance determination information shall be made available, other than provided for in paragraph (c) of this

section, through security channels, only to DoD or other officials of the Federal Government who have an official need for such information.

### § 154.68 Safeguarding procedures.

Personnel security investigative reports and personnel security determination information shall be safeguarded as follows:

(a) Authorized requesters shall control and maintain accountability of all reports of investigation received.

(b) Reproduction, in whole or in part, of personnel security investigative reports by requesters shall be restricted to the minimum number of copies required for the performance of assigned duties.

(c) Personnel security investigative reports shall be stored in a vault, safe, or steel file cabinet having at least a lockbar and an approved three-position dial-type combination padlock or in a similarly protected area/container.

(d) Reports of DoD personnel security investigations shall be sealed in double envelopes or covers when transmitted by mail or when carried by persons not authorized access to such information. The inner cover shall bear a notation substantially as follows:

TO BE OPENED ONLY BY OFFICIALS DESIGNATED TO RECEIVE REPORTS OF PERSONNEL SECURITY INVESTIGATION

(e) An individual's status with respect to a personnel security clearance or a Special Access authorization is to be protected as provided for in 32 CFR part 286.

### § 154.69 Records disposition.

(a) Personnel security investigative reports, to include OPM NACIs may be retained by DoD recipient organizations, only for the period necessary to complete the purpose for which it was originally requested. Such reports are considered to be the property of the investigating organization and are on loan to the recipient organization. All copies of such reports shall be destroyed within 90 days after completion of the required personnel security determination. Destruction shall be accomplished in the same manner as for classified information in accordance with 32 CFR part 159.

(b) DoD record repositories authorized to file personnel security investigative reports shall destroy PSI reports of a favorable or of a minor derogatory nature 15 years after the date of the last action. That is, after the completion date of the investigation or the date on which the record was last released to an authorized user—whichever is later. Personnel security investigative reports resulting in an unfavorable administrative personnel action or court-martial or other investigations of a significant nature due to information contained in the investigation shall be destroyed 25 years after the date of the last action. Files in this latter category that are determined to be of possible historical value and those of widespread public or congressional interest may be offered to the National Archives after 15 years.

(c) Personnel security investigative reports on persons who are considered for affiliation with DoD will be destroyed after 1 year if the affiliation is not completed.

### § 154.70 Foreign source information.

Information that is classified by a foreign government is exempt from public disclosure under the Freedom of Information and Privacy Acts. Further, information provided by foreign governments requesting an express promise of confidentiality shall be released only in a manner that will not identify or allow unauthorized persons to identify the foreign agency concerned.

## Subpart K—Program Management

### § 154.75 General.

To ensure uniform implementation of the DoD personnel security program throughout the Department, program responsibility shall be centralized at DoD Component level.

### § 154.76 Responsibilities.

(a) The Assistant Secretary of Defense for Command, Control, Communications, and Intelligence (ASD(C31)) shall have primary responsibility for providing guidance, oversight, development and approval for policy and procedures governing personnel security

program matters within the Department:

(1) Provide program management through issuance of policy and operating guidance.

(2) Provide staff assistance to the DoD Components and defense agencies in resolving day-to-day security policy and operating problems.

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

(4) Provide policy, oversight, and guidance to the component adjudication functions.

(5) Approve, coordinate and oversee all DoD personnel security research initiatives and activities.

(b) The General Counsel shall ensure that the program is administered in a manner consistent with the laws; all proceedings are promptly initiated and expeditiously completed; and that the rights of individuals involved are protected, consistent with the interests of national security. The General Counsel shall also ensure that all relevant decisions of the courts and legislative initiatives of the Congress are obtained on a continuing basis and that analysis of the foregoing is accomplished and disseminated to DoD personnel security program management authorities.

(c) The Heads of the Components shall ensure that:

(1) The DoD personnel security program is administered within their area of responsibility in a manner consistent with this part.

(2) A single authority within the office of the head of the DoD Component is assigned responsibility for administering the program within the Component.

(3) Information and recommendations are provided the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence (ASD(C31)) and the General Counsel at their request concerning any aspect of the program.

[52 FR 11219, Apr. 8, 1987, as amended at 58 FR 61026, Nov. 19, 1993]

### § 154.77 Reporting requirements.

(a) The OASD(C31) shall be provided personnel security program management data by the Defense Data Manpower Center (DMDC) by December 31 each year for the preceding fiscal year. To facilitate accurate preparation of this report, all adjudicative determinations must be entered into the DC11 by all DoD central adjudication facilities no later than the end of the fiscal year. The information required below is essential for basic personnel security program management and in responding to requests from the Secretary of Defense and Congress. The report shall cover the preceding fiscal year, broken out by clearance category, according to military (officer or enlisted), civilian or contractor status and by the central adjudication facility that took the action, using the enclosed format:

(1) Number of Top Secret, Secret, and Confidential clearances issued;

(2) Number of Top Secret, Secret, and Confidential clearances denied;

(3) Number of Top Secret, Secret, and Confidential clearances revoked;

(4) Number of SCI access determinations issued;

(5) Number of SCI access determinations denied;

(6) Number of SCI access determinations revoked; and

(7) Total number of personnel holding a clearance for Top Secret, Secret, Confidential and Sensitive Compartmented Information as of the end of the fiscal year.

(b) The Defense Investigative Service (DIS) shall provide the OASD(C3I) a quarterly report that reflects investigative cases opened and closed during the most recent quarter, by case category type, and by major requester. The information provided by DIS is essential for evaluating statistical data regarding investigative workload and the manpower required to perform personnel security investigations. Case category types include National Agency Checks (NACs); Expanded NACs; Single Scope Background Investigations (SSBIs), Periodic Reinvestigations (PRs); Secret Periodic Reinvestigations (SPRs); Post Adjudicative (PA); Special Investigative Inquiries (SIIs); and Limited Inquiries (LIs). This report shall be forwarded to OASD(C3I) within 45 days after the end of each quarter.

(c) The reporting requirement for DMDC and DIS has been assigned Report Control Symbol DD-C3I(A) 1749.

[58 FR 61026, Nov. 19, 1993]

### § 154.78 Inspections.

The heads of DoD Components shall assure that personnel security program matters are included in their administrative inspection programs.

## APPENDIX A TO PART 154—INVESTIGATIVE SCOPE

This appendix prescribes the scope of the various types of personnel security investigations.

1. *National Agency Check (NAC).* Components of a NAC. At a minimum, the first three of the described agencies (DCII, FBI/HQ, and FBI/ID) below shall be included in each complete NAC; however, a NAC may also include a check of any or all of the other described agencies, if appropriate.

a. DCII records consist of an alphabetical index of personal names and impersonal titles that appear as subjects or incidentals in investigative documents held by the criminal, counterintelligence, fraud, and personnel security investigative activities of the three military departments, DIS, Defense Criminal Investigative Service (DCIS), and the National Security Agency. DCII records will be checked on all subjects of DoD investigations.

b. FBI/HQ has on file copies of investigations conducted by the FBI. The FBI/HQ check, included in every NAC, consists of a review of files for information of a security nature and that developed during applicant-type investigations.

c. An FBI/ID check, included in every NAC (but not ENTNAC), is based upon a technical fingerprint search that consists of a classification of the subject's fingerprints and comparison with fingerprint cards submitted by law enforcement activities. If the fingerprint card is not classifiable, a ''name check only'' of these files is automatically conducted.

d. OPM. The files of OPM contain the results of investigations conducted by OPM under Executive Orders 9835 and 10450, those requested by the Nuclear Regulatory Commission (NRC), the Department of Energy (DOE) and those requested since August 1952 to serve as a basis for ''Q'' clearances. Prior to that date, ''Q'' clearance investigations were conducted by the FBI. A ''Q'' clearance is granted to individuals who require access to DOE information. In order to receive a ''Q'' clearance, a full field background investigation must be completed on the individual requiring access in accordance with the Atomic Energy Act of 1954. Also on file are the results of investigations on the operation of the Merit System, violations of the Veterans Preference Act, appeals of various types, fraud and collusion in Civil Service examinations and related matters, data on all Federal employment, and an index of all BIs on civilian employees or applicants completed by agencies of the Executive Branch of the U.S. Government. The OPM files may also contain information relative to U.S. citizens who are, or who were, employed by a United Nations organization or other public international organization such as the Organization of American States. OPM records are checked on all persons who are, or who have been, civilian employees of the U.S. Government; or U.S. citizens who are, or who have been, employed by a United Nations organization or other public international organization; and on those who have been granted security clearances by the NRC or DOE.

e. Immigration and Naturalization Service (I&NS). The files of I&NS contain (or show where filed) naturalization certificates, certificates of derivative citizenship, all military certificates of naturalization, repatriation files, petitions for naturalization and declaration of intention, visitors' visas, and records of aliens (including government officials and representatives of international organizations) admitted temporarily into the U.S. I&NS records are checked when the subject is:

(1) An alien in the U.S., or

(2) A naturalized citizen whose naturalization has not been verified, or

(3) An immigrant alien, or

(4) A U.S. citizen who receives derivative citizenship through the naturalization of one or both parents, provided that such citizenship has not been verified in a prior investigation.

f. State Department. The State Department maintains the following records:

(1) Security Division (S/D) files contain information pertinent to matters of security, violations of security, personnel investigations pertinent to that agency, and correspondence files from 1950 to date. These files are checked on all former State Department employees.

(2) Passport Division (P/D) shall be checked if subject indicates U.S. citizenship due to birth in a foreign country of American parents. This is a check of State Department Embassy files to determine if subject's birth was registered at the U.S. Embassy in the country where he was born. Verification of this registration is verification of citizenship.

g. Central Intelligence Agency (CIA). The files of CIA contain information on present and former employees, including members of the Office of Strategic Services (OSS), applicants for employment, foreign nationals, including immigrant aliens in the U.S., and

U.S. citizens traveling outside the U.S. after July 1, 1946. These files shall be checked under the following guidelines.

| Investigation | Criteria for CIA Checks |
|---|---|
| NAC, DNACI or ENTNAC. | Residence anywhere outside of the U.S. for a year or more since age 18 except under the auspices of the U.S. Government; and, travel, education, residence, or employment since age 18 in any designated country (Appendix G). |
| BI | Same as NAC, DNACI, and ENTNAC requirements plus travel, residence, employment, and education outside the U.S. for more than a continuous 3-month period during the past 5 years, or since age 18, except when under the auspices of the Government. |
| SBI | Same as BI requirements except the period of the investigation will cover the past 15 years, or since age 18. Also when subject's employment, education or residence has occurred overseas for a period of more than one year under the auspices of the U.S. Government, such checks will be made. |

These files shall also be checked if subject has been an employee of CIA or when other sources indicate that CIA may have pertinent information.

h. Military Personnel Record Center files are maintained by separate departments of the Armed Forces, General Services Administration and the Reserve Records Centers. They consist of the Master Personnel Records of retired, separated, reserve, and active duty members of the Armed Force. These records shall be checked when the requester provides required identifying data indicating service during the last 15 years.

i. Treasury Department. The files of Treasury Department agencies (Secret Service, Internal Revenue Service, and Bureau of Customs) will be checked only when available information indicates that an agency of the Treasury Department may be reasonably expected to have pertinent information.

j. The files of other agencies such as the National Guard Bureau, the Defense Industrial Security Clearance Office (DISCO), etc., will be checked when pertinent to the purpose for which the investigation is being conducted.

2. *DoD National Agency Check plus Written Inquires (DNACI):*

a. *Scope:* The time period covered by the DNACI is limited to the most recent five (5) years, or since the 18th birthday, whichever is shorter, provided that the investigation covers at least the last two (2) full years of the subject's life, although it may be extended to the period necessary to resolve any questionable or derogatory information. No investigation will be conducted prior to an individual's 16th birthday. All DNACI investigation information will be entered on the DD Form 398–2 and FD-Form 258 and forwarded to the Defense Investigative Service (paragraph D, Appendix B).

b. *Components of a DNACI:*

(1) *NAC.* This is the same as described in paragraph 1, above.

(2) *Credit.* (a) A credit bureau check will be conducted to cover the 50 States, the District of Columbia, Puerto Rico, Guam, and the Virgin Islands, at all locations where subject has resided (including duty stations and home ports), been employed, or attended school for 6 months (cumulative) during the past five (5) years.

(b) When information developed reflects unfavorably upon a person's current credit reputation or financial responsibility, the investigation will be expanded as necessary.

(3) *Employment*—(a) *Non-Federal Employment.* (*1*) Verify, via written inquiry, all employment within the period of investigation with a duration of six (6) months or more. Current employment will be checked regardless of duration.

(*2*) If all previous employments have been less than 6 months long, the most recent employment, in addition to the current, will be checked in all cases.

(*3*) Seasonal holiday, part-time and temporary employment need not be checked unless subparagraph 2 above applies.

(b) *Federal employment.* All Federal employment (to include military assignments) within the period of investigation will be verified by the requester through locally available records, and a statement reflecting that such checks have been favorably accomplished will be contained in the investigative request. Those that cannot be verified in this fashion will be accomplished via written inquiry by DIS (within the 50 United States, Puerto Rico, Guam, and the Virgin Islands).

3. *Background Investigation (BI).* The period of investigation for the BI is 5 years and applies to military, civilian, and contractor personnel.

a. *NAC.* See paragraph 1, above.

b. *Local Agency Checks (LAC).* Same as paragraph 4j, below, except period of coverage is five years.

c. *Credit checks.* Same as paragraph 4i, below.

d. *SUBJECT Interview (SI).* This is the principal component of a BI. In some instances an issue will arise after the primary SI and a secondary interview will be conducted. Interviews in the latter category are normally ''issue'' interviews that will be reported in the standard BI narrative format.

e. *Employment records.* Employment records will be checked at all places where employment references are interviewed with the exception of current Federal employment when the requester indicates that such employment has been verified with favorable results.

f. *Employment reference coverage.* A minimum of *three references, either supervisors or*

*co-workers*, who have knowledge of the SUBJECT's activities in the work environment will be interviewed. At least one employment reference at the current place of employment will always be interviewed with the exception of an individual attending military basic training, or other military training schools lasting less than 90 days. However, if the SUBJECT has only been at the current employment for less than 6 months, it will be necessary to go not only to his or her current employment (for example, for one employment reference) but also to the preceding employment of at least 6 months for additional employment references. If the SUBJECT has not had prior employment of at least 6 months, interview(s) will be conducted at the most recent short-term employment in addition to the current employment.

g. *Developed and Listed Character References*. A minimum of three developed character references (DCR) whose combined association with the SUBJECT covers the entire period of investigation will be interviewed. If coverage cannot be obtained through the DCRs, listed character reference (LCR) will be contacted to obtain coverage.

h. *Unfavorable information*. Unfavorable information developed in the field will be expanded.

4. *Special Background Investigation (SBI)*—a. *Components of an SBI*. The period of investigation for an SBI is the last 15 years or since the 18th birthday, whichever is the shorter period, provided that the investigation covers at least the last 2 full years of the subject's life. No investigation will be conducted for the period prior to an individual's 16th birthday. Emphasis shall be placed on peer coverage whenever interviews are held with personal sources in making education, employment, and reference (including developed) contact.

b. *NAC*. In addition to conducting a NAC on the subject of the investigation, the following additional requirements apply.

(1) A DCII, FBI/ID name check only and FBI/HQ check shall be conducted on subject's current spouse or cohabitant. In addition, such other national agency checks as deemed appropriate based on information on the subject's SPH or PSQ shall be conducted.

(2) A check of FBI/HQ files on members of subject's immediate family who are aliens in the U.S. or immigrant aliens who are 18 years of age or older shall be conducted. As used throughout the part, members of subject's immediate family include the following:

(a) Current spouse.

(b) Adult children, 18 years of age or older, by birth, adoption, or marriage.

(c) Natural, adopted, foster, or stepparents.

(d) Guardians.

(e) Brothers and sisters either by birth, adoption, or remarriage of either parent.

(3) The files of CIA shall be reviewed on alien members of subject's immediate family who are 18 years of age or older, regardless of whether or not these persons reside in the U.S.

(4) I&NS files on members of subject's immediate family 18 years of age or older shall be reviewed when they are:

(a) Aliens in the U.S., or

(b) Naturalized U.S. citizens whose naturalization has not been verified in a prior investigation, or

(c) Immigrant aliens, or

(d) U.S. citizens born in a foreign country of American parent(s) or U.S. citizens who received derivative citizenship through the naturalization of one or both parents, provided that such citizenship has not been verified in a prior investigation.

c. *Birth*. Verify subject's date and place of birth (DPOB) through education, employment and/or other records. Verify through Bureau of Vital Statistics (BVS) records if not otherwise verified under d., below, or if a variance is developed.

d. *Citizenship*. Subject's citizenship status must be verified in all cases. U.S. citizens who are subjects of investigation will be required to produce documentation that will confirm their citizenship. Normally such documentation should be presented to the DoD Component concerned prior to the initiation of the request for investigation. When such documentation is not readily available, investigative action may be initiated with the understanding that the designated authority in the DoD Component will be provided with the documentation prior to the issuance of a clearance. DIS will not check the BVS for native-born U.S. citizens except as indicated in 4.c. above. In the case of foreign-born U.S. citizens, DIS will check I&NS records. The citizenship status of all foreign-born members of subject's immediate family shall be verified. Additionally, when the investigation indicates that a member of subject's immediate family has not obtained U.S. citizenship after having been eligible for a considerable period of time, an attempt should be made to determine the reason. The documents listed below are acceptable for proof of U.S. citizenship for personnel security determination purposes:

(1) A birth certificate must be presented if the individual was born in the United States. To be acceptable, the certificate must show that the birth record was filed shortly after birth and must be certified with the registrar's signature and the raised, impressed, or multicolored seal of his office except for States or jurisdictions which, as a matter of policy, do not issue certificates with a raised or impressed seal. Uncertified copies of birth certificates are not acceptable.

(a) A delayed birth certificate (a record filed more than one year after the date of birth) is acceptable provided that it shows

that the report of birth was supported by acceptable secondary evidence of birth as described in subparagraph (b), below.

(b) If such primary evidence is not obtainable, a notice from the registrar stating that no birth record exists should be submitted. The notice shall be accompanied by the best combination of secondary evidence obtainable. Such evidence may include a baptismal certificate, a certificate of circumcision, a hospital birth record, affidavits of persons having personal knowledge of the facts of the birth, or other documentary evidence such as early census, school, or family bible records, newspaper files and insurance papers. Secondary evidence should have been created as close to the time of birth as possible.

(c) All documents submitted as evidence of birth in the United States shall be original or certified documents. Uncertified copies are not acceptable.

(2) A certificate of naturalization shall be submitted if the individual claims citizenship by naturalization.

(3) A certificate of citizenship issued by the I&NS shall be submitted if citizenship was acquired by birth abroad to a U.S. citizen parent or parents.

(4) A Report of Birth Abroad of A Citizen of The United States of America (Form FS–240), a Certification of Birth (Form FS–545 or DS–1350), or a Certificate of Citizenship is acceptable if citizenship was acquired by birth abroad to a U.S. citizen parent or parents.

(5) A passport or one in which the individual was included will be accepted as proof of citizenship.

e. *Education.* (1) Verify graduation or attendance at institutions of higher learning in the U.S. within the last 15 years, if such attendance was not verified during a prior investigation.

(2) Attempts will be made to review records at overseas educational institutions when the subject resided overseas in excess of one year.

(3) Verify attendance or graduation at the last secondary school attended within the past 10 years if there was no attendance at an institution of higher learning within the period of investigation.

(4) Verification of attendance at military academies is only required when the subject failed to graduate.

f. *Employment.* (1) Non-Federal employment. Verify all employment within the period of investigation to include seasonal, holiday, Christmas, part-time, and temporary employment. Interview one supervisor and one co-worker at subject's current place of employment as well as at each prior place of employment during the past 10 years of six months duration or longer. The interview requirement for supervisors and co-workers does not apply to seasonal, holiday, Christmas, part-time, and temporary employment (4 months or less) unless there are unfavorable issues to resolve or the letter of inquiry provides insufficient information.

(2) *Federal employment.* All Federal employment will be verified within the period of investigation to include Christmas, seasonal temporary, summer hire, part-time, and holiday employment. Do not verify Federal employment through review of records if already verified by the requester. If Federal employment has not been verified by the requester, then subject's personnel file at his/her current place of employment will be reviewed. All previous Federal employment will be verified during this review. In the case of former Federal employees, records shall be examined at the Federal Records Center in St. Louis, Missouri. Interview one supervisor and one co-worker at all places of employment during the past 10 years if so employed for 6 months or more.

(3) *Military employment.* Military service for the last 15 years shall be verified. The subject's duty station, for the purpose of interview coverage, is considered as a place of employment. One supervisor and one co-worker shall be interviewed at subject's current duty station if subject has been stationed there for 6 months or more; additionally, a supervisor and a co-worker at subject's prior duty stations where assigned for 6 months or more during the past 10 years shall be interviewed.

(4) *Unemployment.* Subject's activities during all periods of unemployment in excess of 30 consecutive days, within the period of investigation, that are not otherwise accounted for shall be verified.

(5) When an individual has resided outside the U.S. continuously for over one year, attempts will be made to confirm overseas employments as well as conduct required interviews of a supervisor and co-worker.

g. *References.* Three developed character references who have sufficient knowledge of subject to comment on his background, suitability, and loyalty shall be interviewed personally. Efforts shall be made to interview developed references whose combined association with subject covers the full period of the investigation with particular emphasis on the last 5 years. Employment, education, and neighborhood references, in addition to the required ones, may be used as developed references provided that they have personal knowledge concerning the individual's character, discretion, and loyalty. Listed character references will be interviewed only when developed references are not available or when it is necessary to identify and locate additional developed character references or when it is necessary to verify subject's activities (e.g., unemployment).

h. *Neighborhood investigation.* Conduct a neighborhood investigation to verify each of subject's residences in the U.S. of a period of 6 months or more on a cumulative basis, during the past 5 years or during the period of

investigation, whichever is shorter. During each neighborhood investigation, interview two neighbors who can verify subject's period of residence in that area and who were sufficiently acquainted to comment on subject's suitability for a position of trust. Neighborhood investigations will be expanded beyond this 5-year period only when there is unfavorable information to resolve in the investigation.

i. *Credit*. Conduct credit bureau check in the 50 States, the District of Columbia, Puerto Rico and overseas (where APO/FPO addresses are provided) at all places where subject has resided (including duty stations and home ports), been employed, or attended school for 6 months or more, on a cumulative basis, during the last 7 years or during the period of the investigation, whichever is shorter. When coverage by a credit bureau is not available, credit references located in that area will be interviewed. Financial responsibility, including unexplained affluence, will be stressed in all reference interviews.

j. *Local Agency Checks (LAC's)*. LACs, including State central criminal history record repositories, will be conducted on subject at all places of residence to include duty stations and/or home ports, in the 50 States, the District of Columbia, and Puerto Rico, where residence occurred during the past 15 years or during the period of investigation, whichever is shorter. If subject's place of employment and/or education is serviced by a different law enforcement agency than that servicing the area of residence, LACs shall be conducted also in these areas.

k. *Foreign travel*. If subject has been employed, educated, traveled or resided outside of the U.S. for more than 90 days during the period of investigation, except under the auspices of the U.S. Government, additional record checks during the NAC shall be made in accordance with paragraph 1.f. of this Appendix. In addition, the following requirements apply:

(1) Foreign travel not under the auspices of the U.S. Government. When employment, education, or residence has occurred overseas for more than 90 days during the past 15 years or since age 18, which was not under the auspices of the U.S. Government, a check of records will be made at the Passport Office of the Department of State, the CIA, and other appropriate agencies. Efforts shall be made to develop sources, generally in the U.S., who knew the individual overseas to cover significant employment, education, or residence and to determine whether any lasting foreign contacts or connections were established during this period. If the individual has worked or lived outside of the U.S. continuously for over one year, the investigation will be expanded to cover fully this period through the use of such investigative assets and checks of record sources as may be available to the U.S. Government in the foreign country in which the individual resided.

(2) Foreign travel under the auspices of the U.S. Government. When employment, education, or residence has occurred overseas for a period of more than one year, under the auspices of the U.S. Government, a record check will be made at the Passport Office of the Department of State, the CIA and other appropriate agencies. Efforts shall be made to develop sources (generally in the U.S.) who knew the individual overseas to cover significant employment, education, or residence and to determine whether any lasting foreign contacts or connections were established during this period. Additionally, the investigation will be expanded to cover fully this period through the use of such investigative assets and checks of record sources as may be available to the U.S. Government in the foreign country in which the individual resided.

l. *Foreign connections*. All foreign connections (friends, relatives, and/or business connections) of subject and immediate family in the U.S. or abroad, except where such association was the direct result of subject's official duties with the U.S. Government, shall be ascertained. Investigation shall be directed toward determining the significance of foreign connections on the part of subject and the immediate family, particularly where the association is or has been with persons whose origin was within a country whose national interests are inimical to those of the U.S. When subject or his spouse has close relatives residing in a Communist-controlled country, or subject has resided, visited, or traveled in such a country, not under U.S. Government auspices, the provisions of § 154.8(i)(3) of this part apply.

m. *Organizations*. Efforts will be made during reference interviews and record reviews to determine if subject and/or the immediate family has, or formerly had, membership in, affiliation with, sympathetic association towards, or participated in any foreign or domestic organization, association, movement, group, or combination of persons of the type described in § 154.7(a) through (d) of this part.

n. *Divorce*. Divorces, annulments, and legal separations of subject shall be verified only when there is reason to believe that the grounds for the action could reflect on subject's suitability for a position of trust.

o. *Military service*. All military service and types of discharge during the last 15 years shall be verified.

p. *Medical records*. Medical records shall not be reviewed unless:

(1) The requester indicates that subject's medical records were unavailable for review prior to submitting the request for investigation, or

(2) The requester indicates that unfavorable information is contained in subject's medical records, or

(3) The subject lists one or more of the following on the SPH or PSQ:

(a) A history of mental or nervous disorders.

(b) That subject is now or has been addicted to the use of habit-forming drugs such as narcotics or barbiturates or is now or has been a chronic user to excess of alcoholic beverages.

q. *Updating a previous investigation to SBI standards.* If a previous investigation does not substantially meet the minimum standards of an SBI or if it is more than 5 years old, a current investigation is required but may be limited to that necessary to bring the individual's file up to date in accordance with the investigative requirements of an SBI. Should new information be developed during the current investigation that bears unfavorably upon the individual's activities covered by the previous investigation, the current inquiries shall be expanded as necessary to develop full details of this new information.

5. *Periodic Reinvestigation (PR).* a. Each DoD military, civilian, consultant and contractor employee (to include non-U.S. citizens (foreign nationals and/or immigrant aliens) holding a limited access authorization) occupying a critical sensitive position, possessing a TOP SECRET clearance, or occupying a special access program position shall be the subject of a PR initiated 5 years from the date of completion of the last investigation. The PR shall cover the period of the last 5 years.

b. *Minimum investigative requirements.* A PR shall include the following minimum scope.

(1) *NAC.* A valid NAC on the SUBJECT will be conducted in all cases. Additionally, for positions requiring SCI access, checks of DCII, FBI/HQ, FBI/ID name check only, and other agencies deemed appropriate, will be conducted on the SUBJECT's current spouse or cohabitant, if not previously conducted. Additionally, NACs will be conducted on immediate family members, 18 years of age or older, who are aliens and/or immigrant aliens, if not previously accomplished.

(2) *Credit.* Credit bureau checks covering all places where the SUBJECT resided for 6 months or more, on a cumulative basis, during the period of investigation, in the 50 States, District of Columbia, Puerto Rico and overseas (where APO/FPO addresses are provided), will be conducted.

(3) *Subject interview.* The interview should cover the entire period of time since the last investigation, not just the last 5-year period. Significant information disclosed during the interview, which has been satisfactorily covered during a previous investigation, need not be explored again unless additional relevant information warrants further coverage. An SI is not required if one of the following conditions exists:

(a) The SUBJECT is aboard a deployed ship or in some remote area that would cause the interview to be excessively delayed.

(b) The SUBJECT is in an overseas location serviced by the State Department or the FBI.

(4) *Employment.* Current employment will be verified. Military and Federal service records will not routinely be checked, if previously checked by the requester when PR was originally submitted. Also, employment records will be checked wherever employment interviews are conducted. Records need be checked only when they are locally available, unless unfavorable information has been detected.

(5) *Employment references.* Two supervisors or co-workers at the most recent place of employment or duty station of 6 months; if the current employment is less than 6 months employment reference interviews will be conducted at the next prior place of employment, which was at least a 6-month duration.

(6) *Developed Character References (DCRs).* Two developed character references who are knowledgeable of the SUBJECT will be interviewed. Developed character references who were previously interviewed will only be reinterviewed when other developed references are not available.

(7) *Local Agency Checks (LACs).* DIS will conduct local agency checks on the SUBJECT at all places of residence, employment, and education during the period of investigation, regardless of duration, including overseas locations.

(8) *Neighborhood Investigation.* Conduct a neighborhood investigation to verify subjects' current residence in the United States. Two neighbors who can verify subject's period of residence in that area and who are sufficiently acquainted to comment on the subject's suitability for a position of trust will be interviewed. Neighborhood investigations will be expanded beyond the current residence when unfavorable information arises.

(9) *Ex-spouse interview.* If the subject of investigation is divorced, the ex-spouse will be interviewed when the date of final divorce action is within the period of investigation.

(10) *Select scoping.* When the facts of the case warrant, additional select scoping will be accomplished, as necessary, to fully develop or resolve an issue.

[52 FR 11219, Apr. 8, 1987, as amended at 58 FR 61026, Nov. 19, 1993]

## APPENDIX B TO PART 154—REQUEST PROCEDURES

A. *General.* To conserve investigative resources and to insure that personnel security investigations are limited to those essential

to current operations and are clearly authorized by DoD policies, organizations requesting investigations must assure that continuing command attention is given to the investigative request process.

In this connection, it is particularly important that the provision of Executive Order 12356 requiring strict limitations on the dissemination of official information and material be closely adhered to and that investigations requested for issuing clearances are limited to those instances in which an individual has a clear need for access to classified information. Similarly, investigations required to determine eligibility for appointment or retention in DoD, in either a civilian or military capacity, must not be requested in frequency or scope exceeding that provided for in this part.

In view of the foregoing, the following guidelines have been developed to simplify and facilitate the investigative request process:

1. Limit requests for investigation to those that are essential to current operations and clearly authorized by DoD policies and attempt to utilize individuals who, under the provisions of this part, have already met the security standard;

2. Assure that military personnel on whom investigative requests are initiated will have sufficient time remaining in service after completion of the investigation to warrant conducting it;

3. Insure that request forms and prescribed documentation are properly executed in accordance with instructions;

4. Dispatch the request directly to the DIS Personnel Investigations Center;

5. Promptly notify the DIS Personnel Investigations Center if the investigation is no longer needed (notify OPM if a NACI is no longer needed); and

6. Limit access through strict need-to-know, thereby requiring fewer investigations.

In summary, close observance of the above-cited guidelines will allow the DIS to operate more efficiently and permit more effective, timely, and responsive service in accomplishing investigations.

B. *National Agency Check (NAC)*. When a NAC is requested an original only of the DD Form 398–2 (National Agency Check Request) and a completed FD 258 (Applicant Fingerprint Card) are required. If the request is for an ENTNANC, an original only of the DD Form 398–2 and a completed DD Form 2280 (Armed Forces Fingerprint Card) are required. Those forms should be sent directly to: Personnel Investigation Center, Defense Investigative Service, P.O. Box 1083, Baltimore, Maryland 21203.

C. *National Agency Check plus written Inquiries (NACI)*. When a NACI is requested, an original and one copy of the SF 85 (Data for Nonsensitive or Noncritical-sensitive Position), an SF 171 (Personal Qualifications Statement), and an SF 87 (U.S. Civil Service Commission Fingerprint Chart) shall be sent directly to: Office of Personnel Management, Bureau of Personnel Investigations, NACI Center, Boyers, Pennsylvania 16018.

The notation ''ALL REFERENCES'' shall be stamped immediately above the title at the top of the Standard Form 85.

D. *DoD National Agency Check with Inquiries (DNACI)*. 1. When a DNACI is requested, one copy of DD Form 1879, an original and two copies of the DD Form 398–2 (National Agency Check Request), two copies of FD 258 (Fingerprint Card), and an original of DD Form 2221 (Authority for Release of Information and Records) shall be sent directly to: Personnel Investigations Center, Defense Investigative Service, P.O. Box 1083, Baltimore, Maryland 21203.

2. The DD Form 398–2 must be completed to cover the most recent five year period. All information, to include items relative to residences and employment, must be complete and accurate to avoid delays in processing.

E. *Special Background Investigation (SBI)/Background Investigation (BI)*. 1. When requesting a BI or SBI, one copy of DD Form 1879 (Request for Personnel Security Investigation), an original and four copies of DD Form 398 (Statement of Personnel History), two copies of FD 258, and an original of DD Form 2221 (Authority for Release of Information and Records) shall be sent directly to the: Personnel Investigations Center, Defense Investigative Service, P.O. Box 454, Baltimore, Maryland 21203.

2. For the BI and SBI, the DD Form 398 must be completed to cover the most recent five and 15 year period, respectively, or since the 18th birthday, whichever is shorter.

F. *Periodic Reinvestigation (PR)*. 1. PRs shall be requested only in such cases as are authorized by §154.19 (a) through (k) of this part.

a. For a PR requested in accordance with §154.19 (a) and (k) and the DD Form 1879 must be accompanied by the following documents:

(1) Original and four copies of DD Form 398.

(2) Two copies of FD–258.

(3) Original copy of DD Form 2221.

b. In processing PRs, previous investigative reports will not be requested by the requesting organization, unless significant derogatory or adverse information, postdating the most recent favorable adjudication, is developed during the course of reviewing other locally available records. In the latter instance, requests for previous investigative reports may only be made if it is determined by the requesting organization that the derogatory information is so significant that a review of previous investigative reports is

necessary for current adjudicative determinations.

2. No abbreviated version of DD Form 398 may be submitted in connection with a PR.

3. The PR request shall be sent to the address in paragraph E.1.

G. *Additional investigation to resolve derogatory or adverse information.* 1. Requests for additional investigation required to resolve derogatory or adverse information shall be submitted by DD Form 1879 (Request for Personnel Security Investigation) to the: Defense Investigative Service, P.O. Box 454, Baltimore, Maryland 21203.

Such requests shall set forth the basis for the additional investigation and describe the specific matter to be substantiated or disproved.

2. The request should be accompanied by an original and four copies of the DD Form 398, where appropriate, two copies of FD–258 and an original copy of DD Form 2221, unless such documentation was submitted within the last 12 months to DIS as part of a NAC or other personnel security investigation. If pertinent, the results of a recently completed NAC, NACI, or other related investigative reports available should also accompany the request.

H. *Obtaining results of prior investigations.* Requesters requiring verification of a specified type of personnel security investigation, and/or requiring copies of prior investigations conducted by the DIS shall submit requests by letter or message to: Defense Investigative Service Investigative Files Division, P.O. Box 1211, Baltimore, Maryland 21203, Message Address: DIS PIC BALTIMORE MD/ /D0640.

The request will include subject's name, grade, social security number, date and place of birth, and DIS case control number if known.

I. *Requesting postadjudication cases.* 1. Requests pertaining to issues arising after adjudication of an investigation (postadjudication cases) shall be addressed to DIS on a DD Form 1879 accompanied by a DD Form 398, where appropriate.

2. All requests for initial investigations will be submitted to PIC regardless of their urgency. If, however, there is an urgent need for a postadjudication investigation, or the mailing of a request to PIC for initiation of a postadjudication case would prejudice timely pursuit of investigative action, the DD Form 1879 may be directed for initiation, in CONUS, to the nearest DIS Field Office, and in overseas locations, to the military investigative service element supporting the requester (Appendix I). The field element (either DIS or the military investigative agency) will subsequently forward either the DD Form 1879 or completed investigation to PIC.

3. A fully executed DD Form 1879 and appropriate supporting documents may not be immediately available. Further, a case that is based on sensitive security issues may be compromised by a request that the subject submit a DD Form 398. A brief explanation should appear on DD Form 1879s which does not include complete supporting documentation.

J. *Requests involving contractor employees.* To preclude duplicative investigative requests and double handling of contractor employee cases involving access to classified information, all requests for investigation of contractor personnel must be submitted, using authorized industrial security clearance forms, for processing through the Defense Industrial Security Clearance Office, except for programs in which specific approval has been obtained from the Deputy Under Secretary of Defense for Policy to utilize other procedures.

K. *Responsibility for proper documentation of requests.* The official signing the request for investigation shall be responsible for insuring that all documentation is completed in accordance with these instructions.

## APPENDIX C TO PART 154—TABLES FOR REQUESTING INVESTIGATIONS

### GUIDE FOR REQUESTING BACKGROUND INVESTIGATIONS (BI) (TABLE 1)

| A<br>If the individual is a: | B<br>And duties require: | C<br>Then a BI is required before: |
|---|---|---|
| U.S. national military member, civilian, consultant, or contractor employee. | Top Secret clearance | Granting final clearance. |
| U.S. national civilian employee | Assignment to a "Critical" sensitive position. | Assignment to the position. |
| U.S. national military member, DoD civilian or contractor employee. | Occupying a "critical" position in the Nuclear Weapon Personnel Reliability Program (PRP). | Occupying a "critical" position. |
| U.S. national military member or civilian employee. | Granting, denying clearances | Performing clearance functions. |
| U.S. national military member or civilian employee. | Membership on security screening, hearing, or review board. | Appointment to the board. |
| Immigrant alien | Limited access to Secret or Confidential information. | Issuing limited access authorization (Note 1). |

GUIDE FOR REQUESTING BACKGROUND INVESTIGATIONS (BI) (TABLE 1)—Continued

| A<br>If the individual is a: | B<br>And duties require: | C<br>Then a BI is required before: |
|---|---|---|
| Non-U.S. national employee excluding immigrant alien. | Limited access to Secret or Confidential information. | Issuing limited access authorization. |
| Non-U.S. national nominee military education and orientation program (from a country listed at Appendix G). | Education and orientation for of military personnel. | Before performing duties. |
| U.S. national military member DoD civilian or contractor employee. | Assignment to a category two Presidential Support position. | Assignment. |
| U.S. national military member, DoD civilian or contractor employee assigned to NATO. | Access to NATO COSMIC information ..... | Access may be granted. |

Note 1: BI will cover a 10 year scope.

GUIDE FOR REQUESTING SPECIAL BACKGROUND INVESTIGATIONS (SBI) (TABLE 2)

| A<br>If the individual is a: | B<br>And duties require: | C<br>Then a SBI is required before: |
|---|---|---|
| U.S. national military member, DoD civilian, consultant, or contractor employee. | Access to SCI ..... | Granting Access. |
| | Assisgnment to a category one Presidential Support position. | Assignment. |
| | Access to SIOP-ESI ..... | Granting access. |
| | Assignment to the National Security Agency. | Assignment. |
| | Access to other Special Access programs approved under § 154.17(g). | Granting access. |
| | Assignment to personnel security, counterintelligence, or criminal investigative or direct investigative support duties. | Assignment. |

GUIDE FOR REQUESTING PERIODIC REINVESTIGATIONS (PR) (TABLE 3)

| A<br>If the individual is a: | B<br>And duties require: | C<br>Then a PR is required before: |
|---|---|---|
| U.S. national military member, DoD civilian, consultant, or contractor employee. | Access to SCI ..... | 5 years from date of last SBI/BI or PR. |
| | Top Secret Clearance ..... | 5 years from date of last SBI/BI or PR. |
| | Access to NATO COSMIC ..... | 5 years from date of last SBI/BI or PR. |
| | Assignment to Presidential Support activities. | 5 years from date of last SBI/BI or PR. |
| U.S. national civilian employee ..... | Assignment to a ''Critical'' sensitive position. | 5 years from last SBI/BI or PR. |
| Non-U.S. national employee ..... | Current limited access authorization to Secret or Confidential information. | 5 years from last SBI/BI or PR. |

GUIDE FOR REQUESTING DOD NATIONAL AGENCY CHECK WITH INQUIRIES (DNACI) OR NACI (TABLE 4)

| A<br>If the individual is a: | B<br>And duties require: | C<br>Then DNACI/NACI is required |
|---|---|---|
| U.S. national military member or contractor | Secret clearance ..... | Before granting clearance (note 1). |
| | ..... | May be automatically issued (note 2). |
| | Interim Secret Clearance ..... | |
| U.S. national civilian employee or consultant. | Secret clearance ..... | Before granting clearance. |
| | Interim Secret Clearance ..... | May be automatically issued (note 3). |
| | Appointment to ''Non Critical'' sensitive position. | Before appointment. |
| U.S. national military member, DoD civilian or contractor employee. | Occupying a ''controlled'' position in the Nuclear Weapon PRR. | Before assignment. |

GUIDE FOR REQUESTING DOD NATIONAL AGENCY CHECK WITH INQUIRIES (DNACI) OR NACI (TABLE 4)—Continued

| A<br>If the individual is a: | B<br>And duties require: | C<br>Then DNACI/NACI is required |
|---|---|---|
| Applicant for appointment as a commissioned officer. | Commission in the Award Forces | Before appointment (after appointment for health professionals, chaplains, and attorneys, under conditions authorized by § 154.15(d) of this part). |
| Naval Academy Midshipman, Military Academy Cadet, or Air Force Academy Cadet. | Enrollment | To be initiated 90 days after entry. |
| Reserve Officer Training Corps Cadet of Midshipman. | Entry to advanced course or College Scholarship Program. | Then a DNACI is required to be initiated 90 days after entry. |

Note 1: First term enlistees shall require an ENTNAC.
Note 2: Provided DD Form 398–2 is favorably reviewed, local records check favorably accomplished, and DNACI initiated.
Note 3: Provided an authority designated in Appendix E finds delay in such appointment would be harmful to national security; favorable review of DD Form 398–2; NACI initiated; favorable local records check accomplished. Table 5.

GUIDE FOR REQUESTING NATIONAL AGENCY CHECKS (NAC) (TABLE 5)

| A<br>If the individual is a: | B<br>And duties require: | C<br>Then a NAC is required: |
|---|---|---|
| A first-term enlistee | Retention in the Armed Forces (including National Guard and Reserve). | To be initiated NLT three work days after entry (note 1). |
| Prior service member reentering military service after break in Federal employment exceeding 1 year. | Retention in the Armed Forces (including National Guard and Reserve). | To be initiated NLT three work days after reentry. |
| Nominee for military education and orientation program. | Education and orientation of military personnel. | Before performing duties (note 2). |
| U.S. national military, DoD civilian, or contractor employee. | Access to restricted areas, sensitive information, or equipment as defined in § 154.18(b). | Before authorizing entry. |
| Nonappropriated fund instrumentality (NAFI) civilian employee. | Appointment as NAFI custodian | Before appointment. |
| | Accountability for non appropriated funds | Before completion of probationary period. |
| | Fiscal responsibility as determined by NAFI custodian. | Before completion of probationary period. |
| | Other ''positions of trust'' | Before appointment. |
| Persons requiring access to chemical agents. | Access to or security of chemical agents | Before assignment. |
| U.S. national, civilian employee nominee for customs inspection duties. | Wavier under provisions of § 154.18(d) | Before appointment (note 3). |
| Red Cross/United States Organization personnel. | Assignment with the Armed Forces overseas. | Before assignment (See note 4 for foreign national personnel). |
| U.S. national | DoD building pass | Prior to issuance. |
| Foreign national employed overseas | No access to classified information | Prior to employment (note 4). |

Note 1: Request ENTNAC only.
Note 2: Except where personnel whose country of origin is a country listed at Appendix G, a BI will be required (See § 154.18(1)).
Note 3: A NAC not over 5 years old suffices unless there has been a break in employment over 12 months. Then a current NAC is required.
Note 4: In such cases, the NAC shall consist of: (a) Host government law enforcement and security agency record checks at the city, state (province), and national level, and (b) DCII.

## APPENDIX D TO PART 154—REPORTING OF NONDEROGATORY CASES

Background Investigation (BI) and Special Background Investigation (SBI) shall be considered as devoid of significant adverse information unless they contain information listed below:

1. Incidents, infractions, offenses, charges, citations, arrests, suspicion or allegations of illegal use or abuse of drugs or alcohol, theft or dishonesty, unreliability, irresponsibility, immaturity, instability or recklessness, the use of force, violence or weapons or actions that indicate disregard for the law due to multiplicity of minor infractions.

2. All indications of moral turpitude, heterosexual promiscuity, aberrant, deviant, or bizarre sexual conduct or behavior, transvestitism, transsexualism, indecent exposure, rape, contributing to the delinquency of a minor, child molestation, wife-swapping, window-peeping, and similar situations from whatever source. Unlisted full-time employment or education; full-time education or employment that cannot be verified by any

reference or record source or that contains indications of falsified education or employment experience. Records or testimony of employment, education, or military service where the individual was involved in serious offenses or incidents that would reflect adversely on the honesty, reliability, trustworthiness, or stability of the individual.

3. Foreign travel, education, visits, correspondence, relatives, or contact with persons from or living in a foreign country or foreign intelligence service.

4. Mental, nervous, emotional, psychological, psychiatric, or character disorders/behavior or treatment reported or alleged from any source.

5. Excessive indebtedness, bad checks, financial difficulties or irresponsibility, unexplained affluence, bankruptcy, or evidence of living beyond the individual's means.

6. Any other significant information relating to the criteria included in paragraphs (a) through (q) of §154.7 or Appendix H of this part.

[52 FR 11219, Apr. 8, 1987, as amended at 58 FR 61026, Nov. 19, 1993]

## APPENDIX E TO PART 154—PERSONNEL SECURITY DETERMINATION AUTHORITIES

A. *Officials authorized to grant, deny or revoke personnel security clearances (Top Secret, Secret, and Confidential):*

1. Secretary of Defense and/or designee
2. Secretary of the Army and/or designee
3. Secretary of the Navy and/or designee
4. Secretary of the Air Force and/or designee
5. Chairman, Joint Chiefs of Staff and/or designee
6. Directors of the Defense Agencies and/or designee
7. Commanders of the Unified and Specified Commands and/or designee

B. *Officials authorized to grant Limited Access Authorizations:*

1. Secretaries of the Military Departments and/or designee
2. Director, Washington Headquarters Service for OSD and/or designee
3. Chairman, JCS and/or designee
4. Directors of the Defense Agencies and/or designee
5. Commanders, Unified and Specified Commands and/or designee

C. *Officials authorized to grant access to SCI:*

Director, NSA—for NSA

Director, DIA—for OSD, OJCS, and Defense Agencies

Senior Officers of the Intelligence Community of the Army, Navy, and Air Force—for their respective Military Departments, or their single designee.

D. Officials authorized to certify personnel under their jurisdiction for access to Restricted Data (to include Critical Nuclear Weapon Design Information): see enclosure to DoD Directive 5210.2.

E. Officials authorized to approve personnel for assignment to Presidential Support activities: The Executive Secretary to the Secretary and Deputy Secretary of Defense or designee.

F. *Officials authorized to grant access to SIOP-ESI:*

1. Director of Strategic Target Planning
2. Director, Joint Staff, OJCS
3. Chief of Staff, U.S. Army
4. Chief of Naval Operations
5. Chief of Staff, U.S. Air Force
6. Commandant of the Marine Corps
7. Commanders of Unified and Specified Commands
8. The authority to grant access delegated above may be further delegated in writing by the above officials to the appropriate subordinates.

G. *Officials authorized to designate sensitive positions:*

1. Heads of DoD Components or their designees for critical-sensitive positions.

2. Organizational commanders for noncritical-sensitive positions.

H. *Nonappropriated Fund Positions of Trust:*

Officials authorized to designate nonappropriated fund positions of trust: Heads of DoD Components and/or their designees.

## APPENDIX F TO PART 154—GUIDELINES FOR CONDUCTING PRENOMINATION PERSONAL INTERVIEWS

A. *Purpose*. The purpose of the personal interview is to assist in determining the acceptability of an individual for nomination and further processing for a position requiring an SBI.

B. *Scope*. Questions asked during the course of a personal interview must have a relevance to a security determination. Care must be taken not to inject improper matters into the personal interview. For example, religious beliefs and affiliations, beliefs and opinions regarding racial matters, political beliefs and affiliations of a nonsubversive nature, opinions regarding the constitutionality of legislative policies, and affiliations with labor unions and fraternal organizations are not proper subjects for inquiry. Department of Defense representatives conducting personal interviews should always be prepared to explain the relevance of their inquiries. Adverse inferences shall not be drawn from the refusal of a person to answer questions the relevance of which has not been established.

C. *The interviewer*. Except as prescribed in paragraph B. above, persons conducting personal interviews normally will have broad

latitude in performing this essential and important function and, therefore, a high premium must necessarily be placed upon the exercise of good judgment and common sense. To insure that personal interviews are conducted in a manner that does not violate lawful civil and private rights or discourage lawful political activity in any of its forms, or intimidate free expression, it is necessary that interviewers have a keen and well-developed awareness of and respect for the rights of interviewees. Interviewers shall never offer an opinion as to the relevance or significance of information provided by the interviewee to eligibility for access to SCI. If explanation in this regard is required, the interviewer will indicate that the sole function of the interview is to obtain information and that the determination of relevance or significance to the individual's eligibility will be made by other designated officials.

D. *Interview procedures*. 1. The Head of the DoD Component concerned shall establish uniform procedures for conducting the interview that are designed to elicit information relevant to making a determination of whether the interviewee, on the basis of the interview and other locally available information (DD 398, Personnel Security Investigation Questionnaire, personnel records, security file, etc.), is considered acceptable for nomination and further processing.

2. Such procedures shall be structured to insure the interviewee his full rights under the Constitution of the United States, the Privacy Act of 1974 and other applicable statutes and regulations.

E. *Protection of interview results*. All information developed during the course of the interview shall be maintained in personnel security channels and made available only to those authorities who have a need-to-know in connection with the processing of an individual's nomination for duties requiring access to SCI or those who need access to information either to conduct the required SBI or to adjudicate the matter of the interviewee's eligibility for access to SCI, or as otherwise authorized by Executive order or statute.

F. *Acceptability determination*. 1. The determination of the interviewee's acceptability for nomination for duties requiring access to sensitive information shall be made by the commander, or designee, of the DoD organization that is considering nominating the interviewee for such duties.

2. Criteria guidelines contained in DCID 1/14 upon which the acceptability for nomination determination is to be based shall be provided to commanders of DoD organizations who may nominate individuals for access to SCI and shall be consistent with those established by the Senior Officer of the Intelligence Community of the Component concerned with respect to acceptability for nomination to duties requiring access to SCI.

## APPENDIX G TO PART 154 [RESERVED]

## APPENDIX H TO PART 154—ADJUDICATIVE GUIDELINES FOR DETERMINING ELIGIBILITY FOR ACCESS TO CLASSIFIED INFORMATION

1. *Introduction*. The following adjudicative guidelines are established for all U.S. Government civilian and military personnel, consultants, contractors, employees of contractors, licensees, certificate holders or grantees and their employees, and other individuals who require access to classified information. They apply to persons being considered for initial or continued eligibility for access to classified information, to include sensitive compartmented information and special access programs, and are to be used by government departments and agencies in all final clearance determinations. Government departments and agencies may also choose to apply these guidelines to analogous situations regarding persons being considered for access to other types of protected information.

Decisions regarding eligibility for access to classified information take into account factors that could cause a conflict of interest and place a person in the position of having to choose between his or her commitments to the United States, including the commitment to protect classified information, and any other compelling loyalty. Accesses decisions also take into account a person's reliability, trustworthiness and ability to protect classified information. No coercive policing could replace the self-discipline and integrity of the person entrusted with the nation's secrets as the most effective means of protecting them. When a person's life history shows evidence of unreliability or untrustworthiness, questions arise whether the person can be relied on and trusted to exercise the responsibility necessary for working in a secure environment where protecting classified information is paramount.

2. *The adjudicative process*.

(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. Eligibility for access to classified information is predicated upon the individual meeting these personnel security guidelines. The adjudication process is the careful weighing of a number of variables known as the whole-person concept. Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination. In evaluating the relevance of an individual's conduct, the adjudicator should consider the following factors:

(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;

(b) Each case must be judged on its own merits, and final determination remains the responsibility of the specific department or agency. Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security.

(c) The ability to develop specific thresholds for action under these guidelines is limited by the nature and complexity of human behavior. The ultimate determination of whether the granting or continuing of eligibility for a security clearance is clearly consistent with the interests of national security must be an overall common sense judgment based upon careful consideration of the following guidelines, each of which is to be evaluated in the context of the whole person.

(1) GUIDELINE A: Allegiance to the United States;

(2) GUIDELINE B: Foreign Influence;

(3) GUIDELINE C: Foreign Preference;

(4) GUIDELINE D: Sexual Behavior;

(5) GUIDELINE E: Personal Conduct;

(6) GUIDELINE F: Financial Considerations;

(7) GUIDELINE G: Alcohol Consumption;

(8) GUIDELINE H: Drug Involvement;

(9) GUIDELINE I: Psychological Conditions;

(10) GUIDELINE J: Criminal Conduct;

(11) GUIDELINE K: Handling Protected Information;

(12) GUIDELINE L: Outside Activities;

(13) GUIDELINE M: Use of Information Technology Systems

(d) Although adverse information concerning a single criterion may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or emotionally unstable behavior. Notwithstanding the whole-person concept, pursuit of further investigation may be terminated by an appropriate adjudicative agency in the face of reliable, significant, disqualifying, adverse information.

(e) When information of security concern becomes known about an individual who is currently eligible for access to classified information, the adjudicator should consider whether the person:

(1) Voluntarily reported the information;

(2) Was truthful and complete in responding to questions;

(3) Sought assistance and followed professional 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.

(f) If after evaluating information of security concern, the adjudicator decides that the information is not serious enough to warrant a recommendation of disapproval or revocation of the security clearance, it may be appropriate to recommend approval with a warning that future incidents of a similar nature may result in revocation of access.

GUIDELINE A: ALLEGIANCE TO THE UNITED STATES

3. *The concern.* 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.

4. *Conditions that could raise a security concern and may be disqualifying include:*

(a) Involvement in, support of, training to commit, or advocacy of any act of sabotage, espionage, treason, terrorism, or sedition against the United States of America;

(b) Association or sympathy with persons who are attempting to commit, or who are committing, any of the above acts;

(c) Association or sympathy with persons or organizations that advocate, threaten, or use force or violence, or use any other illegal or unconstitutional means, in an effort to:

(1) Overthrow or influence the government of the United States or any state or local government;

(2) Prevent Federal, state, or local government personnel from performing their official duties;

(3) Gain retribution for perceived wrongs caused by the Federal, state, or local government;

(4) Prevent others from exercising their rights under the Constitution or laws of the United States or of any state.

5. *Conditions that could mitigate security concerns include:*

(a) The individual was unaware of the unlawful aims of the individual or organization and severed ties upon learning of these;

(b) The individual's involvement was only with the lawful or humanitarian aspects of such an organization;

(c) Involvement in the above activities occurred for only a short period of time and

was attributable to curiosity or academic interest;

(d) The involvement or association with such activities occurred under such unusual circumstances, or so much time has elapsed, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or loyalty.

GUIDELINE B: FOREIGN INFLUENCE

6. *The concern.* Foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign financial interests, may be manipulated or induced to help a foreign person, group, organization, or government in a way that is not in U.S. interests, or is vulnerable to pressure or coercion by any foreign interest. Adjudication under this Guideline can and should consider the identity of the foreign country in which the foreign contact or financial interest is located, including, but not limited to, such considerations as whether the foreign country is known to target United States citizens to obtain protected information and/or is associated with a risk of terrorism.

7. *Conditions that could raise a security concern and may be disqualifying include:*

(a) Contact with a foreign family member, business or professional associate, friend, or other person who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion;

(b) Connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual's obligation to protect sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information;

(c) Counterintelligence information, that may be classified, indicates that the individual's access to protected information may involve unacceptable risk to national security;

(d) Sharing living quarters with a person or persons, regardless of citizenship status, if that relationship creates a heightened risk of foreign inducement, manipulation, pressure, or coercion;

(e) A substantial business, financial, or property interest in a foreign country, or in any foreign-owned or foreign-operated business, which could subject the individual to heightened risk of foreign influence or exploitation;

(f) Failure to report, when required, association with a foreign national;

(g) Unauthorized association with a suspected or known agent, associate, or employee of a foreign intelligence service;

(h) Indications that representatives or nationals from a foreign country are acting to increase the vulnerability of the individual to possible future exploitation, inducement, manipulation, pressure, or coercion;

(i) Conduct, especially while traveling outside the U.S., which may make the individual vulnerable to exploitation, pressure, or coercion by a foreign person, group, government, or country.

8. *Conditions that could mitigate security concerns include:*

(a) The nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the U.S.;

(b) There is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest;

(c) Contact or communication with foreign citizens is so casual and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation;

(d) The foreign contacts and activities are on U.S. Government business or are approved by the cognizant security authority;

(e) The individual has promptly complied with existing agency requirements regarding the reporting of contacts, requests, or threats from persons, groups, or organizations from a foreign country;

(f) The value or routine nature of the foreign business, financial, or property interests is such that they are unlikely to result in a conflict and could not be used effectively to influence, manipulate, or pressure the individual.

GUIDELINE C: FOREIGN PREFERENCE

9. *The concern.* 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.

10. *Conditions that could raise a security concern and may be disqualifying include:*

(a) Exercise of any right, privilege or obligation of foreign citizenship after becoming a U.S. citizen or through the foreign citizenship of a family member. This includes but is not limited to:

(1) Possession of a current foreign passport;

(2) Military service or a willingness to bear arms for a foreign country;

(3) Accepting educational, medical, retirement, social welfare, or other such benefits from a foreign country;

(4) Residence in a foreign country to meet citizenship requirements;

(5) Using foreign citizenship to protect financial or business interests in another country;

(6) Seeking or holding political office in a foreign country;

(7) Voting in a foreign election;

(b) Action to acquire or obtain recognition of a foreign citizenship by an American citizen;

(c) Performing or attempting to perform duties, or otherwise acting, so as to serve the interests of a foreign person, group, organization, or government in conflict with the national security interest;

(d) Any statement or action that shows allegiance to a country other than the United States: for example, declaration of intent to renounce United States citizenship; renunciation of United States citizenship.

11. *Conditions that could mitigate security concerns include:*

(a) Dual citizenship is based solely on parents' citizenship or birth in a foreign country;

(b) The individual has expressed a willingness to renounce dual citizenship;

(c) Exercise of the rights, privileges, or obligations of foreign citizenship occurred before the individual became a U.S. citizen or when the individual was a minor;

(d) Use of a foreign passport is approved by the cognizant security authority.

(e) The passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated;

(f) The vote in a foreign election was encouraged by the United States Government.

GUIDELINE D: SEXUAL BEHAVIOR

12. *The concern*. Sexual behavior that involves a criminal offense indicates a personality or emotional disorder, reflects lack of judgment or discretion, or which may subject the individual to undue influence or coercion, exploitation, or duress can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. No adverse inference concerning the standards in this Guideline may be raised solely on the basis of the sexual orientation of the individual.

13. *Conditions that could raise a security concern and may be disqualifying include:*

(a) Sexual behavior of a criminal nature, whether or not the individual has been prosecuted;

(b) A pattern of compulsive, self-destructive, or high risk sexual behavior that the person is unable to stop or that may be symptomatic of a personality disorder;

(c) Sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress;

(d) Sexual behavior of a public nature and/or that reflects lack of discretion or judgment.

14. *Conditions that could mitigate security concerns include:*

(a) The behavior occurred prior to or during adolescence and there is no evidence of subsequent conduct of a similar nature;

(b) The sexual behavior happened so long ago, so infrequently, or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(c) The behavior no longer serves as a basis for coercion, exploitation, or duress.

(d) The sexual behavior is strictly private, consensual, and discreet.

GUIDELINE E: PERSONAL CONDUCT

15. *The concern*. Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:

(a) Refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, and cooperation with medical or psychological evaluation;

(b) Refusal to provide full, frank and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

16. *Conditions that could raise a security concern and may be disqualifying include:*

(a) Deliberate omission, concealment, or falsification of relevant facts from any personnel security 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;

(b) Deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative;

(c) Credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any

other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information;

(d) Credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of:

(1) Untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information:

(2) Disruptive, violent, or other inappropriate behavior in the workplace;

(3) A pattern of dishonesty or rule violations;

(4) Evidence of significant misuse of Government or other employer's time or resources;

(e) Personal conduct or concealment of information about one's conduct that creates a vulnerability to exploitation, manipulation, or duress, such as:

(1) Engaging in activities which, if known, may affect the person's personal, professional, or community standing, or

(2) While in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group;

(f) violation of a written or recorded commitment made by the individual to the employer as a condition of employment;

(g) association with persons involved in criminal activity.

17. *Conditions that could mitigate security concerns include:*

(a) The individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) The refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully.

(c) The offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(d) The individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) The individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

(f) The information was unsubstantiated or from a source of questionable reliability;

(g) Association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

GUIDELINE F: FINANCIAL CONSIDERATIONS

18. *The concern.* Failure or inability to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. Compulsive gambling is a concern as it may lead to financial crimes including espionage. Affluence that cannot be explained by known sources of income is also a security concern. It may indicate proceeds from financially profitable criminal acts.

19. *Conditions that could raise a security concern and may be disqualifying include:*

(a) Inability or unwillingness to satisfy debts;

(b) Indebtedness caused by frivolous or irresponsible spending and the absence of any evidence of willingness or intent to pay the debt or establish a realistic plan to pay the debt.

(c) A history of not meeting financial obligations;

(d) 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;

(e) Consistent spending beyond one's means, which may be indicated by excessive indebtedness, significant negative cash flow, high debt-to-income ratio, and/or other financial analysis;

(f) Financial problems that are linked to drug abuse, alcoholism, gambling problems, or other issues of security concern;

(g) Failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same;

(h) Unexplained affluence, as shown by a lifestyle or standard of living, increase in net worth, or money transfers that cannot be explained by subject's known legal sources of income;

(i) Compulsive or addictive gambling as indicated by an unsuccessful attempt to stop gambling, ''chasing losses'' (i.e. increasing the bets or returning another day in an effort to get even), concealment of gambling losses, borrowing money to fund gambling or pay gambling debts, family conflict or other problems caused by gambling.

20. *Conditions that could mitigate security concerns include:*

(a) The behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(b) The conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances;

(c) The person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control;

(d) The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts;

(e) The individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue;

(f) The affluence resulted from a legal source of income.

GUIDELINE G: ALCOHOL CONSUMPTION

21. *The concern.* Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness.

22. *Conditions that could raise a security concern and may be disqualifying include:*

(a) Alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, disturbing the peace, or other incidents of concern, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent;

(b) Alcohol-related incidents at work, such as reporting for work or duty in an intoxicated or impaired condition, or drinking on the job, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent;

(c) Habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent;

(d) Diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of alcohol abuse or alcohol dependence;

(e) Evaluation of alcohol abuse or alcohol dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program;

(f) Relapse after diagnosis of alcohol abuse or dependence and completion of an alcohol rehabilitation program;

(g) Failure to follow any court order regarding alcohol education, evaluation, treatment, or abstinence.

23. *Conditions that could mitigate security concerns include:*

(a) So much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(b) The individual acknowledges his or her alcoholism or issues of alcohol abuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence (if alcohol dependent) or responsible use (if an alcohol abuser);

(c) The individual is a current employee who is participating in a counseling or treatment program, has no history of previous treatment and relapse, and is making satisfactory progress;

(d) The individual has successfully completed inpatient or outpatient counseling or rehabilitation along with any required aftercare, has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations, such as participation in meetings of Alcoholics Anonymous or a similar organization and has received a favorable prognosis by a duly qualified medical professional or a licensed clinical social worker who is a staff member of a recognized alcohol treatment program.

GUIDELINE H: DRUG INVOLVEMENT

24. *The concern.* Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations.

(a) Drugs are defined as mood and behavior altering substances, and include:

(1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens), and

(2) Inhalants and other similar substances;

(b) Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

25. *Conditions that could raise a security concern and may be disqualifying include:*

(a) Any drug abuse (see above definition);[1]

(b) Testing positive for illegal drug use;

(c) Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;

(d) Diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of drug abuse or drug dependence;

(e) Evaluation of drug abuse or drug dependence by a licensed clinical social worker who is a staff member of a recognized drug treatment program;

(f) Failure to successfully complete a drug treatment program prescribed by a duly qualified medical professional;

(g) Any illegal drug use after being granted a security clearance;

(h) Expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use.

26. *Conditions that could mitigate security concerns include:*

(a) The behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(b) A demonstrated intent not to abuse any drugs in the future, such as:

(1) Disassociation from drug-using associates and contacts;

(2) Changing or avoiding the environment where drugs were used;

(3) An appropriate period of abstinence;

(4) A signed statement of intent with automatic revocation of clearance for any violation;

(c) Abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended;

(d) Satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

GUIDELINE I: PSYCHOLOGICAL CONDITIONS

27. *The concern.* Certain emotional, mental, and personality conditions can impair judgment, reliability, or trustworthiness. A formal diagnosis of a disorder is not required for there to be a concern under this guideline. A duly qualified mental health professional (e.g., clinical psychologist or psychiatrist) employed by, or acceptable to and approved by the U.S. Government, should be consulted when evaluating potentially disqualifying and mitigating information under this guideline. No negative inference concerning the standards in this Guideline may be raised solely on the basis of seeking mental health counseling.

28. *Conditions that could raise a security concern and may be disqualifying include:*

(a) Behavior that casts doubt on an individual's judgment, reliability, or trustworthiness that is not covered under any other guideline, including but not limited to emotionally unstable, irresponsible, dysfunctional, violent, paranoid, or bizarre behavior;

(b) An opinion by a duly qualified mental health professional that the individual has a condition not covered under any other guideline that may impair judgment, reliability, or trustworthiness;[2]

(c) The individual has failed to follow treatment advice related to a diagnosed emotional, mental, or personality condition, e.g., failure to take prescribed medication.

29. *Conditions that could mitigate security concerns include:*

(a) The identified condition is readily controllable with treatment, and the individual has demonstrated ongoing and consistent compliance with the treatment plan;

(b) The individual has voluntarily entered a counseling or treatment program for a condition that is amenable to treatment, and the individual is currently receiving counseling or treatment with a favorable prognosis by a duly qualified mental health professional;

(c) Recent opinion by a duly qualified mental health professional employed by, or acceptable to and approved by the U.S. Government that an individual's previous condition is under control or in remission, and has a low probability of recurrence or exacerbation;

[1] Under the provisions of 10 U.S.C. 986 any person who is an unlawful user of, or is addicted to, a controlled substance as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), may not be granted or have renewed their access to classified information.

[2] Under the provisions of 10 U.S.C. 986, any person who is mentally incompetent, as determined by a credentialed mental health professional approved by the Department of Defense, may not be granted or have renewed their access to classified information.

(d) The past emotional instability was a temporary condition (e.g., one caused by death, illness, or marital breakup), the situation has been resolved, and the individual no longer shows indications of emotional instability;

(e) There is no indication of a current problem.

GUIDELINE J: CRIMINAL CONDUCT

30. *The concern.* Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

31. *Conditions that could raise a security concern and may be disqualifying include:*

(a) A single serious crime or multiple lesser offenses;

(b) Discharge or dismissal from the Armed Forces under dishonorable conditions;[3]

(c) Allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted;

(d) Individual is currently on parole or probation;

(e) Violation of parole or probation, or failure to complete a court-mandated rehabilitation program;

(f) Conviction in a Federal or State court, including a court-martial of a crime, sentenced to imprisonment for a term exceeding one year and incarcerated as a result of that sentence for not less than a year.[4]

32. *Conditions that could mitigate security concerns include:*

(a) So much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(b) The person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;

(c) Evidence that the person did not commit the offense;

(d) There is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement;

(e) Potentially disqualifying conditions 31. (b) and (f) may not be mitigated unless, where meritorious circumstances exist, the Secretaries of the Military Departments or designee; or the Directors of Washington Headquarters Services (WHS), Defense Intelligence Agency (DIA), National Security Agency (NSA), Defense Office of Hearings and Appeals (DOHA) or designee has granted a waiver.

GUIDELINE K: HANDLING PROTECTED INFORMATION

33. *The concern.* Deliberate or negligent failure to comply with rules and regulations for protecting classified or other sensitive information raises doubt about an individual's trustworthiness, judgment, reliability, or willingness and ability to safeguard such information, and is a serious security concern.

34. *Conditions that could raise a security concern and may be disqualifying include:*

(a) Deliberate or negligent disclosure of classified or other protected information to unauthorized persons, including but not limited to personal or business contacts, to the media, or to persons present at seminars, meetings, or conferences;

(b) Collecting or storing classified or other protected information at home or in any other unauthorized location;

(c) Loading, drafting, editing, modifying, storing, transmitting, or otherwise handling classified reports, data, or other information on any unapproved equipment including but not limited to any typewriter, word processor, or computer hardware, software, drive, system, gameboard, handheld, ''palm'' or pocket device or other adjunct equipment;

(d) Inappropriate efforts to obtain or view classified or other protected information outside one's need to know;

(e) Copying classified or other protected information in a manner designed to conceal or remove classification or other document control markings;

(f) Viewing or downloading information from a secure system when the information is beyond the individual's need-to-know;

(g) Any failure to comply with rules for the protection of classified or other sensitive information;

(h) Negligence or lax security habits that persist despite counseling by management.

(i) Failure to comply with rules or regulations that results in damage to the National

[3] Under the provisions of 10 U.S.C. 986, a person who has received a dishonorable discharge or has been dismissed from the Armed Forces may not be granted or have renewed access to classified information. In a meritorious case, the Secretaries of the Military Departments or designee; or the Directors of WHS, DIA, NSA, DOHA or designee may authorize a waiver of this prohibition.

[4] Under the above mentioned statute, a person who has been convicted in a Federal or State court, including courts martial, sentenced to imprisonment for a term exceeding one year and incarcerated for not less than one year, may not be granted or have renewed access to classified information. The same waiver provision also applies.

Security, regardless of whether it was deliberate or negligent.

35. *Conditions that could mitigate security concerns include:*

(a) So much time has elapsed since the behavior, or it has happened so infrequently or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(b) The individual responded favorably to counseling or remedial security training and now demonstrates a positive attitude toward the discharge of security responsibilities;

(c) The security violations were due to improper or inadequate training.

GUIDELINE L: OUTSIDE ACTIVITIES

36. *The concern.* Involvement in certain types of outside employment or activities is of security concern if it poses a conflict of interest with an individual's security responsibilities and could create an increased risk of unauthorized disclosure of classified information.

37. *Conditions that could raise a security concern and may be disqualifying include:*

(a) Any employment or service, whether compensated or volunteer, with:

(1) The government of a foreign country;

(2) Any foreign national, organization, or other entity;

(3) A representative of any foreign interest;

(4) Any foreign, domestic, or international organization or person engaged in analysis, discussion, or publication of material on intelligence, defense, foreign affairs, or protected technology;

(b) Failure to report or fully disclose an outside activity when this is required.

38. *Conditions that could mitigate security concerns include:*

(a) Evaluation of the outside employment or activity by the appropriate security or counterintelligence office indicates that it does not pose a conflict with an individual's security responsibilities or with the national security interests of the United States;

(b) The individual terminated the employment or discontinued the activity upon being notified that it was in conflict with his or her security responsibilities.

GUIDELINE M: USE OF INFORMATION TECHNOLOGY SYSTEMS

39. *The concern.* Noncompliance with rules, procedures, guidelines or regulations pertaining to information technology systems may raise security concerns about an individual's reliability and trustworthiness, calling into question the willingness or ability to properly protect sensitive systems, networks, and information. Information Technology Systems include all related computer hardware, software, firmware, and data used for the communication, transmission, processing, manipulation, storage, or protection of information.

40. *Conditions that could raise a security concern and may be disqualifying include:*

(a) Illegal or unauthorized entry into any information technology system or component thereof;

(b) Illegal or unauthorized modification, destruction, manipulation or denial of access to information, software, firmware, or hardware in an information technology system;

(c) Use of any information technology system to gain unauthorized access to another system or to a compartmented area within the same system;

(d) Downloading, storing, or transmitting classified information on or to any unauthorized software, hardware, or information technology system;

(e) Unauthorized use of a government or other information technology system;

(f) Introduction, removal, or duplication of hardware, firmware, software, or media to or from any information technology system without authorization, when prohibited by rules, procedures, guidelines or regulations;

(g) Negligence or lax security habits in handling information technology that persist despite counseling by management;

(h) Any misuse of information technology, whether deliberate or negligent, that results in damage to the national security.

41. *Conditions that could mitigate security concerns include:*

(a) So much time has elapsed since the behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(b) The misuse was minor and done only in the interest of organizational efficiency and effectiveness, such as letting another person use one's password or computer when no other timely alternative was readily available;

(c) The conduct was unintentional or inadvertent and was followed by a prompt, good-faith effort to correct the situation and by notification of supervisor.

[71 FR 51475, Aug. 30, 2006]

## APPENDIX I TO PART 154—OVERSEAS INVESTIGATIONS

### *1. Purpose*

The purpose of this appendix is to establish, within the framework of this part, 32 CFR part 361 and Defense Investigative Service Manual 20–1, standardized procedures for the military investigative agencies to follow when they perform administrative and investigative functions on behalf of DIS at overseas locations.

*2. Type Investigation*

This part describes in detail Background Investigations (BI) which are conducted for Limited Access Authorizations and those Special Investigative Inquiries conducted for post-adjudicative purposes. Hereafter they are referred to as LAA and Post-adjudicative cases and are briefly described in paragraphs a and b below:

a. *Limited access authorization*. A level of access to classified defense information that may be granted to a non-U.S. citizen under certain conditions, one of which is that a BI must have been completed with satisfactory results. §154.16(d) further describes LAA cases.

b. *Post-adjudication investigation*. A Personnel Security Investigation (PSI) predicated on new, adverse or questionable security, suitability or hostage information that arises and requires the application of investigation procedures subsequent to adjudicative action on a DoD-affiliated person's eligibility for continued access to classified information, assignment to or retention in sensitive duties or other designated duties requiring such investigation. While these cases are normally predicated on the surfacing of unfavorable information subsequent to favorable adjudication, they may also be opened when favorable information is offered to counter a previous unfavorable adjudication. §154.9(c)(3) further describes these cases.

*3. General*

a. As a rule, investigative activity in most PSIs occurs in the U.S. even when the Subject is at an overseas location. Therefore, the submission of requests for investigation to the Personnel Investigation Center (PIC) at Baltimore is a required procedure as it ensures uniform application of DoD PSI policy and the efficient dispatch and coordination of leads.

b. When the purpose of the investigation is for an LAA or post-adjudication on a Subject overseas, much, if not all of the leads are at an overseas location. While these cases also may be submitted directly to PIC for action, there is an inherent delay in the mailing of the request, the exchange of leads and reports with PIC, and transmittal of the reports back to the requester. To avoid this delay, the military investigative agencies, when acting for DIS overseas in accordance with 32 CFR part 361 may, with their Headquarters approval, accept these requests for investigations, initiate them and disseminate the results from the same level as they open, close, and disseminate their own cases. Usually this will greatly improve response time to the requester.

c. Under the procedures in paragraph b., above, DIS will not often be in a position to directly exercise its responsibility for control and direction until the case or lead is in progress or even completed; therefore, adherence to the policy stated in referenced documents, and as modified herein, is mandatory. When the policy of the military investigative agency is at variance with the above, the matter will be referred to the respective headquarters for resolution.

d. Since DIS is ultimately responsible for the personnel security product, it must be kept informed of all such matters referred to in this appendix. For instance, when the investigative agency overseas receives a DD Form 1879, Request for Personnel Security Investigation, which sets forth an issue outside DIS jurisdiction, it will reject the request, inform the requester of the reason and furnish an information copy of the DD Form 1879 and rejection letter to PIC. When the issue/jurisdiction is unclear to the investigative agency, the DD Form 1879 and the perceived jurisdictional question should be promptly forwarded to DIS for action and, if appropriate, to the component's headquarters for information. Questions on the interpretation of DIS or DoD policy and Directives pertaining to individual PSI cases can usually be resolved through direct communications with PIC.

e. 32 CFR part 361 establishes the supporting relationship of the military investigative agencies to DIS in overseas areas, and DIS provides these agencies with copies of relevant policy and interpretive guidance. For these reasons, the investigative agency vice the requester, is responsible for evaluating the request, processing it, collecting and evaluating the results within their jurisdiction for sufficiency, and forwarding the completed product to the appropriate activity.

f. The magnitude of operations at PIC requires that methods of handling LAA and post-adjudicative cases be consistent to the maximum extent possible. For this reason, the procedures for LAA cases are nearly identical to those for post-adjudicative cases. Briefly, the main exceptions are:

(1) The notification to PIC that a post-adjudication case has been opened will be by message, since an issue is present at the outset, whereas notification of an LAA case should normally be by mail.

(2) The scope of the LAA investigation is 10 years or since the person's 18th birthday, whichever is shortest, whereas the leads in a post-djudication case are limited to resolving the issue.

*4. Jurisdiction*

a. As set-forth in 32 CFR part 361 DIS is responsible for conducting all DoD PSIs in the 50 States, District of Columbia, and Puerto Rico, and will request the military departments to accomplish investigative requirements elsewhere. The military investigative

agencies in overseas locations routinely respond to personnel security investigative leads for DIS.

b. DIS jurisdiction also includes investigation of subversive affiliations, suitability information, and hostage situations when such inquiries are required for personnel security purposes; however, jurisdiction will rest with the military investigative agencies, FBI and/or civil authorities as appropriate when the alleged subversion or suitability issue represents a violation of law or, in the case of a hostage situation, there is an indication that the person concerned is actually being pressured, coerced, or influenced by interests inimical to the United States, or that hostile intelligence is taking action specifically directed against that person. Specific policy guidance on the applicability of these procedures and the jurisdictional considerations are stated in §154.9.

*5. Case Opening*

a. A request for investigation must be submitted by using DD Form 1879 and accompanied by supporting documentation unless such documentation is not immediately available, or the obtaining of documentation would compromise a sensitive investigation. Upon receipt of the request, the military investigative component will identify the issue(s), scope the leads, and ensure that the proposed action is that which is authorized for DIS as delineated in this part, 32 CFR part 361 and Defense Investigative Service Manual 201–1.

b. Upon such determination, the Component will prepare an Action Lead Sheet (ALS) which fully identifies the Subject and the scope of the case, and specifies precisely the leads which each investigative component (including DIS/PIC when appropriate) is to conduct.

c. Case opening procedures described above are identical for LAA and post-adjudication cases except with respect to notification of case opening to PIC:

(1) Post-adjudication Cases. These cases, because they involve an issue, are potentially sensitive and must be examined as early as possible by PIC for conformity to the latest DoD policy. Accordingly, the initial notification to PIC of case openings will always be by message. The message will contain at a minimum:

(a) Full identification of the subject;

(b) A narrative describing the allegation/facts in sufficient detail to support opening of the case; and

(c) A brief listing of the leads that are planned.

The DD Form 1879 and supporting documents, along with the agency's ALS, should be subsequently mailed to PIC.

(2) LAA Cases. The notification to PIC of case opening will normally be accomplished by mailing the DD Form 1879, DD Form 398 (Personal History Statement), a copy of the ALS, and any other supporting documents to PIC. Message notification to PIC in LAA cases will only be required if there is a security or suitability issue apparent in the DD Form 1879 or supporting documents.

(d) Beyond initial actions necessary to test allegation for investigative merit and jurisdiction, no further investigative action should commence until the notification of case opening to PIC has been dispatched.

(e) PIC will promptly respond to the notification of case opening by mail or message specifying any qualifying remarks along with a summary of previously existing data. PIC will also provide a DIS case control number (CCN). This number must be used by all components on all case related paperwork/reports.

(The investigating agency may assign its unique service CCN for interim internal control; however, the case will be processed, referenced, and entered into the DCII by the DIS case control number.) The first five digits of the DIS CCN will be the Julian date of the case opening when received at DIS.

*6. Case Processing*

a. The expected completion time for leads in LAA cases is 50 calendar days and for post-adjudication cases, 30 days, as computed from the date of receipt of the request. If conditions preclude completion in this time period, a pending report of the results to date, along with an estimated date of completion will be submitted to PIC.

b. Copies of all ALSs will be furnished to PIC. In addition, PIC will be promptly notified of any significant change in the scope of the case, or the development of an investigative issue.

c. The procedures for implementing the Privacy Act in PSI cases are set in DIS Manual 20–1–M 1. Any other restrictions on the release of information imposed by an overseas source or by regulations of the country where the inquiry takes place will be clearly stated in the report.

d. The report format for these cases will be that used by the military investigative agency.

e. Investigative action outside the jurisdictional area of an investigative component office may be directed elsewhere by ALS as needed in accordance with that agency's procedures and within the following geographical considerations:

(1) Leads will be sent to PIC if the investigative action is in the United States, District of Columbia, Puerto Rico, American Samoa, Bahama Islands, the U.S. Virgin Islands, and the following islands in the Pacific: Wake, Midway, Kwajalin, Johnston, Carolines, Marshalls, and Eniwetok.

(2) Leads to areas not listed above may be dispatched to other units of the investigative agency or even to another military agency's

field units if there is an agreement or memorandum of understanding that provides for such action. For case accountability purposes, copies of such ''lateral'' leads must be sent to the PIC.

(3) Leads that cannot be dispatched as described in paragraph (2) above, and those that must be sent to a non-DoD investigative agency should be sent to PIC for disposition.

f. The Defense Investigative Manual calls for obtaining PIC approval before conducting a Subject interview on a post-adjudicative investigation. To avoid the delay that compliance with this procedure would create, a military investigative component may conduct the interview provided:

(1) All other investigative leads have been completed and reviewed.

(2) The CCN has been received, signifying DIS concurrence with the appropriateness of the investigation.

(3) Contrary instructions have not been received from the PIC.

(4) The interview is limited to the resolution of the relevant issues disclosed by the investigation.

g. Notwithstanding the provisions of paragraphs f.(1) through (4) of this Appendix, if time is of the essence due to imminent transfer of the subject, a subject interview may be conducted at the discretion of the investigative agency.

*7. Case Responsibility LAA and PA*

Paragraph 3, above, describes the advantages of timely handling which accrue when the military investigative components act for DIS overseas. These actions for DIS may, however, be limited by the component's staffing and resource limitations, especially since some cases require more administration and management than others. Post-adjudication case leads, for instance, will normally be within the geographical jurisdiction of the component that accepted the request for investigation; therefore, relatively little case management is required. In contrast, LAA cases may require leads worldwide, and, therefore, create more complex case management and administration, especially in the tracking, monitoring and reviewing of leads outside the component's geographical area. Accordingly, an investigative component will accept the case from the requester, but only assign itself the appropriate leads within its own geographical jurisdiction and send the balance to PIC for appropriate disposition in accordance with the following:

a. The investigative agency will accept the request for investigation (thereby saving time otherwise lost in mailing to PIC) but limit its involvement in case management by extracting only those leads it will conduct or manage locally.

b. The agency should then prepare an ALS that shows clearly what leads it will cover and send PIC a copy of this ALS, along with the request for investigation and any other appropriate documentation. It must be clear in the ALS that PIC is to act on all those leads that the unit has not assigned to itself.

c. PIC, as case manager, will assume responsibility for the complete investigative package and, upon receipt of the last lead, will send the results to the appropriate activity.

d. The agency that accepted the case and assigned itself leads may send a copy of its report to the activity in the ''Results to'' block at the same time it sends the originals to PIC. If so, the letter of transmittal must inform the recipient that these reports are only a portion of the investigation, and that the balance will be forthcoming from PIC. Similarly, PIC must be informed of which investigative reports were disseminated. (This is normally done by sending PIC a copy of the letter of transmittal.)

*8. Scope*

a. *LAA*. The scope of investigation is 10 years or from age 18, whichever is the shortest period.

b. Post-Adjudication Cases. There is no standard scope. The inquiries conducted will be limited to those necessary to resolve the issue(s).

*9. Case Closing: LAA and PA*

a. Whether the investigative component or PIC closes out an investigation, there are three key elements to consider:

(1) The investigative results must be reviewed for quality and conformance to policy.

(2) The results must be sent to the activity listed in the ''Results to'' block of the DD Form 1879.

(3) PIC must be informed whether or not any dissemination was made by the investigative agency and, if so, what reports were furnished.

b. Investigative results may also be sent to a requester or higher level activity that makes a statement of need for the results. In such instances, a copy of the letter requesting the results and the corresponding letter of transmittal must be sent to PIC for retention.

c. When an investigative agency disseminates reports for PIC, it may use the transmittal documents, letters, or cover sheets it customarily uses for its own cases.

d. The material that is to be provided to PIC will consist of: The originals of all reports, and all other case documentation such as original statements, confidential source sheets, interview logs, requests for investigation, letters of transmittal to adjudicaters/requesters, or communications with the requester, such as those that modify the scope of the investigation.

e. For DIS to fulfill its responsibilities under DoD 5220.22–R and the Privacy Act of 1974 all inquiries conducted in its behalf must be set forth in an ROI for the permanent file, whether the case is completed, terminated early, or referred to another agency.

*10. Referral*

A case may require premature closing at any time after receipt of the DD Form 1879 by the investigative component if the information accompanying the request, or that which is later developed, is outside DIS jurisdiction. For example, alleged violations of law, a counterintelligence matter, or actual coercion/influence in a hostage situation (see paragraph 4.b. of this Appendix ) must be referred to the appropriate agency, and DIS involvement terminated. The requester will be informed by letter or indorsement to the DD Form 1879 of the information developed that, due to jurisdictional consideration, the case was referred to (fill in appropriate address) and that the DIS case is closed. The agency to which referral was made and PIC will be furnished with the results of all investigations conducted under DIS auspices. DIS, however, has an interest in the referral agency's actions and no information should be solicited from that agency.

## APPENDIX J TO PART 154—ADP POSITION CATEGORIES AND CRITERIA FOR DESIGNATING POSITIONS

OMB Circular A–71 (and Transmittal Memo #B1), July 1978 OMB Circular A–130, December 12, 1985, and FPM Letter 732, November 14, 1978 contain the criteria for designating positions under the existing categories used in the personnel security program for Federal civilian employees as well as the criteria for designating ADP and ADP related positions. This policy is outlined below:

*ADP Position Categories*

*1. Critical-Sensitive Positions*

ADP-I positions. Those positions in which the incumbent is responsible for the planning, direction, and implementation of a computer security program; major responsibility for the direction, planning and design of a computer system, including the hardware and software; or, can access a system during the operation or maintenance in such a way, and with a relatively high risk for causing grave damage, or realize a significant personal gain.

*2. Noncritical-Sensitive Positions*

ADP-II positions. Those positions in which the incumbent is responsible for the direction, planning, design, operation, or maintenance of a computer system, and whose work is technically reviewed by a higher authority of the ADP-I category to insure the integrity of the system.

*3. Nonsensitive Positions*

ADP-III positions. All other positions involved in computer activities.

In establishing the categories of positions, other factors may enter into the determination, permitting placement in higher or lower categories based on the agency's judgement as to the unique characteristics of the system or the safeguards protecting the system.

*Criteria for Designating Positions*

Three categories have been established for designating computer and computer-related positions—ADP-I, ADP-II, and ADP-III. Specific criteria for assigning positions to one of these categories is as follows:

| Category | Criteria |
|---|---|
| ADP-I ..... | Responsibility or the development and administration of agency computer security programs, and also including direction and control of risk analysis and/or threat assessment. |
| | Significant involvement in life-critical or mission-critical systems. |
| | Significant involvement in life-critical or mission-critical systems. |
| | Responsibility for the preparation or approval of data for input into a system which does not necessarily involve personal access to the system, but with relatively high risk for effecting grave damage or realizing significant personal gain. |
| | Relatively high risk assignments associated with or directly involving the accounting, disbursement, or authorization for disbursement from systems of (1) dollar amounts of $10 million per year or greater, or (2) lesser amounts if the activities of the individual are not subject to technical review by higher authority in the ADP-I category to ensure the integrity of the system. |
| | Positions involving *major* responsibility for the direction planning, design, testing, maintenance, operation, monitoring, and/or management of systems hardware and software. |
| | Other positions as designated by the agency head that involve relatively high risk for effecting grave damage or realizing significant personal gain. |
| ADP-II ..... | Responsibility for systems design, operation, testing, maintenance, and/or monitoring that is carried out under technical review of higher authority in the ADP-I category, includes, but is not limited to: |
| | (1) access to and/or processing of proprietary data, information requiring protection under the Privacy Act of 1974, and Government-developed privileged information involving the award of contracts; |

| Category | Criteria |
|---|---|
| | (2) accounting, disbursement, or authorization for disbursement from systems of dollar amounts less than $10 million per year. Other positions are designated by the agency head that involve a degree of access to a system that creates a significant potential for damage or personal gain less than that in ADP-I positions. |
| ADP-III ..... | All other positions involved in Federal computer activities. |

# PART 155—DEFENSE INDUSTRIAL PERSONNEL SECURITY CLEARANCE PROGRAM

Sec.
155.1 Purpose.
155.2 Applicability and scope.
155.3 Definitions.
155.4 Policy.
155.5 Responsibilities.
155.6 Procedures.
APPENDIX A TO PART 155—ADDITIONAL PROCEDURAL GUIDANCE

AUTHORITY: E.O. 10865, 3 CFR 1959–1963 Comp., p. 398, as amended by E.O. 10909, 3 CFR 1959–1963 Comp., p. 437; E.O. 11382, 3 CFR 1966–1970 Comp., p. 690; and E.O. 12829, 3 CFR 1993 Comp., p. 570.

SOURCE: 57 FR 5383, Feb. 14, 1992, unless otherwise noted.

## § 155.1 Purpose.

This part updates policy, responsibilities, and procedures of the Defense Industrial Personnel Security Clearance Review Program implementing E.O. 10865, as amended.

[57 FR 5383, Feb. 14, 1992, as amended at 59 FR 48565, Sept. 22, 1994]

## § 155.2 Applicability and scope.

This part:

(a) Applies to the Office of the Secretary of Defense, the Military Departments, the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Inspector General of the Department of Defense (IG, DoD), and the Defense Agencies (hereafter referred to collectively as ''the DoD Components'').

(b) By mutual agreement, also extends to other Federal Agencies that include:

(1) Department of Agriculture.

(2) Department of Commerce.

(3) Department of Interior.

(4) Department of Justice.

(5) Department of Labor.

(6) Department of State.

(7) Department of Transportation.

(8) Department of Treasury.

(9) Environmental Protection Agency.

(10) Federal Emergency Management Agency.

(11) Federal Reserve System.

(12) General Accounting Office.

(13) General Services Administration.

(14) National Aeronautics and Space Administration.

(15) National Science Foundation.

(16) Small Business Administration.

(17) United States Arms Control and Disarmament Agency.

(18) United States Information Agency.

(19) United States International Trade Commission.

(20) United States Trade Representative.

(c) Applies to cases that the Defense Industrial Security Clearance Office (DISCO) forwards to the ''Defense Office of Hearings and Appeals (DOHA)'' for action under this part to determine whether it is clearly consistent with the national interest to grant or continue a security clearance for the applicant.

(d) Provides a program that may be extended to other security cases at the direction of the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence (ASD($C^3$I)).

(e) Does not apply to cases in which:

(1) A security clearance is withdrawn because the applicant no longer has a need for access to classified information;

(2) An interim security clearance is withdrawn by the DISCO during an investigation; or

(3) A security clearance is withdrawn for administrative reasons that are without prejudice as to a later determination of whether the grant or continuance of the applicant's security clearance would be clearly consistent with the national interest.

(f) Does not apply to cases for access to sensitive compartmented information or a special access program.

[57 FR 5383, Feb. 14, 1992, as amended at 59 FR 35464, July 12, 1994]

**§ 155.3 Definitions.**

(a) *Applicant*. Any U.S. citizen who holds or requires a security clearance or any immigrant alien who holds or requires a limited access authorization for access to classified information needed in connection with his or her employment in the private sector; any U.S. citizen who is a direct-hire employee or selectee for a position with the North Atlantic Treaty Organization (NATO) and who holds or requires NATO certificates of security clearance or security assurances for access to U.S. or foreign classified information; or any U.S. citizen nominated by the Red Cross or United Service Organizations for assignment with the Military Services overseas. The term ''applicant'' does not apply to those U.S. citizens who are seconded to NATO by U.S. Departments and Agencies or to U.S. citizens recruited through such Agencies in response to a request from NATO.

(b) *Clearance Decision*. A decision made in accordance with this part concerning whether it is clearly consistent with the national interest to grant an applicant a security clearance for access to Confidential, Secret, or Top Secret information. A favorable clearance decision establishes eligibility of the applicant to be granted a security clearance for access at the level governed by the documented need for such access, and the type of investigation specified for that level in 32 CFR part 154. An unfavorable clearance decision denies any application for a security clearance and revokes any existing security clearance, thereby preventing access to classified information at any level and the retention of any existing security clearance.

**§ 155.4 Policy.**

It is DoD policy that:

(a) All proceedings provided for by this part shall be conducted in a fair and impartial manner.

(b) A clearance decision reflects the basis for an ultimate finding as to whether it is clearly consistent with the national interest to grant or continue a security clearance for the applicant.

(c) Except as otherwise provided for by E.O. 10865, as amended, or this part, a final unfavorable clearance decision shall not be made without first providing the applicant with:

(1) Notice of specific reasons for the proposed action.

(2) An opportunity to respond to the reasons.

(3) Notice of the right to a hearing and the opportunity to cross-examine persons providing information adverse to the applicant.

(4) Opportunity to present evidence on his or her own behalf, or to be represented by counsel or personal representative.

(5) Written notice of final clearance decisions.

(6) Notice of appeal procedures.

(d) Actions pursuant to this part shall cease upon termination of the applicant's need for access to classified information except in those cases in which:

(1) A hearing has commenced;

(2) A clearance decision has been issued; or

(3) The applicant's security clearance was suspended and the applicant provided a written request that the case continue.

[57 FR 5383, Feb. 14, 1992, as amended at 59 FR 48565, Sept. 22, 1994]

**§ 155.5 Responsibilities.**

(a) The Assistant Secretary of Defense of Command, Control, Communications and Intelligence shall:

(1) Establish investigative policy and adjudicative standards and oversee their application.

(2) Coordinate with the General Counsel of the Department of Defense (GC, DoD) on policy affecting clearance decisions.

(3) Issue clarifying guidance and instructions as needed.

(b) The General Counsel of the Department of Defense shall:

(1) Establish guidance and provide oversight as to legal sufficiency of procedures and standards established by this part.

(2) Establish the organization and composition of the DOHA.

(3) Designate a civilian attorney to be the Director, DOHA.

(4) Issue clarifying guidance and instructions as needed.

(5) Administer the program established by this part.

(6) Issue invitational travel orders in appropriate cases to persons to appear and testify who have provided oral or written statements adverse to the applicant relating to a controverted issue.

(7) Designate attorneys to be Department Counsels assigned to the DOHA to represent the Government's interest in cases and related matters within the applicability and scope of this part.

(8) Designate attorneys to be Administrative Judges assigned to the DOHA.

(9) Designate attorneys to be Administrative Judge members of the DOHA Appeal Board.

(10) Provide for supervision of attorneys and other personnel assigned or attached to the DOHA.

(11) Develop and implement policy established or coordinated with the GC, DoD, in accordance with this part.

(12) Establish and maintain qualitative and quantitative standards for all work by DOHA employees arising within the applicability and scope of this part.

(13) Ensure that the Administrative Judges and Appeal Board members have the requisite independence to render fair and impartial decisions consistent with DoD policy.

(14) Provide training, clarify policy, or initiate personnel actions, as appropriate, to ensure that all DOHA decisions are made in accordance with policy, procedures, and standards established by this part.

(15) Provide for maintenance and control of all DOHA records.

(16) Take actions as provided for in § 155.6(b), and the additional procedural guidance in appendix A to this part.

(17) Establish and maintain procedures for timely assignment and completion of cases.

(18) Issue guidance and instructions, as needed, to fulfill the foregoing responsibilities.

(19) Designate the Director, DOHA, to implement paragraphs (b)(5) through (b)(18) of this section, under general guidance of the GC, DoD.

(c) The Heads of the DoD Components shall provide (from resources available to the designated DoD Component) financing, personnel, personnel spaces, office facilities, and related administrative support required by the DOHA.

(d) The ASD($C^3I$) shall ensure that cases within the scope and applicability of this part are referred promptly to the DOHA, as required, and that clearance decisions by the DOHA are acted upon without delay.

[57 FR 5383, Feb. 14, 1992, as amended at 59 FR 35464, July 12, 1994]

### § 155.6 Procedures.

(a) Applicants shall be investigated in accordance with the standards in 32 CFR part 154.

(b) An applicant is required to give, and to authorize others to give, full, frank, and truthful answers to relevant and material questions needed by the DOHA to reach a clearance decision and to otherwise comply with the procedures authorized by this part. The applicant may elect on constitutional or other grounds not to comply; but refusal or failure to furnish or authorize the providing of relevant and material information or otherwise cooperate at any stage in the investigation or adjudicative process may prevent the DOHA from making a clearance decision. If an applicant fails or refuses to:

(1) Provide relevant and material information or to authorize others to provide such information; or

(2) Proceed in a timely or orderly fashion in accordance with this part; or

(3) Follow directions of an Administrative Judge or the Appeal Board; then the Director, DOHA, or designee, may revoke any security clearance held by the applicant and discontinue case processing. Requests for resumption of case processing and reinstatement of a security clearance may be approved by the Director, DOHA, only upon a showing of good cause. If the request is denied, in whole or in part, the decision is final and bars reapplication for a security clearance for 1 year from the date of the revocation.

(c) Each clearance decision must be a fair and impartial common sense determination based upon consideration of all the relevant and material information and the pertinent criteria in 32 CFR 154.7 and adjudication policy in appendix H to 32 CFR part 154, including as appropriate:

(1) Nature and seriousness of the conduct and surrounding circumstances.

(2) Frequency and recency of the conduct.

(3) Age of the applicant.

(4) Motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences involved.

(5) Absence or presence of rehabilitation.

(6) Probability that the circumstances or conduct will continue or recur in the future.

(d) Whenever there is a reasonable basis for concluding that an applicant's continued access to classified information poses an imminent threat to the national interest, any security clearance held by the applicant may be suspended by the ASD($C^3I$), with the concurrence of the GC, DoD, pending a final clearance decision. This suspension may be rescinded by the same authorities upon presentation of additional information that conclusively demonstrates that an imminent threat to the national interest no longer exists. Procedures in appendix A to this part shall be expedited whenever an applicant's security clearance has been suspended pursuant to this section.

(e) Nothing contained in this part shall limit or affect the responsibility and powers of the Secretary of Defense or the head of another Department or Agency to deny or revoke a security clearance when the security of the nation so requires. Such authority may not be delegated and may be exercised only when the Secretary of Defense or the head of another Department or Agency determines that the hearing procedures and other provisions of this part cannot be invoked consistent with the national security. Such a determination shall be conclusive.

(f) Additional procedural guidance is in appendix A to this part.

[57 FR 5383, Feb. 14, 1992, as amended at 59 FR 35464, July 12, 1994]

## APPENDIX A TO PART 155—ADDITIONAL PROCEDURAL GUIDANCE

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.

2. Upon referral, the DOHA shall make a prompt determination whether to grant or continue a security clearance, issue a statement of reasons (SOR) as to why it is not clearly consistent with the national interest to do so, or take interim actions, including but not limited to:

a. Direct further investigation.

b. Propound written interrogatories to the applicant or other persons with relevant information.

c. Requiring the applicant to undergo a medical evaluation by a DoD Psychiatric Consultant.

d. Interviewing the applicant.

3. An unfavorable clearance decision shall not be made unless the applicant has been provided with a written SOR that shall be as detailed and comprehensive as the national security permits. A letter of instruction with the SOR shall explain that the applicant or Department Counsel may request a hearing. It shall also explain the adverse consequences for failure to respond to the SOR within the prescribed time frame.

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. To be entitled to a hearing, the applicant must specifically request a hearing in his or her answer. The answer must be received by the DOHA within 20 days from receipt of the SOR. Requests for an extension of time to file an answer may be submitted to the Director, DOHA, or designee, who in turn may grant the extension only upon a showing of good cause.

5. If the applicant does not file a timely and responsive answer to the SOR, the Director, DOHA, or designee, may discontinue processing the case, deny issuance of the requested security clearance, and direct the DISCO to revoke any security clearance held by the applicant.

6. Should review of the applicant's answer to the SOR indicate that allegations are unfounded, or evidence is insufficient for further processing, Department Counsel shall take such action as appropriate under the circumstances, including but not limited to withdrawal of the SOR and transmittal to the Director for notification of the DISCO for appropriate action.

7. If the applicant has not requested a hearing with his or her answer to the SOR and Department Counsel has not requested a hearing within 20 days of receipt of the applicant's answer, the case shall be assigned to an Administrative Judge for a clearance decision based on the written record. Department Counsel shall provide the applicant with a copy of all relevant and material information that could be adduced at a hearing. The applicant shall have 30 days from

receipt of the information in which to submit a documentary response setting forth objections, rebuttal, extenuation, mitigation, or explanation, as appropriate.

8. If a hearing is requested by the applicant or Department Counsel, the case shall be assigned to an Administrative Judge for a clearance decision based on the hearing record. Following issuance of a notice of hearing by the Administrative Judge, or designee, the applicant shall appear in person with or without counsel or a personal representative at a time and place designated by the notice of hearing. The applicant shall have a reasonable time to prepare his or her case. The applicant shall be notified at least 15 days in advance of the time and place of the hearing, which generally shall be held at a location in the United States within a metropolitan area near the applicant's place of employment or residence. A continuance may be granted by the Administrative Judge only for good cause. Hearings may be held outside of the United States in NATO cases, or in other cases upon a finding of good cause by the Director, DOHA, or designee.

9. The Administrative Judge may require a prehearing conference.

10. The Administrative Judge may rule on questions of procedure, discovery, and evidence and shall conduct all proceedings in a fair, timely, and orderly manner.

11. Discovery by the applicant is limited to non-privileged documents and materials subject to control by the DOHA. Discovery by Department Counsel after issuance of an SOR may be granted by the Administrative Judge only upon a showing of good cause.

12. A hearing shall be open except when the applicant requests that it be closed, or when the Administrative Judge determines that there is a need to protect classified information or there is other good cause for keeping the proceeding closed. No inference shall be drawn as to the merits of a case on the basis of a request that the hearing be closed.

13. As far in advance as practical, Department Counsel and the applicant shall serve one another with a copy of any pleading, proposed documentary evidence, or other written communication to be submitted to the Administrative Judge.

14. Department Counsel is responsible for presenting witnesses and other evidence to establish facts alleged in the SOR that have been controverted.

15. The applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.

16. Witnesses shall be subject to cross-examination.

17. The SOR may be amended at the hearing by the Administrative Judge on his or her own motion, or upon motion by Department Counsel or the applicant, so as to render it in conformity with the evidence admitted or for other good cause. When such amendments are made, the Administrative Judge may grant either party's request for such additional time as the Administrative Judge may deem appropriate for further preparation or other good cause.

18. The Administrative Judge hearing the case shall notify the applicant and all witnesses testifying that 18 U.S.C. 1001 is applicable.

19. The Federal Rules of Evidence (28 U.S.C. 101 *et seq.*) shall serve as a guide. Relevant and material evidence may be received subject to rebuttal, and technical rules of evidence may be relaxed, except as otherwise provided herein, to permit the development of a full and complete record.

20. Official records or evidence compiled or created in the regular course of business, other than DoD personnel background reports of investigation (ROI), may be received and considered by the Administrative Judge without authenticating witnesses, provided that such information has been furnished by an investigative agency pursuant to its responsibilities in connection with assisting the Secretary of Defense, or the Department or Agency head concerned, to safeguard classified information within industry under to E.O. 10865, as amended. An ROI may be received with an authenticating witness provided it is otherwise admissible under the Federal Rules of Evidence (28 U.S.C. 101 *et seq.*).

21. Records that cannot be inspected by the applicant because they are classified may be received and considered by the Administrative Judge, provided the GC, DoD, has:

a. Made a preliminary determination that such evidence appears to be relevant and material.

b. Determined that failure to receive and consider such evidence would be substantially harmful to the national security.

22. A written or oral statement adverse to the applicant on a controverted issue may be received and considered by the Administrative Judge without affording an opportunity to cross-examine the person making the statement orally, or in writing when justified by the circumstances, only in either of the following circumstances:

a. If the head of the Department or Agency supplying the statement certifies that the person who furnished the information is a confidential informant who has been engaged in obtaining intelligence information for the Government and that disclosure of his or her identity would be substantially harmful to the national interest; or

b. If the GC, DoD, has determined the statement concerned appears to be relevant, material, and reliable; failure to receive and

consider the statement would be substantially harmful to the national security; and the person who furnished the information cannot appear to testify due to the following:

(1) Death, severe illness, or similar cause, in which case the identity of the person and the information to be considered shall be made available to the applicant; or

(2) Some other cause determined by the Secretary of Defense, or when appropriate by the Department or Agency head, to be good and sufficient.

23. Whenever evidence is received under item 21. or 22., the applicant shall be furnished with as comprehensive and detailed a summary of the information as the national security permits. The Administrative Judge and Appeal Board may make a clearance decision either favorable or unfavorable to the applicant based on such evidence after giving appropriate consideration to the fact that the applicant did not have an opportunity to confront such evidence, but any final determination adverse to the applicant shall be made only by the Secretary of Defense, or the Department or Agency head, based on a personal review of the case record.

24. A verbatim transcript shall be made of the hearing. The applicant shall be furnished one copy of the transcript, less the exhibits, without cost.

25. The Administrative Judge shall make a written clearance decision in a timely manner setting forth pertinent findings of fact, policies, and conclusions as to the allegations in the SOR, and whether it is clearly consistent with the national interest to grant or continue a security clearance for the applicant. The applicant and Department Counsel shall each be provided a copy of the clearance decision. In cases in which evidence is received under items 21. and 22., the Administrative Judge's written clearance decision may require deletions in the interest of national security.

26. If the Administrative Judge decides that it is clearly consistent with the national interest for the applicant to be granted or to retain a security clearance, the DISCO shall be so notified by the Director, DOHA, or designee, when the clearance decision becomes final in accordance with item 36., below.

27. If the Administrative Judge decides that it is not clearly consistent with the national interest for the applicant to be granted or to retain a security clearance, the Director, DOHA, or designee, shall expeditiously notify the DISCO, which shall in turn notify the applicant's employer of the denial or revocation of the applicant's security clearance. The letter forwarding the Administrative Judge's clearance decision to the applicant shall advise the applicant that these actions are being taken, and that the applicant may appeal the Administrative Judge's clearance decision.

28. The applicant or Department Counsel may appeal the Administrative Judge's clearance decision by filing a written notice of appeal with the Appeal Board within 15 days after the date of the Administrative Judge's clearance decision. A notice of appeal received after 15 days from the date of the clearance decision shall not be accepted by the Appeal Board, or designated Board Member, except for good cause. A notice of cross appeal may be filed with the Appeal Board within 10 days of receipt of the notice of appeal. An untimely cross appeal shall not be accepted by the Appeal Board, or designated Board Member, except for good cause.

29. Upon receipt of a notice of appeal, the Appeal Board shall be provided the case record. No new evidence shall be received or considered by the Appeal Board.

30. After filing a timely notice of appeal, a written appeal brief must be received by the Appeal Board within 45 days from the date of the Administrative Judge's clearance decision. The appeal brief must state the specific issue or issues being raised, and cite specific portions of the case record supporting any alleged error. A written reply brief, if any, must be filed within 20 days from receipt of the appeal brief. A copy of any brief filed must be served upon the applicant or Department Counsel, as appropriate.

31. Requests for extension of time for submission of briefs may be submitted to the Appeal Board or designated Board Member.

A copy of any request for extension of time must be served on the opposing party at the time of submission. The Appeal Board, or designated Board Member, shall be responsible for controlling the Appeal Board's docket, and may enter an order dismissing an appeal in an appropriate case or vacate such an order upon a showing of good cause.

32. The Appeal Board shall address the material issues raised by the parties to determine whether harmful error occurred. Its scope of review shall be to determine whether or not:

a. The Administrative Judge's findings of fact are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record. In making this review, the Appeal Board shall give deference to the credibility determinations of the Administrative Judge;

b. The Administrative Judge adhered to the procedures required by E.O. 10865, as amended and this part; or

c. The Administrative Judge's rulings or conclusions are arbitrary, capricious, or contrary to law.

33. The Appeal Board shall issue a written clearance decision addressing the material

issues raised on appeal. The Appeal Board shall have authority to:

a. Affirm the decision of the Administrative Judge;

b. Remand the case to an Administrative Judge to correct identified error. If the case is remanded, the Appeal Board shall specify the action to be taken on remand; or

c. Reverse the decision of the Administrative Judge if correction of identified error mandates such action.

34. A copy of the Appeal Board's written clearance decision shall be provided to the parties. In cases in which evidence was received under items 21. and 22., the Appeal Board's clearance decision may require deletions in the interest of national security.

35. Upon remand, the case file shall be assigned to an Administrative Judge for correction of error(s) in accordance with the Appeal Board's clearance decision. The assigned Administrative Judge shall make a new clearance decision in the case after correcting the error(s) identified by the Appeal Board. The Administrative Judge's clearance decision after remand shall be provided to the parties. The clearance decision after remand may be appealed pursuant to items 28. to 35.

36. A clearance decision shall be considered final when:

a. A security clearance is granted or continued pursuant to item 2.;

b. No timely notice of appeal is filed;

c. No timely appeal brief is filed after a notice of appeal has been filed;

d. The appeal has been withdrawn;

e. When the Appeal Board affirms or reverses an Administrative Judge's clearance decision; or

f. When a decision has been made by the Secretary of Defense, or the Department or Agency head, under item 23.

The Director, DOHA, or designee, shall notify the DISCO of all final clearance decisions.

37. An applicant whose security clearance has been finally denied or revoked by the DOHA is barred from reapplication for 1 year from the date of the initial unfavorable clearance decision.

38. A reapplication for a security clearance must be made initially by the applicant's employer to the DISCO and is subject to the same processing requirements as those for a new security clearance application. The applicant shall thereafter be advised he is responsible for providing the Director, DOHA, with a copy of any adverse clearance decision together with evidence that circumstances or conditions previously found against the applicant have been rectified or sufficiently mitigated to warrant reconsideration.

39. If the Director, DOHA, determines that reconsideration is warranted, the case shall be subject to this part for making a clearance decision.

40. If the Director, DOHA, determines that reconsideration is not warranted, the DOHA shall notify the applicant of this decision. Such a decision is final and bars further reapplication for an additional one year period from the date of the decision rejecting the application.

41. Nothing in this part is intended to give an applicant reapplying for a security clearance any greater rights than those applicable to any other applicant under this part.

42. An applicant may file a written petition, under oath or affirmation, for reimbursement of loss of earnings resulting from the suspension, revocation, or denial of his or her security clearance. The petition for reimbursement must include as an attachment the favorable clearance decision and documentation supporting the reimbursement claim. The Director, DOHA, or designee, may in his or her discretion require additional information from the petitioner.

43. Claims for reimbursement must be filed with the Director, DOHA, or designee, within 1 year after the date the security clearance is granted. Department Counsel generally shall file a response within 60 days after receipt of applicant's petition for reimbursement and provide a copy thereof to the applicant.

44. Reimbursement is authorized only if the applicant demonstrates by clear and convincing evidence to the Director, DOHA, that all of the following conditions are met:

a. The suspension, denial, or revocation was the primary cause of the claimed pecuniary loss; and

b. The suspension, denial, or revocation was due to gross negligence of the Department of Defense at the time the action was taken, and not in any way by the applicant's failure or refusal to cooperate.

45. The amount of reimbursement shall not exceed the difference between the earnings of the applicant at the time of the suspension, revocation, or denial and the applicant's interim earnings, and further shall be subject to reasonable efforts on the part of the applicant to mitigate any loss of earnings. No reimbursement shall be allowed for any period of undue delay resulting from the applicant's acts or failure to act. Reimbursement is not authorized for loss of merit raises and general increases, loss of employment opportunities, counsel's fees, or other costs relating to proceedings under this part.

46. Claims approved by the Director, DOHA, shall be forwarded to the Department or Agency concerned for payment. Any payment made in response to a claim for reimbursement shall be in full satisfaction of any further claim against the United States or any Federal Department or Agency, or any of its officers or employees.

47. Clearance decisions issued by Administrative Judges and the Appeal Board shall be indexed and made available in redacted form to the public.

[57 FR 5383, Feb. 14, 1992, as amended at 59 FR 35464, July 12, 1994; 59 FR 48565, Sept. 22, 1994]

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

Sec.
156.1 Purpose.
156.2 Applicability and scope.
156.3 Policy
156.4 Responsibilities.

AUTHORITY: 50 U.S.C. 781.

SOURCE: 58 FR 42855, Aug. 12, 1993, unless otherwise noted.

## § 156.1 Purpose.

This part:

(a) Updates the policy and responsibilities for the DoDPSP under Pub. L. 81–832; E.O. 10450, 18 FR 2489, 3 CFR, 1949–1953 Comp., p. 936; E.O. 10865, 25 FR 1583, 3 CFR, 1959–1963 Comp., p. 398; E.O. 12333, 46 FR 59941, 3 CFR, 1981 Comp., p.200; and E.O. 12356, 47 FR 14874 and 15557, 3 CFR 1982 Comp., p. 166.

(b) Continues to authorize the publication of DoD 5200.2–R[1] in accordance with DoD 5025.1–M.[2]

## § 156.2 Applicability and scope.

This part applies to:

(a) The Office of the Secretary of Defense, the Military Departments (including the Coast Guard when it is operating as a Military Service in the Navy), the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Unified and Specified Commands, and the Defense Agencies, except as provided for the National Security Agency (NSA) in paragraph (b) of this section (hereafter referred to collectively as ''the DoD Components'').

(b) The NSA is exempt from the provisions of this Directive. The personnel security program for the NSA is implemented pursuant to DoD Directive 5210.45,[3] and internal regulations of the NSA.

(c) DoD military and civilian personnel, consultants to the Department of Defense, contractors cleared under the Defense Industrial Security Program (DISP) Regulations DoD 5220.22[4] and others affiliated with the Department of Defense.

## § 156.3 Policy.

It is DoD policy that:

(a) No person shall be appointed as a civilian employee of the Department of Defense, accepted for entrance into the Armed Forces of the United States, authorized access to classified information, or assigned to duties that are subject to investigation under this part unless such appointment, acceptance, clearance, or assignment is clearly consistent with the interests of national security.

(b) A personnel security clearance shall be granted and assignment to sensitive duties shall be authorized only to U.S. citizens. As an exception, a non-U.S. citizen may, by an authorized official (as specified in 32 CFR part 154) be assigned to sensitive duties or granted a Limited Access Authorization for access to classified information if there is a need for access in support of a specific DoD program, project, or contract.

(c) The personnel security standard that shall be applied in determining a person's eligibility for a security clearance or assignment to sensitive duties is whether, based on all available information, the person's allegiance, trustworthiness, reliability, and judgment are such that the person can reasonably to expected to comply with Government policy and procedures for safeguarding classified information and performing sensitive duties.

(d) 32 CFR part 154 shall identify those positions and duties that require a personnel security investigation (PSI). A PSI is required for:

(1) Appointment to a sensitive civilian position.

(2) Entry into military service.

[1] Copies may be obtained at cost, from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161.

[2] See footnote 1 to 156.1(b).

[3] See footnote 1 to 156.1(b).

[4] See footnote 1 to 156.1(b).

(3) The granting of a security clearance or approval for access to classified information.

(4) Assignment to other duties that require a personnel security or trustworthiness determination.

(5) Continuing eligibility for retention of a security clearance and approval for access to classified information or for assignment to other sensitive duties.

(e) 32 CFR part 154 shall contain personnel security criteria and adjudicative guidance to assist in determining whether an individual meets the clearance and sensitive position standards referred to in paragraphs (a) and (c) of this section.

(f) No unfavorable personnel security determination shall be made except in accordance with procedures set forth in 32 CFR part 154 or 32 CFR part 155 or as otherwise authorized by law.

### § 156.4 Responsibilities.

(a) The *Assistant Secretary of Defense for Command, Control, Communications, and Intelligence* shall:

(1) Be responsible for overall policy, guidance, and control of the DoDPSP.

(2) Develop and implement plans, policies, and procedures for the DoDPSP.

(3) Issue and maintain DoD 5200.2–R consistent with DoD 5025.1–M.

(4) Conduct an active oversight program to ensure compliance with DoDPSP requirements.

(5) Ensure that research is conducted to assess and improve the effectiveness of the DoDPSP (DoD Directive 5210.79[5]).

(6) Ensure that the Defense Investigative Service is operated pursuant to 32 CFR part 361.

(7) Ensure that the DoD Security Institute provides the education, training, and awareness support to the DoDPSP under DoD Directive 5200.32.[6]

(8) Be authorized to make exceptions to the requirements of this part on a case-by-case basis when it is determined that doing so furthers the mission of the Department of Defense and is consistent with the protection of classified information from unauthorized disclosure.

(b) The *General Counsel of the Department of Defense* shall:

(1) Be responsible for providing advice and guidance as to the legal sufficiency of procedures and standards implementing the DoDPSP and the DISP.

(2) Exercise oversight of PSP appeals procedures to verify that the rights of individuals are being protected consistent with the constitution, laws of the United States, Executive Orders, Directives, or Regulations that implement the DoDPSP and DISP, and with the interests of national security.

(c) The *Heads of the DoD Components* shall:

(1) Designate a senior official who shall be responsible for implementing the DoDPSP within their components.

(2) Ensure that the DoDPSP is properly administered under this Directive within their components.

(3) Ensure that information and recommendations are provided to the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence on any aspect of the program.

[5] See footnote 1 to 156.1(b).

[6] See footnote 1 to 156.1(b).

## PART 159—PRIVATE SECURITY CONTRACTORS OPERATING IN CONTINGENCY OPERATIONS

Sec.
159.1 Purpose.
159.2 Applicability and scope.
159.3 Definitions.
159.4 Policy.
159.5 Responsibilities.
159.6 Procedures.

AUTHORITY: Public Law 110–181; Pub. L. 110–417.

SOURCE: 74 FR 34691, July 17, 2009, unless otherwise noted.

### § 159.1 Purpose.

This part establishes policy, assigns responsibilities and provides procedures for the regulation of the selection, accountability, training, equipping, and conduct of personnel performing private security functions under a covered contract. It also assigns responsibilities and establishes procedures for incident reporting, use of and accountability for equipment, rules for the use of force, and a process

for administrative action or the removal, as appropriate, of PSCs and PSC personnel.

### § 159.2 Applicability and scope.

This part:

(a) Applies to:

(1) 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 in the Department of Defense (hereafter referred to as the ''DoD Components'').

(2) The Department of State and other U.S. Federal agencies insofar as it implements the requirements of section 862 of Public Law 110–181. Specifically, in areas of operations which require enhanced coordination of PSC and PSC personnel working for U.S. Government (U.S.G.) agencies, the Secretary of Defense may designate such areas as areas of combat operations for the limited purposes of this part. In such an instance, the standards established in accordance with this part would, in coordination with the Secretary of State, expand from covering only DoD PSCs and PSC personnel to cover all U.S.G.-funded PSCs and PSC personnel operating in the designated area.

(b) Prescribes policies applicable to all:

(1) DoD PSCs and PSC personnel performing private security functions during contingency operations outside the United States.

(2) USG-funded PSCs and PSC personnel performing private security functions in an area of combat operations, as designated by the Secretary of Defense.

### § 159.3 Definitions.

Unless otherwise noted, these terms and their definitions are for the purpose of this part.

*Area of combat operations*. An area of operations designated as such by the Secretary of Defense for the purpose of this part, when enhanced coordination of PSCs working for U.S.G. agencies is required.

*Contingency operation*. A military operation that is either designated by the Secretary of Defense as a contingency operation or becomes a contingency operation as a matter of law (10 U.S.C. 101(a)(13)). It is a military operation that: a. Is designated by the Secretary of Defense as an operation in which members of the Armed Forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing force; or b. Is created by definition of law. Under 10 U.S.C. 101(a)(13)(B), a contingency operation exists if a military operation results in the (1) call-up to (or retention on) active duty of members of the uniformed Services under certain enumerated statutes (10 U.S.C. 688, 12301(a), 12302, 12304, 12305, 12406, or 331–335); and (2) the call-up to (or retention on) active duty of members of the uniformed Services under any other (non-enumerated) provision of law during war or national emergency declared by the President or Congress. These may include humanitarian or peacekeeping operations or other military operations or exercises.

*Contractor*. The contractor, subcontractor, grantee, or other party carrying out the covered contract.

*Covered contract*. A DoD contract for performance of services in an area of contingency operations or a contract of a non-DoD Federal agency for performance of services in an area of combat operations, as designated by the Secretary of Defense;

A subcontract at any tier under such a contract; or

A task order or delivery order issued under such a contract or subcontract.

Also includes contracts or subcontracts funded under grants and subgrants by a Federal agency for performance in an area of combat operations as designated by the Secretary of Defense. Excludes temporary arrangements entered into by non-DoD contractors or grantees for the performance of private security functions by individual indigenous personnel not affiliated with a local or expatriate security company. Such arrangements must still be in compliance with local law.

*Private security functions.* Activities engaged in by a contractor under a covered contract as follows:

(1) Guarding of personnel, facilities, designated sites, or property of a Federal agency, the contractor or subcontractor, or a third party.[1]

(2) Any other activity for which personnel are required to carry weapons in the performance of their duties. For the DoD, DoDI Instruction 3020.41, ''Contractor Personnel Authorized to Accompany the U.S. Armed Forces,''[2] prescribes policies related to personnel allowed to carry weapons for self defense.

*PSC.* During contingency operations ''PSC'' means a company employed by the DoD performing private security functions under a covered contract. In a designated area of combat operations, the term ''PSC'' expands to include all companies employed by U.S.G. agencies performing private security functions under a covered contract.

*PSC personnel.* Any individual performing private security functions under a covered contract.

**§ 159.4 Policy.**

(a) Consistent with the requirements of paragraph (a)(2) of section 862 of Public Law 110–181, the selection, training, equipping, and conduct of PSC personnel including the establishment of appropriate processes shall be coordinated between the DoD and the Department of State.

(b) Geographic Combatant Commanders will provide tailored PSC guidance and procedures for the operational environment in their Area of Responsibility (AOR) in accordance with this part, the Federal Acquisition Regulation (FAR)[3] and the Defense Federal Acquisition Regulation Supplement (DFARS).[4]

(c) In a designated area of combat operations, the relevant Chief of Mission will be responsible for developing and issuing implementing instructions for non-DoD PSCs and their personnel consistent with the standards set forth by the geographic Combatant Commander in accordance with paragraph (b) of this section. The Chief of Mission has the option to instruct non DoD PSCs and their personnel to follow the guidance and procedures developed by the Geographic Combatant Commander and/or Subordinate Commander.

(d) The requirements of this part shall not apply to contracts entered into by elements of the intelligence community in support of intelligence activities.

**§ 159.5 Responsibilities.**

(a) The Assistant Deputy Under Secretary of Defense for Program Support, under the authority, direction, and control of the Deputy Under Secretary of Defense for Logistics and Materiel Readiness, shall monitor the registering, processing, and accounting of PSC personnel in an area of contingency operations.

(b) The Director, Defense Procurement and Acquisition Policy, under the authority, direction, and control of the Deputy Under Secretary of Defense for Acquisition and Technology (DUSD(AT)), shall ensure that the DFARS and (in consultation with the other members of the FAR Council) the FAR provide appropriate guidance and contract clauses consistent with this part and paragraph (b) of section 862 of Public Law 110–181.

(c) The Director, Defense Business Transformation Agency, under the authority, direction, and control of the Deputy Chief Management Officer of the Department of Defense, through the DUSD(AT), shall ensure that information systems effectively support the accountability and visibility of contracts, contractors, and specified equipment associated with private security functions.

[1] Contractors performing private security functions are not authorized to perform inherently governmental functions. In this regard, they are limited to a defensive response to hostile acts or demonstrated hostile intent.

[2] Available at *http://www.dtic.mil/whs/directives/corres/pdf/302041p.pdf*.

[3] Published in Title 48 of the Code of Federal Regulations.

[4] Published in Title 48 of the Code of Federal Regulations.

(d) The Chairman of the Joint Chiefs of Staff shall ensure that joint doctrine is consistent with the principles established by DoD Directive 3020.49 ''Orchestrating, Synchronizing, and Integrating Program Management of Contingency Acquisition Planning and Its Operational Execution,''[5] DoD Instruction 3020.41, ''Contractor Personnel Authorized to Accompany the U.S. Armed Forces,'' and this part.

(e) The geographic Combatant Commanders in whose AOR a contingency operation is occurring, and within which PSCs and PSC personnel perform under covered contracts, shall:

(1) Provide guidance and procedures, as necessary and consistent with the principles established by DoD Directive 3020.49, ''Orchestrating, Synchronizing, and Integrating Program Management of Contingency Acquisition Planning and Its Operational Execution,'' DoD Instruction 3020.41, ''Contractor Personnel Authorized to Accompany the U.S. Armed Forces,''[6] and this part, for the selection, training, accountability and equipping of such PSC personnel and the conduct of PSCs and PSC personnel within their AOR. Individual training and qualification standards shall meet, at a minimum, one of the Military Departments' established standards.

Within a geographic Combatant Command, Subordinate Commanders shall be responsible for developing and issuing implementing procedures as warranted by the situation, operation, and environment, in consultation with the relevant Chief of Mission in designated areas of combat operations.

(2) Through the Contracting Officer, ensure that PSC personnel acknowledge, through their PSC, their understanding and obligation to comply with the terms and conditions of their covered contracts.

(3) Issue written authorization to the PSC identifying individual PSC personnel who are authorized to be armed. Rules for the use of force, developed in accordance with Chairman of the Joint Chief of Staff Instruction 3121.01B, ''Standing Rules of Engagement/Standing Rules for the Use of Force for U.S. Forces,''[7] shall be included with the written authorization.

(4) Ensure that the procedures, orders, directives and instructions prescribed § 159.6(a) of this part are available through a single location (to include an Internet Web site, consistent with security considerations and requirements).

(f) The Heads of the DoD Components shall:

(1) Ensure that all private security-related requirement documents are in compliance with the procedures listed in § 159.6 of this part and the guidance and procedures issued by the geographic Combatant Command,

(2) Ensure private security-related contracts contain the appropriate clauses in accordance with the applicable FAR clause and include additional mission-specific requirements as appropriate.

### § 159.6 Procedures.

(a) *Standing Combatant Command Guidance and Procedures.* Each geographic Combatant Commander shall develop and publish guidance and procedures for PSCs and PSC personnel operating during a contingency operation within their AOR, consistent with applicable law; this part; applicable Military Department publications; and other applicable DoD issuances to include DoD Directive 3020.49, ''Orchestrating, Synchronizing, and Integrating Program Management of Contingency Acquisition Planning and Its Operational Execution,'' DFARS, DoD Directive 2311.01E, ''DoD Law of War Program,''[8] DoD 5200.8–R, ''Physical Security Program,''[9] CJCSI 3121.01B,

[5] Available from *http://www.dtic.mil/whs/directives/corres/pdf/302040p.pdf*.

[6] Available from *http://www.dtic.mil/whs/directives/corres/html/302041.htm*.

[7] CJCSI 3121.01B provides guidance on the standing rules of engagement (SROE) and establishes standing rules for the use of force (SRUF) for DOD operations worldwide. This document is classified secret. CJCSI 3121.01B is available via Secure Internet Protocol Router Network at *http://js.smil.mil* If the requester is not an authorized user of the classified network, the requester should contact Joint Staff J–3 at 703–614–0425.

[8] Available at *http://www.dtic.mil/whs/directives/corres/html/231101.htm*.

[9] Available at *http://www.dtic.mil/whs/directives/corres/pdf/520008r.pdf*.

''Standing Rules of Engagement/Standing Rules for the Use of Force for U.S. Forces,'' and DoD Directive 5210.56, ''Use of Deadly Force and the Carrying of Firearms by DoD Personnel Engaged in Law Enforcement and Security Duties.''[10] The guidance and procedures shall:

(1) Contain, at a minimum, procedures to implement the following processes, and identify the organization responsible for managing these processes:

(i) Registering, processing, accounting for and keeping appropriate records of PSCs and PSC personnel in accordance with DoD Instruction 3020.41, ''Contractor Personnel Authorized to Accompany the U.S. Armed Forces.''

(ii) PSC verification that PSC personnel meet all the legal, training, and qualification requirements for authorization to carry a weapon in accordance with the terms and conditions of their contract and host country law. Weapons accountability procedures will be established and approved prior to the weapons authorization.

(iii) Arming of PSC personnel. Requests for permission to arm PSC personnel shall be reviewed on a case-by-case basis by the appropriate Staff Judge Advocate to the geographic Combatant Commander (or a designee) to ensure there is a legal basis for approval. The request will then be approved or denied by the geographic Combatant Commander or a specifically identified designee, no lower than the flag officer level. Requests to arm non-DOD PSC personnel shall be reviewed and approved in accordance with §159.4(c) of this part. Requests for permission to arm PSC personnel shall include:

(A) A description of where PSC personnel will operate, the anticipated threat, and what property or personnel such personnel are intended to protect, if any.

(B) A description of how the movement of PSC personnel will be coordinated through areas of increased risk or planned or ongoing military operations, including how PSC personnel will be rapidly identified by members of the U.S. Armed Forces.

(C) A communication plan, to include a description of how relevant threat information will be shared between PSC personnel and U.S. military forces and how appropriate assistance will be provided to PSC personnel who become engaged in hostile situations. DoD contractors performing private security functions are only to be used in accordance with DoD Instruction 1100.22, ''Guidance for Determining Workforce Mix,''[11] that is, they are limited to a defensive response to hostile acts or demonstrated hostile intent.

(D) Documentation of individual training covering weapons familiarization and qualification, rules for the use of force, limits on the use of force including whether defense of others is consistent with host nation Status of Forces Agreements or local law, the distinction between the rules of engagement applicable to military forces and the prescribed rules for the use of force that control the use of weapons by civilians, and the Law of Armed Conflict.

(E) Written acknowledgment by the PSC and its individual PSC personnel, after investigation of background of PSC personnel by the contractor, verifying such personnel are not prohibited under U.S. law to possess firearms.

(F) Written acknowledgment by the PSC and individual PSC personnel that:

*(1)* Potential civil and criminal liability exists under U.S. and local law or host nation Status of Forces Agreements for the use of weapons.[12]

*(2)* Proof of authorization to be armed must be carried by each PSC personnel.

*(3)* PSC personnel may possess only U.S.G.-issued and/or -approved weapons and ammunition for which they have been qualified according to paragraph (a)(1)(iii)(E) of this section.

[10] Available at *http://www.dtic.mil/whs/directives/corres/html/521056.htm*.

[11] Available at *http://www.dtic.mil/whs/directives/corres/pdf/110022p.pdf*.

[12] This requirement is specific to arming procedures. Such written acknowledgement should not be construed to limit civil and criminal liability to conduct arising from ''the use of weapons.'' PSC personnel could be held criminally liable for any conduct that would constitute a federal offense (see MEJA, 18 USC 3261(a)).

*(4)* PSC personnel were briefed and understand limitations on the use of force.

*(5)* Authorization to possess weapons and ammunition may be revoked for non-compliance with established rules for the use of force.

(*6*) PSC personnel are prohibited from consuming alcoholic beverages or being under the influence of alcohol while armed.

(iv) Registration and identification in the Synchronized Predeployment and Operational Tracker (or its successor database) of armored vehicles, helicopters, and other vehicles operated by PSC personnel.

(v) Reporting alleged criminal activity or other incidents involving PSCs or PSC personnel by another company or any other person. All incidents involving the following shall be reported and documented:

(A) A weapon is discharged by an individual performing private security functions;

(B) An individual performing private security functions is killed or injured in the performance of their duties;

(C) A person other than an individual performing private security functions is killed or injured as a result of conduct by PSC personnel;

(D) Property is destroyed as a result of conduct by a PSC or PSC personnel;

(E) An individual performing private security functions has come under attack including in cases where a weapon is discharged against an individual performing private security functions or personnel performing such functions believe a weapon was so discharged; or

(F) Active, non-lethal counter-measures (other than the discharge of a weapon) are employed by PSC personnel in response to a perceived immediate threat in an incident that could significantly affect U.S. objectives with regard to the military mission or international relations.

(vi) The independent review and, if practicable, investigation of incidents reported pursuant to paragraphs (a)(1)(v)(A) through (a)(1)(v)(F) of this section and incidents of alleged misconduct by PSC personnel.

(vii) Identification of ultimate criminal jurisdiction and investigative responsibilities, where conduct of U.S.G.-funded PSCs or PSC personnel are in question, in accordance with applicable laws to include a recognition of investigative jurisdiction and coordination for joint investigations (i.e., other U.S.G. agencies, host nation, or third country agencies), where the conduct of PSCs and PSC personnel is in question.

(viii) A mechanism by which a commander of a combatant command may request an action by which PSC personnel who are non-compliant with contract requirements are removed from the designated operational area.

(ix) Interagency coordination of administrative penalties or removal, as appropriate, of non-DoD PSC personnel who fail to comply with the terms and conditions of their contract, as is applicable to this part.

(x) Implementation of the training requirements contained below in paragraph (a)(2)(ii) of this section.

(2) Specifically cover:

(i) Matters relating to authorized equipment, force protection, security, health, safety, and relations and interaction with locals in accordance with DoD Instruction 3020.41, ''Contractor Personnel Authorized to Accompany the U.S. Armed Forces.''

(ii) Predeployment training requirements addressing, at a minimum, the identification of resources and assistance available to PSC personnel as well as country information and cultural training, and guidance on working with host country nationals and military personnel.

(iii) Rules for the use of force and graduated force procedures.

(iv) Requirements and procedures for direction, control and the maintenance of communications with regard to the movement and coordination of PSCs and PSC personnel, including specifying interoperability requirements. These include coordinating with the Chief of Mission, as necessary, private security operations outside secure bases and U.S. diplomatic properties to include movement control procedures for all contractors, including PSC personnel.

(b) *Availability of Guidance and Procedures.* The geographic Combatant Commander shall ensure the guidance and procedures prescribed in paragraph (a)

of this section are readily available and accessible by PSCs and their personnel (e.g., on a Web page and/or through contract terms), consistent with security considerations and requirements.

(c) *Subordinate Guidance and Procedures*. The Subordinate Commander, in consultation with the Chief of Mission, will issue guidance and procedures implementing the standing combatant command publications specified in paragraph (a) of this section, consistent with the situation and operating environment.

(d) *Consultation and Coordination*. The Chief of Mission and the geographic Combatant Commander/Subordinate Commander shall make every effort to consult and coordinate responses to common threats and common concerns related to oversight of the conduct of U.S.G.-funded PSC and their personnel. The Memorandum of Agreement between the Department of Defense and Department of State on U.S.G. Private Security Contractors[13] shall provide the framework for the development of guidance and procedures without regard to the specific locations identified therein.

[13] Available at *http://www.acq.osd.mil/log/PS/p_vault.html*.

# SUBCHAPTER G—DEFENSE CONTRACTING

## PART 162—PRODUCTIVITY ENHANCING CAPITAL INVESTMENT (PECI)

Sec.
162.1 Purpose.
162.2 Applicability and scope.
162.3 Definitions.
162.4 Policy.
162.5 Responsibilities.
162.6 Procedures.
162.7 Information requirements.
APPENDIX A TO PART 162—REPORTING PROCEDURES

AUTHORITY: 10 U.S.C. 136: E.O. 12367, 3 CFR, 1988 Comp., p. 566.

SOURCE: 56 FR 50271, Oct. 4, 1991, unless otherwise noted.

### § 162.1 Purpose.

This part:

(a) Updates policy, responsibilities, procedures, and guidance for the PECI process under DoD Directive 5010.31.[1]

(b) Authorizes the publication of DoD 5010.36 36–H–[2] ''Productivity Enhancing Capital Investment (PECI) Handbook,'' consistent with DoD 5025.1–M.[3]

### § 162.2 Applicability and scope.

This part.

(a) Applies to the Office of the Secretary of Defense (OSD); the Military Departments; Chairman, Joint Chiefs of Staff and the Joint Staff; the Defense Agencies; and the DoD Field Activities (hereafter referred to collectively as the ''DoD Components'').

(b) Encompasses the acquisition of equipment and facilities to improve the following:

(1) Productivity, quality, and processes of DoD Components including major facilities, equipment, or process modernization.

(2) Performance of individual jobs, tasks, procedures, operations, and processes.

(c) Encompasses PIF investments at appropriated and industrially funded activities, if they are not participating in the Defense Business Operations Fund. For industrially funded activities, projects may be submitted for PIF on an exception basis; primarily, this includes facilities, multi-function projects, prototypes, demonstrations, and cross-service initiatives. Investments at Government-owned, contractor-operated (GOCO) facilities are limited to those for which the Department of Defense has responsibility to provide equipment or facilities and from which productivity benefits can be recovered within existing contractual provisions.

### § 162.3 Definition.

(a) *Capital Investment*. The acquisition, installation, transportation, and other costs needed to place equipment or facilities in operation meeting DoD capitalization requirements.

(b) *Economic Life*. The time period over which the benefits to be gained from a project may reasonably be expected to accrue to the Department of Defense.

(c) *Internal Rate of Return (IRR)*. The discount rate that equates the present value of the future cash inflows, e.g. savings and cost avoidances, with the present value costs of an investment.

(d) *Life-Cycle Savings*. The estimated cumulative budgetary savings expected over the life of the project.

(e) *Net Present Value of Investment*. The difference between the present value benefit and the present value cost at a given discount rate.

(f) *Off-the-Shelf*. Equipment that is readily available through Government or commercial sources or that can be fabricated through combination or modification of existing equipment.

(g) *Pay-Back Period*. The number of years required for the cumulative savings to have the same value as the investment cost.

(h) *PECI Benefits*. Benefits resulting from PECIs are classified as savings or as cost avoidance:

(1) *Savings*. Benefits that can be precisely measured, quantified, and placed

[1] Copies may be obtained, at cost, from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161.

[2] Copies will be obtained, at cost, from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161.

[3] See footnote 1 to § 162.1(a).

under management control at time of realization. Savings can be reflected as specific reductions in the approved program or budget, after they have been achieved. Examples include costs for manpower authorizations and or funded work-year reductions, reduced or eliminated operating costs (utilities, travel, and repair), and reduced or eliminated parts and contracts.

(2) *Cost-Avoidance*. Benefits from actions that obviate the requirements for an increase in future levels of manpower or costs that would be necessary, if present management practices were continued. The effect of cost-avoidance savings is the achievement of a higher level of readiness or increased value (quantity, quality or timeliness) of output at level staffing cost or the absorption of a growing work load at the same level of staffing or cost.

(i) *Post-Investment Assessment* (PIA). A PIA is conducted by DoD Components to establish accountability and provide information to improve future investment strategies.

(j) *Productivity*. The efficiency with which resources are used to provide a government service or product at specified levels of quality and timeliness.

(k) *Productivity Enhancement (or Productivity Improvement)*. A decrease in the unit cost of products and services delivered with equal or better levels of quality and timeliness.

(l) *Productivity Enhancing Capital Investment* (PECI). Equipment or facility funding that shall improve Government service, products, quality, or timeliness. PECI projects are funded using PIF, PEIF, and CSI programs. These programs are defined as follows:

(1) *Productivity Investment Fund* (PIF). PIF projects cost over $100,000 and must amortize within 4 years from the date they become operational. In FY 1994 the threshold changes to $150,000.

(2) *Productivity Enhancing Incentive Fund* (PEIF). PEIF projects cost under $100,000 and are expected to amortize within 2 years of the date they become operational. In FY 1994 the limit changes to $150,000.

(3) *Component-Sponsored Investment* (CSI). CSI projects are fast pay-back or high interest investments that may have different DoD Component selection criteria than those specified for PIF or PEIF projects.

(m) *Quality*. The extent to which a product or service meets customer requirements and customer expectations.

## § 162.4 Policy.

It is DoD Policy that:

(a) The PECI program shall be an integral part of DoD Component investment planning and of the Defense Planning, Programming, and Budgeting System (PPBS) DoD Instruction 7045.7.[4] PECI planning shall include the productivity investment fund (PIF), the productivity enhancing incentive fund (PEIF), and component-sponsored investments (CSIs). The PECI program is a major DoD strategy to achieve productivity goals under E.O. 12637.[5]

(b) PECI projects shall be selected to improve quality and productivity, or to reduce unit cost of outputs in defense operations. PECI projects shall be evaluated and approved for funding based on recognized principles of economic analysis. Each PECI project shall be subject to all restrictions established by public law, DoD policy, and other regulatory constraints.

(c) DoD personnel at all levels shall be encouraged to seek out and identify opportunities for quality and productivity improvement. Those efforts shall be supported by using the PECI as a means of financing the improvements. The PECI Program shall provide incentives for participation, supported by the financial management system and policies.

(d) Individuals or groups who successfully identify PECI opportunities that result in significant savings or improvements in quality or productivity or who aggressively promote PECI incentives within their organizations should be recognized through the DoD Incentive Awards Program, DoD Instruction 5120.16,[6] the Secretary of Defense Productivity Excellence Awards Program, performance appraisal, or other appropriate means. All these savings derived through PECI will remain with the originating DoD Component.

[4] See footnote 1 to § 162.1(a).
[5] See footnote 1 to § 162.1(a).
[6] See footnote 1 to § 162.1(a).

As an incentive a portion of these savings, when possible, should remain at the submitting activity.

(e) Funds provided through FY 1993 from the centrally managed OSD PIF may not be reprogrammed for non-PIF purposes without prior approval of the Assistant Secretary of Defense (Force Management and Personnel) (ASD(FM&P)). The Heads of DoD Components shall monitor obligation rates to ensure PIF projects are executed quickly. If project funding cannot be obligated within the specified fiscal year(s) for the type of funding, the Head of the DoD Component must reprogram PIF funds to alternate approved PIF projects. The PIF projects shall be monitored to ensure timely implementation and to validate savings through the amortization period. The PECIs are subject to audit as established by DoD Instruction 7600.2[7] (reference (g)) policy.

### § 162.5 Responsibilities.

(a) The Assistant Secretary of Defense (Force Management and Personnel (ASD (FM&P)) shall:

(1) Develop policies and guidance for the overall DoD PECI program.

(2) Maintain oversight of the PECI program to ensure implementation of this instruction. Through FY 1993 that oversight includes total process control and coordination of PIF actions to identify, select and approve, reprogram, and disapprove projects. Starting FY 1994 and ASD (FM&P) shall retain central oversight of the PECI program which is decentralized to the Components.

(3) Evaluate program results and training requirements and provide additional guidance, as necessary.

(4) Develop, maintain, and publish a DoD 5010.36–H consistent with DoD 5025.1–M[8]

(5) Coordinate PECI efforts with the Heads of the DoD Components on matters that affect their particular areas of responsibility.

(6) Use the Defense Productivity Program Office (DPPO) to:

(i) Provide technical guidance and support for PECI efforts.

(ii) Monitor and evaluate DoD Component PECI efforts.

(iii) Ensure compliance with DoD Directive 7750.5[9]

(b) The Inspector General of the Department of Defense (IG, DoD) shall provide policy and guidance for the audit of the PECI and incorporate the requirement for audit into audit planning and program documents.

(c) The Heads of the DoD Components shall:

(1) Develop and sustain a formal PECI program that:

(i) Emphasizes and encourages the improvement of day-to-day operations through PECI funding.

(ii) Provides motivation and opportunities for personnel, at all levels, to participate in the identification, documentation, and implementation of PECI proposals.

(iii) Includes PIF, PEIF, and CSI efforts, as appropriate.

(iv) Reviews and approves submitted projects, broadens project applicability when reasonable, applies off-the-shelf technology, and integrates capital investment planning into the PPBS.

(2) Designate an official to be the central point of contact (POC) who shall oversee and monitor the PECI program.

(3) Establish procedures ensuring that the policies contained in § 162.4, above, are adhered to.

### § 162.6 Procedures.

The following procedures shall be followed by the DoD Components in the identification, documentation, selection, and financing of PECI projects:

(a) Document each PECI project to ensure that it is:

(1) A desirable action in accordance with the DoD Component's long-range planning and programing objectives, quality objectives, and customer and/or user satisfaction.

(2) Needed to perform and improve valid operations, functions, or services (as established by assigned missions and taskings) that cannot be performed as effectively or economically by other means, such as the use of existing facilities, methods, processes, or procedures.

[7] See footnote 1 to § 162.1(a).

[8] See footnote 1 to § 162.1(a).

[9] See footnote 1 to § 162.1(a).

(3) Justified on the basis of a valid economic analysis done in accordance with DoD Instruction 7041.3.

(4) Validated as to reasonableness, completeness, and correct appropriation.

(5) Classified properly as having savings or cost avoidance benefits

(b) Include resources for PECI in programming documents and budget submissions. The level of funding shall be established under quality and productivity plans and goals established by the Component.

(c) Use guidelines for project documentation, pre-investment analysis, financing, and post-investment accountability of PECI projects, when DoD 5010.36–H is published.

(d) Classify PECI projects for financing and aggregated reporting as follows:

(1) *PIF projects*. PIF projects are competitively selected from candidate proposals and financed through traditional budget appropriation processes from funds set aside for this purpose. PIF projects must cost over $100,000 and must amortize within 4 years from the date that they become operational. Both equipment and facilities investments that conform to public law, or DoD policies governing their qualification, may be included. Projects may include a function at several activities or locations and be Service-wide or Agency-wide. In FY 1994 the threshold will change to $150,000.

(2) *PEIF projects*. PEIF projects are financed from the DoD Component accounts established in annual appropriations and are expected to amortize within 2 years of the date they become operational. Funding for PEIF projects shall be included in the DoD Component annual appropriations as a single amount to cover projects, as they are proposed throughout the budget year. PEIF projects cannot exceed $100,000 or cost limitations established by the OSD (whichever is greater) and are limited to facility modification and acquisition of ''off-the shelf'' equipment requiring little or no modification before use. In FY 1994 the limit changes to $150,000. Justification for those projects shall be based on the potential to improve quality and productivity that is realized through improvements in operating methods, quality, processes, or procedures.

(3) *CSI*. CSI projects are investments financed from the DoD Component accounts that may have longer amortization periods than the PEIF and may have different DoD Component cost or benefit criteria than those specified for PIF projects. The CSI projects shall be identified and included in the DoD Component's annual budget.

### § 162.7 Information requirements.

(a) DoD Components shall submit to the ASD (FM&P), by December 15th of each year, an annual status report on all PECI programs as outlined in appendix A to this part. The DoD Components shall maintain the data at a central point to support reporting requirements.

(b) The Summary Report, ''PECI Program Status,'' is assigned Report Control Symbol FM&P (A) 1561, in accordance with DoD Directive 7750.5.

## APPENDIX TO PART 162—REPORTING PROCEDURES

### *A. General*

The PECI reporting requirements provide the OSD with summary information required to provide program accountability, and satisfy the congressional concerns on program management. Information may be submitted in memorandum, letter, or other acceptable form.

### *B. Information Requirements*

1. *PIF*. Each DoD Component that has a funded PIF project must annually report summary PIF information. The information required for each project follows:

a. *Project Identification*. Provide the 11-digit code for each project that has been approved for desired funding, such as follows:

(1) A92BAxxxxxx

(a) ''A'' is for an Army project.

(b) ''92'' is for a FY92 project.

(c) ''BA'' is an Approved PIF project.

(d) ''xxxxxx'' is a DoD Component identifier.

(2) DoD Component PECI points of contact should establish identifiers to ensure each project is unique.

b. *Total Funds Provided*. For each project provide the cumulative amount of PEIC funds invested in the project

c. *Total Amount Obligated*. For each project provide the cumulative amount of funds obligated against the project.

d. *Actual Savings*. For each project provide the cumulative actual savings generated.

e. *Projected Life-Cycle Savings*. For each PIF project provide the estimated amount of savings the project is projected to earn over the project's economic life.

f. *Projected Life-Cycle Cost Avoidance*. For each PIF project provide the estimated amount of cost avoidance the project is projected to achieve.

2. *PEIF*. Each DoD Component that has funded PEIF projects must annually report summary information that includes:

a. *Total Number of Projects*.

b. *Total Funds Provided*.

c. *Total Amount Obligated*.

d. *Total Projected Life-Cycle Savings*.

e. *Total Projected Life-Cycle Cost Avoidance*.

3. *CSI*. Each DoD Component that has funded CSI projects must annually report summary information that includes:

a. *Total Number of Projects*.

b. *Total Funds Provided*.

c. *Total Amount Obligated*.

d. *Total Projected Life-Cycle Savings*.

e. *Total Projected Life-Cycle Cost Avoidance*.

4. *PIA* Post-Investment assessments, articles, pictures, and brief description of projects and their results are encouraged and may be attached to the annual report or submitted throughout the year.

# PART 165—RECOUPMENT OF NONRECURRING COSTS ON SALES OF U.S. ITEMS

Sec.
165.1 Purpose.
165.2 Applicability and scope.
165.3 Definitions.
165.4 Policy.
165.5 Responsibilities.
165.6 Procedures.
165.7 Waivers (including reductions).

AUTHORITY: 31 U.S.C. 9701.

SOURCE: 58 FR 16497, Mar. 29, 1993, unless otherwise noted.

## § 165.1 Purpose.

This part updates policy to conform with Public Law 90–629, ''Arms Export Control Act,'' October 22, 1968, as amended for calculating and assessing nonrecurring cost recoupment charges on sales of items developed for or by the Department of Defense to non-U.S. Government customers.

## § 165.2 Applicability and scope.

(a) This part applies to the Office of the Secretary of Defense, the Military Departments, the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Unified and Specified Commands, the Defense Agencies, and the DoD Field Activities (hereafter referred to collectively as ''the DoD Components'').

(b) The provisions of this part do not apply to sales of excess property when accountability has been transferred to property disposal activities and the property is sold in open competition to the highest bidder.

(c) The policies and procedures provided for in this part shall apply to all sales on or after January 13, 1993, and supersede application thresholds and charges previously established. Previous versions continue to govern sales made during applicable effective dates. Such previously established nonrecurring cost recoupment thresholds and charges shall be eliminated or revised in accordance with this part.

## § 165.3 Definitions.

(a) *Cost pool*. Represents the total cost to be distributed across the specific number of units. The nonrecurring research, development, test, and evaluation cost pool comprises the costs described in paragraph (f), of this section. The nonrecurring production cost pool comprises costs described in paragraph (e), of this section.

(b) *Foreign military sale*. A sale by the U.S. Government of defense items or defense services to a foreign government or international organization under authority of the ''Arms Export Control Act,'' Public Law No. 90–629 (1968) as amended. Except as waived by the Under Secretary of Defense for Policy, Foreign Military Sales are the only sales subject to nonrecurring cost recoupment charges.

(c) *Major defense equipment*. Any item of significant military equipment on the United States Munitions List having a nonrecurring research, development, test, and evaluation cost of more than 50 million dollars or a total production cost of more than 200 million dollars. The determination of whether an item meets the major defense equipment dollar threshold for research, development, test, and evaluation shall be based on DoD obligations recorded to the date the equipment is offered for sale. Production costs shall include costs incurred by the Department of

Defense. Production costs for the foreign military sales program and known direct commercial sales production are excluded.

(d) *Model.* A basic alpha-numeric designation in a weapon system series; e.g., a ship hull series, an equipment or system series, an airframe series, or a vehicle series. For example, the F5A and the F5F are different models in the same F–5 system series.

(e) *Nonrecurring production costs.* Those one-time costs incurred in support of previous production of the model specified and those costs specifically incurred in support of the total projected production run. Those nonrecurring cost include DoD expenditures for preproduction engineering; rate and special tooling; special test equipment; production engineering; product improvement; destructive testing; and pilot model production, testing, and evaluation. That includes costs of any engineering change proposals initiated before the date of calculations of the nonrecurring costs recoupment charge. Nonrecurring production costs do not include DoD expenditures for machine tools, capital equipment, or facilities for which contractor rental payments are made or waived in accordance with the DoD FAR Supplement.

(f) *Nonrecurring research, development, test, and evaluation costs.* Those costs funded by a research, development, test, and evaluation appropriation to develop or improve the product or technology under consideration either through contract or in-house DoD effort. This includes costs of any engineering change proposal started before the date of calculation of the nonrecurring cost recoupment charges as well as projections of such costs, to the extent additional effort applicable to the sale model or technology is necessary or planned. It does not include costs funded by either procurement or operation and maintenance appropriations.

(g) *Pro rata recovery of nonrecurring costs.* Equal distribution (proration) of a pool of nonrecurring cost to a specific number of units that benefit from the investment so that a DoD Component shall collect from a customer a fair (pro rata) share of the investment in the product being sold. The production quantity base used to determine the pro rata calculation of major defense equipment includes total production.

(h) *Significant change in nonrecurring cost recoupment charge.* A significant change occurs as follows:

(1) A new calculation shows a change of 30 percent of the current system nonrecurring cost charge.

(2) The nonrecurring cost unit charge increases or decreases by 50,000 dollars or more; or

(3) Where the potential for a 5 million dollars change in recoupment exists. The total collections may be estimated based on the projected sales quantities. When potential collections increase or decrease by 5 million dollars, a significant change occurs.

(i) *''Special'' research, development, test, and evaluation and nonrecurring production costs.* Costs incurred under a foreign military sale at the request of, or for the benefit of, a foreign customer to develop a special feature or unique or joint requirement. Those costs must be paid by the customer as they are incurred.

### § 165.4 Policy.

It is DoD policy that:

(a) A nonrecurring cost recoupment charge shall be imposed for sales of major defense equipment only as required by Act of Congress (e.g., Arms Export Control Act).

(b) The Under Secretary of Defense for Policy may grant a waiver to recoupment charges in accordance with § 165.7.

(c) Nonrecurring cost charges shall be based on the amount of the DoD nonrecurring investment in an item.

### § 165.5 Responsibilities.

(a) The Comptroller of the Department of Defense shall provide necessary financial management guidance.

(b) The Under Secretary of Defense (Acquisition) shall take appropriate action to revise the DoD Federal Acquisition Regulation Supplement in accordance with this part.

(c) The Under Secretary of Defense for Policy shall:

(1) Monitor the application of this part.

(2) Review and approve nonrecurring cost recoupment charges and nonrecurring cost recoupment charge waiver requests received from foreign countries and international organizations for foreign military sales.

(3) Ensure publication of a listing of items developed for or by the Department of Defense to which nonrecurring cost recoupment charges are applicable.

(d) The Secretaries of the Military Departments and the Directors of the Defense Agencies shall:

(1) Determine the DoD nonrecurring investment in items developed for or by the Department of Defense and perform required pro rata calculations in accordance with this part and financial management guidance from the Comptroller of the Department of Defense.

(2) Validate and provide recommended charges to the Under Secretary of Defense for Policy. Supporting documentation will be retained until the item has been eliminated from the nonrecurring cost recoupment charge listing.

(3) Review approved nonrecurring cost recoupment charges on a biennial basis to determine if there has been a change in factors or assumptions used to compute a nonrecurring cost recoupment charge and, if there is a significant change in a nonrecurring cost recoupment charge, provide a recommended change to the Under Secretary of Defense for Policy.

(4) Collect charges on foreign military sales in accordance with DoD 7290.3–M,[1] ''Foreign Military Sales Financial Management Manual'' and on other sales, made prior to January 13, 1993, in accordance with DoD 7220.9–M,[2] ''DoD Accounting Manual.''

(5) Deposit collections to accounts as prescribed by the Comptroller, DoD.

(6) Request guidance from the Under Secretary of Defense for Policy, within 90 days, if an issue concerning a recoupment charge cannot be resolved.

[1] Forward written requests to Defense Institute for Security Assistance Management, ATTN: DISAM-DRP, Wright-Patterson Air Force Base, Ohio 45433.

[2] Copies may be obtained, at cost, from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161.

**§ 165.6 Procedures.**

(a) The nonrecurring cost recoupment charge to be reimbursed shall be a pro rata recovery of nonrecurring cost for the applicable major defense equipment. Recovery of nonrecurring cost recoupment charges shall cease upon the recovery of total DoD costs. Such charges shall be based on a cost pool as defined in § 165.3. For a system that includes more than one component, a ''building block'' approach (i.e., the sum of nonrecurring cost recoupment charges for individual components) shall be used to determine the nonrecurring cost recoupment charge for the sale of the entire system.

(b) A nonrecurring cost recoupment charge shall not apply when a waiver has been approved by the Under Secretary of Defense for Policy in accordance with § 165.7 or when sales are financed with U.S. Government funds made available on a nonrepayable basis. Approved revised nonrecurring cost recoupment charges shall not be applied retroactively to accepted foreign military sales agreements.

(c) When major defense equipment are sold at a reduced price due to age or condition, the nonrecurring cost recoupment charge shall be reduced by the same percentage reduction.

(d) The full amount of ''special'' research, development, test, and evaluation and nonrecurring production costs incurred for the benefit of particular customers shall be paid by those customers. However, when a subsequent purchaser requests the same specialized features that resulted from the added ''special'' research, development, test, and evaluation and nonrecurring production costs, a pro rata share of those costs may be paid by the subsequent purchaser and transferred to the original customer if those special nonrecurring costs exceed 50 million dollars. The pro rata share may be a unit charge determined by the DoD Component as a result of distribution of the total costs divided by the total production. Such reimbursements shall not be collected after 10 years have elapsed since acceptance of DD Form 1513, ''U.S. DoD Offer and Acceptance,'' by the original customer, unless otherwise authorized by the Under Secretary of

Defense for Policy. The U.S. Government shall not be charged any nonrecurring costs recoupment charge if it adopts the features for its own use or provides equipment with such features under a U.S. Grant Aid or similar program.

(e) For coproduction, codevelopment and cooperative development, or cooperative production DoD agreements, the policy set forth in this part shall determine the allocation basis for recouping from the third party purchasers the investment costs of the participants. Such DoD agreements shall provide for the application of the policies in this part to sales to third parties by any of the parties to the agreement and for the distribution of recoupments among the parties to the agreement.

### § 165.7 Waivers (including reductions).

(a) The ''Arms Export Control Act,'' Public Law No. 90–629, as amended, requires the recoupment of a proportionate amount of nonrecurring cost of major defense equipment from foreign military sales customers but authorizes consideration of reductions or waivers for particular sales which, if made, significantly advance U.S. Government interests and the furtherance of mutual defense treaties between the United States and certain countries.

(b) Requests for waivers should originate with the foreign government and shall provide information on the extent of standardization to be derived as a result of the waiver.

(c) Blanket waiver requests should not be submitted and shall not be considered. The term ''blanket waiver'' refers to a nonrecurring cost recoupment charge waiver that is not related to a particular sale; for example, waivers for all sales to a country or all sales of a weapon system.

(d) A waiver request shall not be considered for a sale that was accepted without a nonrecurring cost recoupment charge waiver, unless the acceptance was conditional on consideration of the waiver request.

(e) Requests for waivers shall be processed expeditiously, and a decision normally made to either approve or disapprove the request within 60 days after receipt. A waiver in whole or in part of the recoupment charge or a denial of the request shall be provided in writing to the appropriate DoD Component.

## PART 168a—NATIONAL DEFENSE SCIENCE AND ENGINEERING GRADUATE FELLOWSHIPS

Sec.
168a.1 Purpose.
168a.2 Applicability.
168a.3 Definition.
168a.4 Policy and procedures.
168a.5 Responsibilities.

AUTHORITY: 10 U.S.C. 2191.

SOURCE: 55 FR 29844, July 23, 1990, unless otherwise noted.

### § 168a.1 Purpose.

This part:

(a) Establishes guidelines for the award of National Defense Science and Engineering Graduate (NDSEG) Fellowships, as required by 10 U.S.C. 2191.

(b) Authorizes, in accordance with 10 U.S.C. 2191 and consistent with DoD 5025.1, the publication of a regulation which will be codified at 32 CFR part 168b.

### § 168a.2 Applicability.

This part applies to the Office of the Secretary of Defense (OSD), the Military Departments, and the Defense Agencies (hereafter referred to collectively as ''DoD Components'').

### § 168a.3 Definition.

*Sponsoring Agency*. A DoD Component or an activity that is designated to award NDSEG fellowships under § 168a.5(a).

### § 168a.4 Policy and procedures.

(a) Sponsoring Agencies, in awarding NDSEG fellowships, shall award:

(1) Solely to U.S. citizens and nationals who agree to pursue graduate degrees in science, engineering, or other fields of study that are designated, in accordance with § 168a.5(b)(2), to be of priority interest to the Department of Defense.

(2) Through a nationwide competition in which all appropriate actions

have been taken to encourage applications from members of groups (including minorities, women, and disabled persons) that historically have been underrepresented in science and engineering.

(3) Without regard to the geographic region in which the applicant lives or the geographic region in which the applicant intends to pursue an advanced degree.

(b) The criteria for award of NDSEG fellowships shall be:

(1) The applicant's academic ability relative to other persons applying in the applicant's proposed field of study.

(2) The priority of the applicant's proposed field of study to the Department of Defense.

### § 168a.5 Responsibilities.

(a) The Deputy Director, Defense Research and Engineering (Research and Advanced Technology) [DDDR&E(R&AT)], shall:

(1) Administer this part and issue DoD guidance, as needed, for NDSEG fellowships.

(2) Designate those DoD Components that will award NDSEG fellowships, consistent with relevant statutory authority.

(3) Issue a regulation in accordance with 10 U.S.C. 2191 and DoD 5025.1–M.

(b) The Heads of Sponsoring Agencies, or their designees, in coordination with a representative of the Deputy Director, Defense Research and Engineering (Research and Advanced Technology) [DDDR&E(R&AT)], shall:

(1) Oversee the nationwide competition to select NDSEG fellowship recipients.

(2) Determine those science, engineering and other fields of priority interest to the Department of Defense in which NDSEG fellowships are to be awarded.

(3) Prepare a regulation, in accordance with 10 U.S.C. 2191, that prescribes.

(i) Procedures for selecting NDSEG fellows.

(ii) The basis for determining the amounts of NDSEG fellowships.

(iii) The maximum NDSEG fellowship amount that may be awarded to an individual during an academic year.

## PART 169—COMMERCIAL ACTIVITIES PROGRAM

Sec.
169.1 Purpose.
169.2 Applicability and Scope.
169.3 Definitions.
169.4 Policy.
169.5 Responsibilities.

AUTHORITY: 5 U.S.C. 301 and 552 and Pub. L. 93–400.

SOURCE: 54 FR 13373, Apr. 3, 1989, unless otherwise noted.

### § 169.1 Purpose.

This document:

(a) Revises 32 CFR part 169.

(b) Updates DoD policies and assigns responsibilities for commercial activities (CAs) as required by E.O. 12615, Pub. L. 100–180, sec. 1111, and OMB Circular A–76.

### § 169.2 Applicability and scope.

This part:

(a) Applies to the Office of the Secretary of Defense (OSD), the Military Departments, and the Defense Agencies (hereafter referred to collectively as ''DoD Components'').

(b) Encompasses DoD policy for CAs in the United States, its territories and possessions, the District of Columbia, and the Commonwealth of Puerto Rico.

(c) Is not mandatory for CAs staffed solely with DoD civilian personnel paid by nonappropriated funds, such as military exchanges. However, this part is mandatory for CAs when they are staffed partially with DoD civilian personnel paid by or reimbursed from appropriated funds, such as libraries, open messes, and other morale, welfare, and recreation (MWR) activities. When related installation support functions are being cost-compared under a single solicitation, a DoD Component may decide that it is practical to include activities staffed solely with DoD civilian personnel paid by nonappropriated funds.

(d) Does not apply to DoD governmental functions as defined § 169.3.

(e) Does not apply when contrary to law, Executive orders, or any treaty or international agreement.

(f) Does not apply in times of a declared war or military mobilization.

(g) Does not provide authority to enter into contracts.

(h) Does not apply to the conduct of research and development, except for severable in-house CAs that support research and development, such as those listed in enclosure 3 of DoD Instruction 4100.33[1] (32 CFR part 169a).

(i) Does not justify conversion to contract solely to avoid personnel ceilings or salary limitations.

(j) Does not authorize contracts that establish an employer-employee relationship between the Department of Defense and contractor employees, as described in FAR 37.104.

**§ 169.3 Definitions.**

*Commercial Activity Review*. The process of evaluating CAs for the purpose of determining whether or not a cost comparison will be conducted.

*Commercial Source*. A business or other non-Federal activity located in the United States, its territories and possessions, the District of Columbia, or the Commonwealth of Puerto Rico that provides a commercial product or service.

*Conversion to Contract*. The changeover of a CA from performance by DoD personnel to performance under contract by a commercial source.

*Conversion to In-House*. The changeover of a CA from performance under contract to performance by DoD personnel.

*Core Logistics*. Those functions identified as core logistics activities pursuant to section 307 of Pub. L 98–525 and section 1231 of Pub. L. 99–145, codified at section 2464, title 10 that are necessary to maintain a logistics capability (including personnel, equipment, and facilities) to ensure a ready and controlled source of technical competence and resources necessary to ensure effective and timely response to a mobilization, national defense contingency situation, and other emergency requirements.

*Cost Comparison*. The process of developing an estimate of the cost of performance of a CA by DoD employees and comparing it, in accordance with the requirements in DoD Instruction 4100.33 to the cost of performance by contract.

*Direct-Conversion*. Conversion to contract performance of an in-house commercial activity based on a simplified cost comparsion or the conversion of an in-house commerical activity performed exclusively by military personnel.

*Displaced DoD Employee*. Any DoD employee affected by conversion to contract operation (including such actions as job elimination, or grade reduction). It includes both employees in the function converted to contract and employees outside the function who are affected adversely by conversion through reassignment or the exercise of bumping or retreat rights.

*DoD Commercial Activity (CA)*. An activity that provides a product or service obtainable (or obtained) from a commerical source. A DoD CA may be the mission of an organization or a function within the organization. It must be type of work that is separable from other functions or activities so that it is suitable for performance by contract. A representative list of the functions performed by such activities is provided in enclosure 3 of DoD Instruction 4100.33. A DoD CA falls into one of two categories:

(a) Contract CA. A DoD CA managed by a DoD Component, but operated with contractor personnel.

(b) In-House CA. A DoD CA operated by a DoD Component with DoD personnel.

*DoD Employee*. Civilian personnel of the Department of Defense.

*DoD Governmental Function*. A function that is related so intimately to the public interest as to mandate performance by DoD personnel. These functions include those that require either the exercise of discretion in applying Government authority or the use of value judgment in making the decision for the Department of Defense. Services or products in support of Governmental functions, such as those listed in enclosure 3 of DoD Instruction 4100.33, are CAs and are subject to this part and its implementing Instructions. Governmental functions normally fall into two categories:

[1] Copies may be obtained, if needed, from the U.S. Naval Publications and Forms Center, ATTN: Code 1053, 5801 Tabor Avenue, Philadelphia, PA 19120.

(a) *Act of Governing*. The discretionary exercise of Governmental authority. Examples include criminal investigations, prosecutions, and other judicial functions; management of Government programs requiring value judgments, as in direction of the national defense; management and direction of the Armed Services; activities performed exclusively by military personnel who are subject to deployment in a combat, combat support, or combat service support role; conduct of foreign relations; selection of program priorities; direction of Federal employees; regulation of the use of space, oceans, navigable rivers, and other natural resources; management of natural resources on Federal Property; direction of intelligence and counterintelligence operations; and regulation of industry and commerce, including food and drugs.

(b) *Monetary Transactions and Entitlements*. Refers to such actions as tax collection and revenue disbursements; control of treasury accounts and the money supply, and the administration of public trusts.

*DoD Personnel*. Military and civilian personnel of the Department of Defense.

*Expansion*. The modernization, replacement, upgrading, or enlargement of a DoD CA involving a cost increase exceeding either 30 percent of the total capital investment or 30 percent of the annual personnel and material costs. A consolidation of two or more CAs is not an expansion, unless the proposed total capital investment or annual personnel and material costs of the consolidation exceeds the total of the individual CAs by 30 percent or more.

*Installation*. An installation is the grouping of facilities, collocated in the same vicinity, that supports particular functions. Activities collocated and supported by an installation are considered to be tenants.

*Installation Commander*. The commanding officer or head of an installation or a tenant activity, who has budget and supervisory control over resources and personnel.

*New Requirement*. A recently established need for a commercial product or service. A new requirement does not include interim in-house operation of essential services pending reacquisition of the services prompted by such action as the termination of an existing contract operation.

*Preferential Procurement Programs*. Preferential procurement programs include mandatory source programs such as Federal Prison Industries (FPI) and the workshops administered by the Committee for Purchase from the Blind and Other Severely Handicapped under Pub. L. 92–98. Small, minority, and disadvantaged businesses; and labor surplus area set-asides and awards made under Pub. L. 85–536, section 8(a) and Pub. L. 95–507 are included under preferential procurement programs.

*Right of First Refusal of Employment*. Contractors provide Government employees, displaced as a result of the conversion to contract performance, the right of first refusal for employment openings under the contract in positions for which they are qualified, if that employment is consistent with post-Government employment conflict of interest standards.

## § 169.4 Policy.

(a) *Ensure DoD Mission Accomplishment*. When complying with this part and its implementing Instruction, DoD Components shall consider the overall DoD mission and the defense objective of maintaining readiness and sustainability to ensure a capability for mobilizing the defense and support structure.

(b) *Achieve Economy and Quality through Competition*. Encourage competition with the objective of enhancing quality, economy, and performance. When performance by a commercial source is permissible, a comparsion of the cost of contracting and the cost of in-house performance shall be performed to determine who shall provide the best value for the Government, considering price and other factors included in the solicitation. The restriction of a solicitation to a preferential procurement program does not negate the requirement to perform a cost comparison. Performance history will be considered in the source selection process, and high quality performance should be rewarded.

(c) *Retain Governmental Functions In-House*. Certain functions that are inherently governmental in nature, and intimately related to the public interest, mandate performance by DoD personnel only. These functions are not in competition with commercial sources; therefore, these functions shall be performed by DoD personnel.

(d) *Rely on the Commercial Sector*. DoD Components shall rely on commercially available sources to provide commercial products and services except when required for national defense, when no satisfactory commercial source is available, or when in the best interest of direct patient care. DoD Components shall not consider an in-house new requirement, an expansion of an in-house requirement, conversion to in-house, or otherwise carry on any CAs to provide commercial products or services if the products or services can be procured more economically from commercial sources.

(e) *Delegate Decision Authority and Responsibility*. DoD Components shall delegate decision authority and responsibility to lower organization levels, giving more authority to the doers, and linking responsibility with that authority. This shall facilitate the work that installation commanders must perform without limiting their freedom to do their jobs. When possible, the installation commanders should have the freedom to make intelligent use of their resources, while preserving the essential wartime capabilities of U.S. support organizations in accordance with DoD Directive 4001.1.[2]

(f) *Share Resources Saved*. When possible, make available to the installation commander a share of any resources saved or earned so that the commander can improve operations or working and living conditions on the installation.

(g) *Provide Placement Assistance*. Provide a variety of placement assistance to employees whose Federal jobs are eliminated through CA competitions.

[54 FR 13373, Apr. 3, 1989; 54 FR 21726, May 19, 1989]

[2] See footnote 1 to § 169.2(h)

**§ 169.5 Responsibilities.**

(a) The *Assistant Secretary of Defense (Production and Logistics)* (ASD (P&L)), or designee, shall:

(1) Formulate and develop policy consistent with this part for the DoD CA program.

(2) Issue Instructions to implement the policies of this part.

(3) Maintain an inventory of in-house DoD CAs and the Commercial Activities Management Information System (CAMIS).

(4) Establish criteria for determining whether a CA is required to be retained in-house for national defense.

(5) Approve or disapprove core logistics waiver requests.

(b) The *Comptroller of the Department of Defense* (C, DoD) shall provide inflation factors and/or price indices and policy guidance to the DoD Components on procedures and systems for obtaining cost data for use in preparing the in-house cost estimate.

(c) The *Heads of DoD Components* shall:

(1) Comply with this part and DoD Instruction 4100.33.

(2) Designate an official at the Military Service Assistant Secretary level, or equivalent, to implement this part.

(3) Establish an office as a central point of contact for implementing this part.

(4) Encourage and facilitate CA competitions.

(5) Delegate, as much as practicable, broad authority to installation commanders to decide how best to use the CA program to accomplish the mission. Minimally, as prescribed by P.L. 100–180, section 1111 and E.O. 12615, installation commanders shall have the authority and responsibility to carry out the following:

(i) Prepare an inventory each fiscal year of commercial activities carried out by Government personnel on the military installation in accordance with DoD Instruction 4100.33.

(ii) Decide which commercial activities shall be reviewed under the procedures and requirements of E.O. 12615, OMB Circular A–76, and DoD Instruction 4100.33. This authority shall not be applied retroactively. Cost comparisons and direct conversions initiated,

as of December 4, 1987, shall be continued.

(iii) Conduct a cost comparison of those commercial activities selected for conversion to contractor performance under OMB Circular A–76.

(iv) To the maximum extent practicable, assist in finding suitable employment for any DoD employee displaced because of a contract entered into with a contractor for performance of a commercial activity on the military installation.

(6) Develop specific national defense guidance consistent with DoD Instruction 4100.33.

(7) Establish administrative appeal procedures consistent with DoD Instruction 4100.33.

(8) Ensure that contracts resulting from cost comparisons conducted under this part are solicited and awarded in accordance with the FAR and the DFARS.

(9) Ensure that all notification and reporting requirements established in DoD Instruction 4100.33 are satisfied.

(10) Ensure that the Freedom of Information Act Program is complied with in responding to requests for disclosure of contractor-supplied information obtained in the course of procurement.

(11) Ensure that high standards of objectivity and consistency are maintained in compiling and maintaining the CA inventory and conducting the reviews and cost comparisons.

(12) Provide, when requested, assistance to installation commanders to ensure effective CA program implementation and technical competence in management and implementation of the CA program.

(13) Ensure that maximum efforts are exerted to assist displaced DoD employees in finding suitable employment, to include, as appropriate:

(i) Providing priority placement assistance for other Federal jobs.

(ii) Training and relocation when these shall contribute directly to placement.

(iii) Providing outplacement assistance for employment in other sectors of the economy with particular attention to assisting eligible employees to exercise their right of first refusal with the successful contractor.

(14) Maintain the technical competence necessary to ensure effective and efficient management of the CA program.

(15) Ensure, once the cost comparison is initiated, that the milestones are met, and completion of the cost comparison is without unreasonable delay.

# PART 169a—COMMERCIAL ACTIVITIES PROGRAM PROCEDURES

## Subpart A—General

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169a.1 Purpose.
169a.2 Applicability and scope.
169a.3 Definitions.
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## Subpart B—Procedures

169a.8 Inventory and review schedule (Reports Control Symbol DD-P&L(A)).
169a.9 Reviews: Existing in-house commercial activities.
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169a.13 CAs involving forty-five or fewer DoD civilian employees.
169a.14 Military personnel commerical activity.
169a.15 Special considerations.
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## Subpart C—Reporting Requirements

169a.21 Reporting requirements.
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APPENDIX A TO PART 169A—CODES AND DEFINITIONS OF FUNCTIONAL AREAS
APPENDIX B TO PART 169A—COMMERCIAL ACTIVITIES INVENTORY REPORT AND FIVE-YEAR REVIEW SCHEDULE
APPENDIX C TO PART 169A—SIMPLIFIED COST COMPARISONS FOR DIRECT CONVERSION OF CAS
APPENDIX D TO PART 169A—COMMERCIAL ACTIVITIES MANAGEMENT INFORMATION SYSTEM (CAMIS)

AUTHORITY: 5 U.S.C. 301 and 552.

SOURCE: 50 FR 40805, Oct. 7, 1985, unless otherwise noted.

## Subpart A—General

### § 169a.1 Purpose.

This part:

(a) Reissues DoD Instruction 4100.33[1] to update policy, procedures, and responsibilities required by DoD Directive 4100.15[2] and OMB Circular A–76[3] for use by the Department of Defense (DoD) to determine whether needed commercial activities (CAs) should be accomplished by DoD personnel or by contract with a commercial source.

(b) Cancels DoD 4100.33–H,[4] ''DoD In-House vs. Contract Commercial and Industrial Activities Cost Comparison Handbook.''

### § 169a.2 Applicability and scope.

This part:

(a) Applies to the Office of the Secretary of Defense (OSD), the Military Departments, the Defense Agencies and DoD Field Activities (hereafter referred to collectively as the ''DoD Components'').

(b) Contains DoD procedures for CAs in the United States, its territories and possessions, the District of Columbia, and the Commonwealth of Puerto Rico.

(c) Is not mandatory for CAs staffed solely with DoD civilian personnel paid by nonappropriated funds, such as military exchanges. However, this part is mandatory for CAs when they are staffed partially with DoD civilian personnel paid by or reimbursed from appropriated funds, such as libraries, open messes, and other morale, welfare, and recreation (MWR) activities. When related installation support functions are being cost-compared under a single solicitation, a DoD Component may decide that it is practical to include activities staffed solely with DoD civilian personnel paid by nonappropriated funds.

(d) Does not apply to DoD governmental functions are defined in § 169a.3.

(e) Does not apply when contrary to law, Executive orders, or any treaty or international agreement.

(f) Does not apply in times of a declared war or military mobilization.

(g) Does not provide authority to enter into contracts.

(h) Does not apply to the conduct of research and development, except for severable in-house CAs that support research and development, such as those listed in appendix A to this part.

(i) Does not justify conversion to contract solely to avoid personnel ceilings or salary limitations.

(j) Doe not authorize contracts that establish employer-employee relations between the Department of Defense and contractor employees as described in the Federal Acquisition Regulation (FAR), 48 CFR 37.104.

(k) Does not establish and shall not be construed to create any substantive or procedural basis for anyone to challenge any DoD action or inaction on the basis that such action or inaction was not in accordance with this part except as specifically set forth in § 169a.15(d).

[57 FR 29207, July 1, 1992]

### § 169a.3 Definitions.

*Commercial activity review*. The process of evaluating CAs for the purpose of determining whether or not a cost comparison will be conducted.

*Commercial source*. A business or other non-Federal activity located in the United States, its territories and possessions, the District of Columbia, or the Commonwealth of Puerto Rico that provides a commercial product or service.

*Conversion to contract*. The changeover of a CA from performance by DoD personnel to performance under contract by a commercial source.

*Conversion to in-house*. The changeover of a CA from performance under contract by a commercial source to performance by DoD personnel.

*Cost comparison*. The process of developing an estimate of the cost of performance of a CA by DoD employees and comparing it, in accordance with the requirements in this part, to the cost to the Government for contract performance of the CA.

*Directly affected parties*. DoD employees and their representative organizations and bidders or offerers on the solicitation.

[1] Copies may be obtained, at cost, from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161

[2] See footnote 1 to § 169a.1(a).

[3] Copies may be obtained if needed, from the Office of Management and Budget, Executive Office Building, Washington, DC 20503.

[4] See footnote 1 to § 169a.1(a).

*Displaced DoD employee*. Any DoD employee affected by conversion to contract operation (including such actions as job elimination, grade reduction, or reduction in rank). It includes both employees in the function converted to contract and to employees outside the function who are affected adversely by conversion through reassignment or the exercise of bumping or retreat rights.

*DoD Commercial Activity (CA)*. An activity that provides a product or service obtainable (or obtained) from a commercial source. A DoD CA is not a Governmental function. A DoD CA may be an organization or part of another organization. It must be a type of work that is separable from other functions or activities so that it is suitable for performance by contract. A representative list of the functions performed by such activities is provided in Enclosure 1. A DoD CA falls into one of two categories:

(a) *In-house CA*. A DoD CA operated by a DoD Component with DoD personnel.

(b) *Contract CA*. A DoD CA managed by a DoD Component operated with contractor personnel.

*DoD Employee*. Refers to only civilian personnel of the Department of Defense.

*DoD governmental function*. A function that is related so intimately to the public interest as to mandate performance by DoD personnel. These functions require either the exercise of discretion in applying Government authority or the use of value judgement in making the decision for the Department of Defense.

Services or products in support of Governmental functions such as those listed in enclosure 3 of DoD Instruction 4100.33 are normally subject to this part and its implementing instructions. Governmental functions normally fall into two categories:

(a) The act of governing; that is, the discretionary exercise of Governmental authority. Examples include criminal investigations, prosecutions, and other judicial functions; management of Governmental programs requiring value judgments, as in direction of the national defense; management and direction of the Armed Services; activities performed exclusively by military personnel who are subject to deployment in a combat, combat support, or combat service support role; conduct of foreign relations; selection of program priorities; direction of Federal employees; regulation of the use of space, oceans, navigable rivers, and other natural resources; direction of intelligence and counterintelligence operations; and regulation of industry and commerce, including food and drugs.

(b) Monetary transactions and entitlements, such as tax collection and revenue disbursements; control of the money supply treasury accounts; and the administration of public trusts.

*DoD personnel*. Refers to both military and civilian personnel of the Department of Defense.

*Expansion*. The modernization, replacement, upgrading, or enlargement of a DoD CA involving a cost increase exceeding either 30 percent of the total capital investment or 30 percent of the annual personnel and material costs. A consolidation of two or more CAs is not an expansion unless the proposed total capital investment or annual personnel and material costs of the consolidation exceeds the total of the individual CAs by 30 percent or more.

*New requirement*. A recently established need for a commercial product or service. A new requirement does not include interim in-house operation of essential services pending reacquisition of the services prompted by such action as the termination of an existing contract operation.

*Preferential procurement programs*. Mandatory source programs such as Federal Prison Industries (FPI) and the workshops administered by the Committee for Purchase from the Blind and Other Severely Handicapped under the Javits-Wagner-O'Day Act. Also included are small, minority and disadvantaged businesses, and labor surplus area set-asides and awards made under 15 U.S.C. section 637.

[50 FR 40805, Oct. 7, 1985, as amended at 57 FR 29207, July 1, 1992]

### § 169a.4 Policy.

(a) *Ensure DoD mission accomplishment*. The implementation of this part shall consider the overall DoD mission

and the defense objective of maintaining readiness and sustainability to ensure a capability for mobilizing the defense and support structure.

(b) *Retain governmental functions in-house*. Certain functions that are inherently governmental in nature, and intimately related to the public interest, mandate performance by DoD personnel only. These functions are not in competition with commercial sources; therefore, these functions shall be performed by DoD personnel.

(c) *Rely on the commercial sector*. DoD Components shall rely on commercially available sources to provide commercial products and services, except when required for national defense, when no satisfactory commercial source is available, or when in the best interest of direct patient care. DoD Components shall not consider an in-house new requirement, an expansion of an in-house requirement, conversion to in-house, or otherwise carry on any CAs to provide commercial products or services if the products or services can be procured more economically from commercial sources.

(d) *Achieve economy and enhance productivity*. Encourage competition with the objective of enhancing quality, economy, and performance.

When performance by a commercial source is permissible, a comparison of the cost of contracting and the cost of in-house performance shall be performed to determine who shall provide the best value for the Government, considering price and other factors included in the solicitation. If the installation commander has reason to believe that it may not be cost effective to make an award under mandatory source programs, section 8(a) of the Small Business Act or any other noncompetitive preferential procurement program, a cost comparison, or any other cost analysis, although not required by OMB Circular A–76, may be performed. Performance history will be considered in the source selection process, and high quality performance should be rewarded.

(e) *Delegate decision authority and responsibility*. DoD Components shall delegate decision authority and responsibility to lower organization levels, giving more authority to the doers, and linking responsibility with that authority. This shall facilitate the work that installation commanders must perform without limiting their freedom to do their jobs. When possible, the installation commanders should have the freedom to make intelligent use of their resources, while preserving the essential wartime capabilities of U.S. support organizations in accordance with DoD Directive 4001.15.[5]

(f) *Share resources saved*. When possible, make available to the installation commander a share of any resources saved or earned so that the commander can improve operations or working and living conditions on the installation.

(g) *Provide Placement Assistance*. Provide a variety of placement assistance to employees whose Federal jobs are eliminated through CA competitions.

(h) *Permit interim-in-house operation*. A DoD in-house CA may be established on a temporary basis if a contractor defaults. Action shall be taken to resolicit bids or proposals in accordance with this part.

[57 FR 29207, July 1, 1992]

## Subpart B—Procedures

### § 169a.8 Inventory and review schedule (Report Control Symbol DD-P&L(A)).

(a) Information in each DoD Component's inventory shall be used to assess DoD implementation of OMB Circular A–76 and for other purposes. Each Component's inventory shall be updated at least annually to reflect changes to their review schedule and the results of reviews, cost comparisons, and direct conversions. Updated inventories for all DoD Components except National Security Agency/Central Security Service (NSA/CSS) and the Defense Intelligence Agency (DIA) Shall be submitted to the Assistant Secretary of Defense Production and Logistics) (ASD(P&L)) within 90 days after the end of each fiscal year. Inventory data pertaining to NSA/CSS and DIA shall be held at the specific Agency concerned for subsequent review by properly cleared personnel. Appendix A to

[5] See footnote 1 to § 169a.1(a).

this part provides the codes and explanations for functional areas and Appendix B to this part provides procedures for submitting the inventory.

(b) DoD component's review schedules should be coordinated with the DoD Component's Efficiency Review Program and the Defense Regional Interservice Support (DRIS) Program to preclude duplication of efforts and to make use of information already available.

(c) Review of CAs that provide interservice support shall be scheduled by the supplying DoD Component. Subsequent cost comparisons, when appropriate, shall be executed by the same DoD Component. All affected DoD Components shall be notified of the intent to perform a review.

[50 FR 40805, Oct. 7, 1985, as amended at 57 FR 29208, July 1, 1992]

### § 169a.9 Reviews: Existing in-house commercial activities.

(a) DoD components shall conduct reviews of in-house CAs in accordance with their established review schedules. Existing in-house CAs, once reviewed shall be retained in-house without a cost comparison only when certain conditions are satisfied. (Detailed documentation will be maintained to support the decision to continue in-house performance). These conditions are as follows:

(1) *National Defense*. In most cases, application of this criteria shall be made considering the wartime and peacetime duties of the specific positions involved rather than in terms of broad functions.

(i) A CA, staffed with military personnel who are assigned to the activity, may be retained in-house for national defense reason when the following apply.

(A) The CA is essential for training or experience in required military skills;

(B) The CA is needed to provide appropriate work assignments for a rotation base for overseas or sea-to-shore assignments; or

(C) The CA is necessary to provide career progression to needed military skill levels.

(ii) *Core logistics activities*. The core logistics capability reported to Congress, March 29, 1984, under the provisions of 10 U.S.C. 2646 is comprised of the facilities, equipment, and management personnel at the activities listed in the report. The work at those activities may be performed by either government or contractor personnel, whichever is more cost effective. Core logistics activities reported to Congress under the provisions of 10 U.S.C. 2646, shall be retained in-house unless the Secretary of Defense grants a waiver as provided for in 10 U.S.C. 2464. Requests for waivers shall be submitted to the ASD (P&L). DoD Components may propose to the ASD (P&L) additional core logistics capability for inclusion in the list of core logistics activities. Core logistics activities reported to Congress as additions to the original list shall be retained in-house unless subsequently waived by the Secretary of Defense.

(iii) If the DoD Component has a larger number of similar CAs with a small number of essential military personnel in each CA, action shall be taken, when appropriate, to consolidate the military positions consistent with military requirements so that economical performance by either DoD civilian employees or by contract can be explored for accomplishing a portion of the work.

(iv) The DoD Components may propose to the ASD (P&L) other criteria for exempting CAs for national defense reasons.

(2) *No satisfactory commercial source available*. A DoD commercial activity may be performed by DoD personnel when it can be demonstrated that:

(i) There is no satisfactory commercial source capable of providing the product or service that is needed. Before concluding that there is no satisfactory commercial source available, the DoD Component shall make all reasonable efforts to identify available sources.

(A) DoD Components' efforts to find satisfactory commercial sources shall be carried out in accordance with the FAR and Defense FAR Supplement (DFAS) including review of bidders lists and inventories of contractors, consideration of preferential procurement programs, and requests for help

from Government agencies such as the Small Business Administration.

(B) Where the availability of commercial sources is uncertain, the DoD Component will place up to three notices of the requirement in the *Commerce Business Daily* (CBD) over a 90-day period. (Notices will be in the format specified in FAR, 48 CFR part 5 and part 7, subpart 7.3) When a bona fide urgent requirement occurs, the publication period in the CBD may be reduced to two notices, 15 days apart. Specifications and requirements in the notice will not be unduly restrictive and will not exceed those required of Government personnel or operations.

(ii) Use of a commercial source would cause an unacceptable delay or disruption of an essential program. In-house operation of a commercial activity on the basis that use of a commercial source would cause an unacceptable delay or disrupt an essential DoD program requires a specific documented explanation.

(A) The delay or disruption must be specific as to cost, time, and performance measures.

(B) The disruption must be shown to be a lasting or unacceptable nature. Temporary disruption caused by conversion to contract is not sufficient support for the use of this criteria.

(C) The fact that a DoD commercial activity involves a classified program, or is part of a DoD Component's basic mission, or that there is the possibility of a strike by contract employees is not adequate reason for Government performance of that activity. Further, urgency alone is not an adequate reason to continue Government operation of a commercial activity. It must be shown that commercial sources are not able, and the Government is able, to provide the product or service when needed.

(D) Use of an exemption due to an unacceptable delay or disruption of an essential program shall be approved by the DoD Component's central point of contact office. This authority may be redelegated.

(3) *Patient Care.* Commercial activities at DoD hospitals may be performed by DoD personnel when it is determined by the head of the DoD Component or his designee, in consultation with the DoD Component's chief medical director, that performance by DoD personnel would be in the best interest of direct patient care.

[50 FR 40805, Oct. 7, 1985, as amended at 57 FR 29208, July 1, 1992]

### § 169a.10 Contracts.

When contract cost becomes unreasonable or performance becomes unsatisfactory, the requirement must be resolicited. If the DoD Component competes in the resolicitation, then a cost comparison of a contracted CA shall be performed in accordance with part III of the Supplement to OMB Circular A–76 (Office of Federal Procurement Policy pamphlet No. 4)[6], part II of the Supplement to OMB Circular A–76 (Management Study Guide)[7], part IV of the Supplement to OMB Circular A–76 (Cost Comparison Handbook)[8], if in-house performance is feasible. When contracted CAs are justified for conversion to in-house performance, the contract will be allowed to expire (options will not be exercised) once in-house capability is established.

[57 FR 29208, July 1, 1992]

### § 169a.11 Expansions.

In cases where expansion of an in-house commercial activity is anticipated, a review of the entire commercial activity, including the proposed expansion, shall be conducted to determine if performance by DoD personnel is authorized for national defense reasons, because no commercial source is available, or because it is in the best interest of direct patient care. If performance by DoD personnel is not justified under these criteria, a cost comparison of the entire activity shall be performed. Government facilities and equipment normally will not be expanded to accommodate expansions if adequate and cost effective contractor facilities and equipment are available.

[50 FR 40805, Oct. 7, 1985, as amended at 57 FR 29208, July 1, 1992]

[6] See footnote 3 to § 169a.1(a).
[7] See footnote 3 to § 169a.1(a).
[8] See footnote 3 to § 169a.1(a).

### § 169a.12 New requirements.

(a) In cases where a new requirement for a commercial product or service is anticipated, a review shall be conducted to determine if performance by DoD personnel is authorized for national defense reasons, because no commercial source is available, or because it is in the best interest of direct patient care. If performance by DoD personnel is not justified under these criteria, then the new requirement normally shall be performed by contract.

(b) If there is reason to believe that commercial prices may be unreasonable, a preliminary cost analysis shall be conducted to determine whether it is likely that the work can be performed in-house at a cost that is less than anticipated for contract performance. If in-house performance appears to be more economical, a cost comparison shall be scheduled. The appropriate conversion differentials will be added to the preliminary in-house cost before it is determined that in-house performance is likely to be more economical.

(c) Government facilities and equipment normally will not be expanded to accommodate new requirements if adequate and cost-effective contractor facilities are available. The requirement for Government ownership of facilities does not obviate the possibility of contract operation. If justification for in-house operation is dependent on relative cost, the cost comparison may be delayed to accommodate the lead time necessary for acquiring the facilities.

(d) Approval or disapproval of in-house performance of new requirements involving a capital investment of $500,000 or more will not be redelegated below the level of DAS or equivalent.

(e) Approval to budget for a major capital investment associated with a new requirement will not constitute OSD approval to perform the new requirement with DoD personnel. Government performance shall be determined in accordance with this part.

### § 169a.13 CAs involving forty-five or fewer DoD civilian employees.

(a) When adequately justified under the criteria required in Appendix C to this part, CAs involving 11 to 45 DoD civilian employees may be competed based on simplified cost comparison procedures and 10 or fewer DoD civilian employees may be directly converted to contract without the use of a simplified cost comparison. Such conversion shall be approved by the DoD Component's central point of contact office having the responsibility for implementation of this part. Part IV of the Supplement to OMB Circular A–76 and Appendix C to this part shall be utilized to define the specific elements of costs to be estimated in the simplified cost comparison.

(b) In no case shall any CA involving more than forty-five employees be modified, reorganized, divided, or in any way changed for the purpose of circumventing the requirement to perform a full cost comparison.

(c) The decision to perform a simplified cost comparison on a CA involving military personnel and 11 to 45 DoD Civilian employees reflects a management decision that the work need not be performed in-house. Therefore, all direct military personnel costs will be estimated in the simplified cost comparison (see Appendix C to this part) on the basis of civilian performance.

(d) A most efficient and cost-effective organization analysis certification is required for studies involving 11 to 45 DoD civilian employees (see Appendix C to this part).

[57 FR 29208, July 1, 1992]

### § 169a.14 Military personnel commercial activity.

Commercial activities performed exclusively by military personnel not subject to deployment in a combat, combat support, or combat service support role may be converted to contract without a cost comparison, when adequate competition is available and reasonable prices can be obtained from qualified commercial sources.

### § 169a.15 Special considerations.

(a) Signals Intelligence, Telecommunications (SIGINT) and Automated Information System (AIS) security.

(1) Before making a determination that an activity involving SIGINT as prescribed in Executive Order 12333, and AIS, security should be subjected

to a cost comparison, the DoD Component shall specifically identify the risk to national security and complete a risk assessment to determine if the use of commercial resources poses a potential threat to national security. Information copies of the risk assessment and a decision memorandum containing data on the acceptable and/or unacceptable risk will be maintained within the requesting DoD Component's contracting office.

(2) The National Security Agency (NSA) considers the polygraph program an effective means to enhance security protection for special access type information. The risk to national security is of an acceptable level if contractor personnel assigned to the maintenance and operation of SIGINT, Computer Security (COMPUSEC) and Communications Security (COMSEC) equipment agree to an aperiodic counter-intelligence scope polygraph examination. The following clause should be included in every potential contract involving SIGINT, Telecommunications, and AIS systems:

Contract personnel engaged in operation or maintaining SIGINT, COMSEC or COMPUSEC equipment or having access to classified documents or key material must consent to an aperiodic counter-intelligence scope polygraph examination administered by the Government. Contract personnel who refuse to take the polygraph examination shall not be considered for selection.

(b) *National intelligence*. Before making a determination that an activity involving the collection/processing/production/dissemination of national intelligence as prescribed in Executive Order 12333 should be subjected to a cost comparison, the DoD Component must specifically identify the risk to national intelligence of using commercial sources. Except as noted in paragraph (a) of this section, the DoD Component shall provide its assessment of the risk to national intelligence of using commercial sources to the Director, DIA, who shall make the determination if the risk to national intelligence is unacceptable. DIA shall consult with other organizations as deemed necessary and shall provide the decision to the DoD Component. (Detailed documentation shall be maintained to support the decision).

(c) *Accountable Officer*. (1) The functions and responsibilities of the Accountable Officer are defined by DoD 7200.10–M.[9] Those functions of the Accountable Officer that involve the exercise of substantive discretionary authority in determining the Government's requirements and controlling Government assets cannot be performed by a contractor and must be retained in-house. The responsibilities of the Accountable Officer as an individual and the position of the Accountable Officer are not contractable.

(2) Contractors can perform functions in support of the Accountable Officer and functions where they are performing in accordance with criteria defined by the Government. For instance, contractors can process requisitions, maintain stock control records, perform storage and warehousing, and make local procurements of items specified as deliverables in the contract.

(3) The responsibility for administrative fund control must be retained in-house. The contractor can process all required paperwork up to funds obligation which must be done by the Government employee designated as responsible for funds control. The contractor can also process such documents as reports of survey and adjustments to stockage levels, but approval must rest with the Accountable Officer. In all cases, the administrative control of funds must be retained by the Government since contractors or their employees cannot be held responsible for violations of the United States Code.

(d) *Cost Comparison Process*. If performance of a commercial activity by DoD personnel cannot be justified under national defense, non-availability of commercial source, or patient care criteria, than a full cost comparison shall be conducted in accordance with part II of the Supplement to OMB Circular No. A–76, part III of the Supplement to OMB Circular No. A–76, and part IV of the Supplement to OMB Circular A–76, to determine if performance by DoD employees

[9] See footnote 1 to § 169a.1(a).

is justified on the basis of lower cost (unless the criteria of § 169a. and § 169a. are met). The conclusion that a commercial activity will be cost compared reflects a management decision that the work need not be accomplished by military personnel. Therefore, all direct personnel costs shall be estimated on the basis of civilian performance. Funds shall be budgeted to cover either the cost of the appropriate in-house operation required to accomplish the work or the estimated cost of the contract. Neither funds nor manpower authorizations shall be removed from the activity's budget in anticipation of the outcome of a study.

(1) *Notification*—(i) *Congressional notification*. DoD Components shall notify Congress of the intention to do a cost comparison involving 46 or more DoD civilian personnel. DoD Components shall annotate the notification when a cost comparison is planned at an activity listed in the report to Congress on core logistics (see section 169a.9(a)(1)(ii)). The DoD Component shall notify the ADS(P&L) of any such intent at least 5 working days before the Congressional notification. The cost comparison process begins on the date of Congressional notification.

(ii) *DoD employee notification*. DoD Components shall, in accordance with 10 U.S.C. 2467(b), at least monthly during the development and preparation of the performance work statement (PWS) and management study, consult with DoD civilian employees who will be affected by the cost comparison and consider the views of such employees on the development and preparation of the PWS and management study. DoD Components may consult with such employees more frequently and on other matters relating to the cost comparison. In the case of DoD employees represented by a labor organization accorded exclusive recognition under 5 U.S.C. 7111, consultation with representatives of the labor organization satisfies the consultation requirement. Consultation with nonunion DoD civilian employees may be through such means as group meetings. Alternatively, DoD civilian employees may be invited to designate one or more representatives to speak for them. Other methods may be implemented if adequate notice is provided to the nonunion DOD civilian employees and the right to be represented during the consultations is ensured.

(iii) *Local notification*. It is suggested that upon starting the cost comparison process, the installation make an announcement of the cost comparison, including a brief explanation of the cost-comparison process to the employees of the activity and the community. The installations' labor relations specialist also should be apprised to ensure appropriate notification to employees and their representatives in accordance with applicable collective bargaining agreements. Local Interservice Support Coordinators (ISCs) and the Chair of the appropriate Joint Interservice Regional Support Group (JIRSG) also should be notified of a pending cost comparison.

(2) *Performance Work Statement (PWS)*. (i) The PWS and its Quality Assurance Plan shall be prepared in accordance with part II of the Supplement to OMB Circular No. A–76 5 for full cost comparison, simplified cost comparisons, and direct conversions of DoD personnel commercial activities. The PWS shall include reasonable performance standards that can be used to ensure a comparable level of performance for both Government and contractor and a common basis for evaluation. Employees and/or their bargaining unit representatives should be encouraged to participate in preparing or reviewing the PWS.

(ii) Each DoD Component shall:

(A) Prepare PWSs that are based on accurate and timely historical or projected workload data and that provide measurable and verifiable performance standards.

(B) Monitor the development and use of prototype PWSs.

(C) Review and initiate action to correct disagreements on PWS discrepancies.

(D) Approve prototype PWSs for Component-wide use.

(E) Coordinate these efforts with the other DoD Components to avoid duplication and to provide mutual assistance.

(iii) Guidance on Government Property:

(A) For the purposes of this instruction, Government property is defined in accordance with the 48 CFR part 45.

(B) The decision to offer or not to offer Government property to a contractor shall be determined by a cost-benefit analysis justifying that the decision is in the government's best interest. The determination on Government property must be supported by current, accurate, complete information and be readily available for the independent reviewing activity. The design of this analysis shall not give a decided advantage or disadvantage to either in-house or contract competitors. The management of Government property offered to the contractor shall also be in compliance with 48 CFR part 45.

(iv) If a commercial activity provides critical or sensitive services, the PWS shall include sufficient data for the in-house organization and commercial sources to prepare a plan for expansion in emergency situations.

(v) DoD Components that provide interservice support to other DoD Components or Federal agencies through interservice support agreements or other arrangements shall ensure that the PWS includes this work load and is coordinated with all affected Dod Components and Federal Agencies.

(vi) If there is a requirement for the commercial source to have access to classified information in order to provide the product or service, the commercial source shall be processed for a facility security clearance under the Defense Industrial Security Program in accordance with DoD Directive 5220.22[10] and DoD Regulation 5220.22–R.[11] However, if no *bona fide* requirement for access to classified information exists, no action shall be taken to obtain security clearance for the commercial source.

(vii) Employees of commercial sources who do not require access to classified information for work performance, but require entry into restricted areas of the installation, may be authorized unescorted entry only when the provisions of DoD Regulation 5200.2–R[12] apply.

(3) *Management Study*. A management study shall be performed to analyze completely the method of operation necessary to establish the most efficient and cost-effective in-house organization (MEO) needed to accomplish the requirements in the PWS. The MEO must reflect only approved resources for which the commercial activity has been authorized. As a part of the management study, installations should determine if specific requirements can be met through an Inter/Intraservice Support Agreement (ISA) with other activities or Government Agencies which have excess capacity or capability.

(i) The commercial activity management study is mandatory. Part III of the Supplement to OMB Circular No. A–76 provides guidance on how to conduct the management study. The study shall identify essential functions to be performed, determine performance factors, organization structure, staffing, and operating procedures for the most efficient and cost effective in-house performance of the commercial activity. The MEO becomes the basis of the Government estimate for the cost comparison with potential contractors. In this context, ''efficient'' (or cost-effective) means that the required level of workload (output, as described in the performance work statement) is accomplished with as little resource consumption (input) as possible without degradation in the required quality level of products or services.

(ii) DoD Components have formal programs and training for the performance of management studies, and those programs are appropriate for teaching how to conduct commercial activity management studies. Part III of the Supplement to OMB Circular No. A–76 does not purport to replace the DoD Component's own management techniques, but merely to establish the basic criteria and the interrelationship between the management study and the PWS.

(iii) If a commercial activity provides critical or sensitive services, the management study shall include a plan for expansion in emergency situations.

[10] See footnote 1 to § 169a.1(a).

[11] See footnote 1 to § 169a.1(a).

[12] See footnote 1 to § 169a.1(a).

(iv) Early in the management study, management will solicit the views of the employees in the commercial activity under review, and/or their representatives for their recommendations as to the MEO or ways to improve the method of operation.

(v) The management study will be the basis on which the DoD Component certifies that the Government cost estimate is based on the most efficient and cost effective organization practicable.

(vi) Implementation of the MEO shall be initiated no later than 1 month after cancellation of the soliciation and completed within 6 months. DoD Components shall take action, within 1 month, to schedule and conduct a subsequent cost comparison when the MEO is not initiated and completed as prescribed above. Subsequent cost comparisons may be delayed by the DoD Component's central point of contact office, when situations outside the control of the DoD Component prevent timely or full implementation of the MEO. This authority may not be redelegated.

(vii) DoD Components shall establish procedures to ensure that the in-house operation, as specified in the MEO, is capable of performing in accordance with the requirements of the PWS. The procedures also shall ensure that the resources (facilities, equipment, and personnel) specified in the MEO are available to the in-house operation and that in-house performance remains within the requirements and resources specified in the PWS and MEO for the period of the cost comparison, unless documentation to support changes in workload/scope is available.

(viii) A management study is not required for simplified cost comparisons however, a MEO analysis and certification is required.

(4) *Cost Comparisons*. Cost comparisons shall include all significant costs of both Government and contract performance. Common costs; that is, costs that would be the same for either in-house or contract operation, need not be computed, but the basis of those common costs must be identified and included in the cost comparison documentation. Part IV of the Supplement to OMB Circular A–76 (Cost Comparison Handbook) provides the basic guidance for conducting full cost comparisons. Appendix D provides guidance for conducting simplified cost comparisons. The supplemental guidance contained below is intended to establish uniformity and to ensure all factors are considered when making cost comparisons. Deviation from the guidance contained in part IV of the Supplement to OMB Circular A–76, will not be allowed, except as provided in the following subparagraphs.

(i) *In-house Cost Estimate*. (A) The in-house cost estimate shall be based on the most efficient and cost-effective in-house organization needed to accomplish the requirements in the PWS.

(B) Heads of DoD Components or their designees shall certify that the in-house cost estimate is based on the most efficient and cost-effective operation practicable. Such certification shall be made before the bid opening or the date for receipt of initial proposals.

(C) The ASD(P&L) shall provide inflation factors for adjusting costs for the first and subsequent performance periods. These factors shall be the only acceptable factors for use in cost comparisons. Inflation factors for outyear (second and subsequent) performance periods will not be applied to portions of the in-house estimate that are comparable with those portions of the contract estimate subject to economic price adjustment clauses.

(D) Military positions in the organization under cost comparison shall be converted to civilian positions for costing purposes. Civilian grades and series shall be based on the work described in the PWS and the MEO, determined by the management study rather than on the current organization structure.

(E) DoD Components shall not use the DLA Wholesale Stock Fund Rate and/or the DLA Direct Delivery rate for supplies and materials as reflected in paragraph 3.a. (1) and (2) of part IV of the Supplement to OMB Circular No. A–76. The current standard and pricing formula includes full cost under the Defense Business Operations Fund (DBOF). No further mark-up is required.

(F) DoD Components shall assume for the purpose of depreciation computations that residual value is equal to the

disposal values listed in Appendix C of part IV of the Supplemental to OMB Circular No. 76 (Cost Comparison Handbook) if more precise figures are not available from the official accounting records or other knowledgeable authority. Therefore, the basis for depreciation shall be the original cost plus the cost of capital improvements (if any) less the residual value. The original cost plus the cost of capital improvements less the residual value shall be divided by the useful life (as projected for the commercial activity cost comparison) to determine the annual depreciation.

(G) Purchased services which augment the current in-house work effort and that are included in the PWS should be included in line 3 (other specifically attributable costs). When these purchased services are long-term and contain labor costs subject to economic price adjustment clauses, then the applicable labor portion will not be escalated by outyear inflation factors. In addition, purchased services shall be offset for potential Federal income tax revenue by applying the appropriate rate in Appendix D of part IV of the Supplement to OMB Circular A–76 (Cost Comparison Handbook) to total cost of purchased services.

(H) Overhead costs shall be computed only when such costs will not continue in the event of contract performance. This includes the cost of any position (full time, part time, or intermittent) that is dedicated to providing support to the activity(ies) under cost comparison regardless of the support organization's location. Military positions provided overhead support shall be costed using current military composite standard rates that include PCS costs multiplied by the appropriate support factor.

(ii) *Cost of Contract Performance.* (A) The contract cost estimate shall be based on firm bids or negotiated proposals solicited in accordance with the FAR and the DoD FAR Supplement (DFARS) for full cost comparisons. Existing contract prices (such as those from GSA Supply Schedules) will not be used in a cost comparison. For simplified cost comparisons, the guidance in Appendix C of this part applies.

(B) Standby costs are costs incurred for the upkeep of property in standby status. Such costs neither add to the value of the property nor prolong its life, but keep it in efficient operating condition or available for use. When an in-house activity is terminated in favor of contract performance and an agency elects to hold Government equipment and facilities on standby solely to maintain performance capability, this is a management decision, and such standby costs will not be charged to the cost of contracting.

(C) A specific waiver is required to use contract administration factors that exceed the limits established in Table 3–1 of part IV of the Supplement to OMB Circular No. A–76 (Cost Comparison Handbook). The reason for the deviation from the limits, the supporting alternative computation, and documentation supporting the alternative method, shall be provided to the DoD Component's central point of contact office for advance approval on a case-by-case basis. The authority may not be redelegated. ASD(A&L) shall be notified within 30 days of any such decisions.

(D) The following guidance pertains to one-time conversion costs:

(*1*) *Material Related Costs.* The cost factors below shall be used, if more precise costs are not known, to estimate the cost associated with disposal/transfer of excess government material which result from a conversion to contract performance:

| | Percentage of current replacement cost |
|---|---|
| Packing, crating , and handling (PCH) | 3.5 |
| Transportation | 3.75 |

(*2*) *Labor-Related Costs.* If unique circumstances prevail when a strict application of the 2 percent factor for computation of severance pay results in a substantial overstatement or understatement of this cost, an alternative methodology may be employed. The reason for the deviation from this standard, the alternative computation, and documentation supporting the alternative method shall be provided to the appropriate DoD Component's central point of contact office for advance

approval on a case-by-case basis. This authority may not be redelegated.

(*3*) *Other Transition Costs.* Normally, government personnel assistance after the contract start date (to assist in transition from in-house performance to contract performance) should not be necessary. When transition assistance will not be made available, this condition should be stated clearly in the solicitation so that contractors will be informed that they will be expected to meet full performance requirements from the first date of the contract. Also, when circumstances require full performance on the contract start date, the solicitation shall state that time will be made available for contractor indoctrination prior to the start date of the contract. The inclusion of personnel transition costs in a cost comparison requires advance approval of the DoD Component's central point of contact office. This authority may not be redelegated.

(E) *Gain or Loss on Disposal/Transfer of Assets.* If more precise costs are not available from the Defense Reutilization and Marketing Office or appropriate authority, then:

(*1*) The same factors for PCH and transportation costs as prescribed in § 169a.12E(ii)(D)(*1*) for the costs associated with disposal/transfer of materials may be used.

(*2*) The estimated disposal value may be calculated from the net book value as derived from the table in Appendix C of part IV of the Supplement to OMB Circular No. A–76 (Cost Comparison Handbook), minus the disposal/transfer costs. This figure shall be entered as a gain or loss on line 11 or line 13 of the cost comparison form as appropriate.

NOTE: If a cost-benefit analysis, as prescribed in § 169a.12(B)(iii), indicates that the retention of Government-owned facilities, equipment, or real property for use elsewhere in the Government is cost advantageous to the Government, then the cost comparison form shall reflect a gain to the Government and therefore a decrease to the cost of contracting on line 11 or line 13 of the cost comparison form as appropriate.

[50 FR 40805, Oct. 7, 1985, as amended at 57 FR 29209, July 1, 1992]

### § 169a.16 Independent review.

(a) The estimates of in-house and contracting costs that can be computed before the cost comparison shall be reviewed by a qualified activity, independent of the Task Group preparing the cost comparison. This review shall be completed far enough in advance of the bid or initial proposal opening date to allow the DoD Component to correct any discrepancies found before sealing the in-house cost estimate.

(b) The independent review shall substantiate the currency, reasonableness, accuracy, and completeness of the inhouse estimate. The review shall ensure that the in-house cost estimate is based on the same required services, performance standards, and workload contained in the solicitation. The reviewer shall scrutinize and attest to the adequacy and authenticity of the supporting documentation. Supporting documentation shall be sufficient to require no additional interpretation.

(c) The purpose of the independent review is to ensure costs have been estimated and supported in accordance with provisions of this Instruction. If no (or only minor) discrepancies are noted during this review, the reviewer indicates the minor discrepancies, signs, dates, and returns the CCF to the preparer. If significant discrepancies are noted during the review, the discrepancies shall be reported to the preparer for recommended correction and resubmission.

(d) The independent review is not required for simplified cost comparisons.

[50 FR 40805, Oct. 7, 1985, as amended at 57 FR 29210, July 1, 1992]

### § 169a.17 Solicitation considerations.

(a) Every effort must be made to avoid postponement or cancellation of CA solicitations even if there are significant changes, omissions, or defects in the Government's in-house cost estimate. Such corrections shall be made before the expiration of bids or proposals and may require the extensions of bids or proposals. When there is no alternative, contracting officers must clearly document the reason(s).

(b) Bidders or offerers shall be informed that an in-house cost estimate

is being developed and that a contract may or may not result.

(c) Bids or proposals shall be on at least a 3-year multi-year basis (when appropriate) or shall include prepriced renewal options to cover 2 fiscal years after the initial period.

(d) All contracts awarded as a result of a conversion (whether or not a cost comparison was performed) shall comply with all requirements of the FAR and DFARS.

(e) Solicitations shall be restricted for preferential procurement when the requirements applicable to such programs (such as, small business set-asides or other required sources of supplies and services) are met, in accordance with the FAR.

(f) Solicitations will not be restricted for preferential procurement unless the contracting officer determines that there is a reasonable expectation that the commercial prices will be fair and reasonable, in accordance with the FAR.

(g) Contract defaults may result in temporary performance by Government personnel or other suitable means; such as, an interim contract source. Personnel detailed to such a temporary assignment should be clearly informed that they will return to their permanent assignment when a new contract is awarded. If the default occurs within the first year of contract performance, the following procedures apply:

(1) If the Government was the next lowest bidder/offerer, and in-house performance is still feasible, the function may be returned to in-house performance. If in-house performance is no longer feasible, the contracting officer shall obtain the requirement by contract in accordance with the requirements of the FAR, 48 CFR part 49. A return to in-house performance under the above criteria shall be approved by the DoD Component's central point of contact office. This authority may not be redelegated.

(2) If the contract wage rates are no longer valid or if the contracting officer, after a review of the availability of the next lowest responsible and responsive bidders/offerers, determines that resolicitation is appropriate, the Government may submit a bid for comparison with other bids/offers from the private sector. Submission of a Government bid requires a determination by the DoD Component that performance by DoD employees is still feasible and that a likelihood exists that such performance may be more economical than performance by contract. In such cost comparisons, the conversion differentials will not be applied to the costs of either in-house or contract performance.

(h) If contract default occurs during the second or subsequent year of contract performance, the procedures of § 169a.8(b)(2)(i) of this part apply.

(1) *Grouping of Commercial Activities.* (i) The installation commander shall determine carefully which CAs should be grouped in a single solicitation. The installation commander should keep in mind that the grouping of commercial activities can influence the amount of competition (number of commercial firms that will bid or submit proposals) and the eventual cost to the Government.

(ii) [Reserved]

(2) The installation commander shall consider the adverse impacts that the grouping of commercial activities into a single solicitation may have on small and small disadvantaged business concerns. Commercial activities being performed wholly by small or small disadvantaged businesses will not be incorporated into a cost comparison unless consolidation is necessary to meet mission requirements. Actions must be taken to ensure that such contractors are not displaced merely to accomplish consolidation. Similarly, care must be taken so that nonincumbent small and small disadvantaged business contractors are not handicapped or prejudiced unduly from competing effectively at the prime contractor level.

(3) In developing solicitations for commercial activities, the procurement plan should reflect an analysis of the advantages and disadvantages to the Government that might result from making more than one award. The decision to group commercial activities should reflect an analysis of all relevant factors including the following:

(A) The effect on competition.

(B) The duplicative management functions and costs to be eliminated through grouping.

(C) The economies of administering multifunction vs. single function contracts, including cost risks associated with the pricing structure of each.

(D) The feasibility of separating unrelated functional tasks or groupings.

(E) The effect grouping will have on the performance of the functions.

(4) When the solicitation package includes totally independent functions which are clearly divisible, severable, limited in number, and not price interrelated, they shall be solicited on the basis of an ''any or all'' bid or offer. Commerical bidders or offerors shall be permitted to submit bids or offers on one or any combination of the functions being solicited. These bids or offers shall be evaluated to determine the lowest aggregate contract cost to the Government. This lowest aggregate contract cost then will be compared to the in-house cost estimate based on the MEO for performance of the functions in the single solicitation. The procedures in part IV of the Supplement to OMB Circular No. A–76 (Cost Comparison Handbook) apply.

(5) There are instances when this approach to contracting for CAs may not apply; such as, situations when physical limitations of site (where the activities are to be performed) preclude allowing more than one contractor to perform, when the function cannot be divided for purposes of performance accountability, or for other national security considerations. However, if an ''all or none'' solicitation is issued, the decision to do so must include a cost analysis to reflect that the ''all or none'' solicitation is less costly to the Government or an analysis indicating it is otherwise in the best interest of the Government, all factors considered.

(6) It is recognized that in some cases, decisions will result in the elimination of prime contracting opportunities for small business. In such cases special measures shall be taken. At a minimum, small and small disadvantaged business concerns shall be given preferential consideration by all competing prime contractors in the award of subcontracts. For negotiated procurements the degree to which this is accomplished will be a weighted factor in the evaluation and source selection process leading to contract award.

(7) The contract files shall be documented fully to demonstrate compliance with these procedures.

(i) If no bids or proposals, or no responsive or responsible bids or proposals are received in response to a solicitation, the in-house cost estimate shall remain unopened. The contracting officer shall examine the solicitation to ascertain why no responses were received. Depending on the results of this review, the contracting officer shall consider restructuring the requirement, if feasible and reissue it under restricted or unrestricted solicitation procedures, as appropriate.

(j) Continuation of an in-house CA for lack of a satisfactory commercial source will not be based upon lack of response to a restricted solicitation.

(k) The guidance of subparagraph E.3.f. applies to sumplified cost comparisons and direct conversions of military personnel CAs.

(l) To ensure that bonds and/or insurance requirements are being used in the best interest of the Government, as a general rule, requirements (for other than construction related services) above the levels established in the FAR and DFARS should not be included in acquisitions.

[50 FR 40805, Oct. 7, 1985, as amended at 56 FR 27901, June 18, 1991; 57 FR 29210, July 1, 1992]

### § 169a.18 Administrative appeal procedures.

(a) *Appeals of Cost Comparison Decisions.* (1) Each DoD Component shall establish an administrative appeals procedure to resolve questions from directly affected parties relating to determinations resulting from cost comparisons performed in compliance with this part. The appeal procedure will not apply to questions concerning the following:

(i) Award to one contractor in preference to another;

(ii) DoD management decisions.

(2) The appeals procedure is to provide an administrative safeguard to ensure that DoD Component decisions are fair, equitable, and in accordance with procedures in this part. The procedure

does not authorize an appeal outside the DoD Component or a judicial review.

(3) The appeals procedure shall be independent and objective and provide for a decision on the appeal within 30 calendar days of receipt of the appeal. The decision shall be made by an impartial official at a level organizationally higher than the official who approved the cost comparison decision. The appeal decision shall be final, unless the DoD Component procedures provide for further discretionary review within the DoD Component.

(4) All detailed documentation supporting the initial cost comparison decision shall be made available to directly affected parties upon request when the initial decision is announced. The detailed documentation shall include, at a minimum, the following: the in-house cost estimate with detailed supporting documentation (see § 169a.5(c)(ii) of this part), the completed CCF, name of the tentative winning contractor (if the decision is to contract), or the price of the bidder whose bid or proposal would have been most advantageous to the Government (if the decision is to perform in-house). If the documentation is not available when the initial decision is announced, the time alloted for submission of appeals shall be extended the number of days equal to the delay.

(5) To be considered eligible for review under the DoD Component appeals procedures, appeals shall:

(i) Be received by the DoD Component in writing within 15 working days after the date the supporting documentation is made available to directly affected parties.

(ii) Address specific line items on the CCF and the rationale for questioning those items.

(iii) Demonstrate that the result of the appeal may change the decision.

(b) *Appeals of Simplified Cost Comparisons and Direct Conversions.* (1) Directly affected parties may appeal decision to convert to contract based on a simplified cost comparison involving 11–45 DoD civilian employees or a direct conversion involving 10 or fewer DoD civilian employees. The appeal must address reasons why fair and reasonable prices will not be obtainable.

(2) Each DoD Component shall establish an administrative appeal procedure that is independent and objective; Installation Commanders must make available, upon request, the documentation supporting the decision to directly convert activities; appeals of direct conversions must be filed within 30 calendar days after the decision is announced in the Commerce Business Daily and/or FEDERAL REGISTER, and the supporting documentation is made available; an impartial official one level organizationally higher than the official who approved the direct conversion decision shall hear the appeal; officials shall provide an appeal decision within 30 calendar days of receipt of the appeal.

(c) Since the appeal procedure is intended to protect the rights of all directly affected parties, the DoD Component's procedures, as well as the decision upon appeal, will not be subject to negotiation, arbitration, or agreement.

(d) DoD Components shall include administrative appeal procedures as part of their implementing documents.

[50 FR 40805, Oct. 7, 1985, as amended at 57 FR 29210, July 1, 1992]

### § 169a.19 Study limits.

No DoD funds shall be available to perform any cost study pursuant to the provisions of OMB Circular A–76 if the study being performed exceeds a period of 24 months after initiation of such study with respect to a single function activity or 48 months after initiation of such study for a multi-function activity.

[60 FR 67328, Dec. 29, 1995]

## Subpart C—Reporting Requirements

### § 169a.21 Reporting requirements.

(a) *Inventory and Review Schedule (Report Control Symbol DD-A&T(A) 1540).* See § 169a.8(a) of this part.

(b) *Commercial Activities Management Information System (CAMIS) (Report Control Symbol DD-A&T(Q) 1542).* (1) The purpose of CAMIS is to maintain an accurate DoD data base of commercial activities that undergo an OMB Circular A–76 cost comparison and CAs

that are converted directly to contract without a cost comparison. The CAMIS is used to provide information to the Congress, Office of Management Budget (OMB), General Accounting Office (GAO), OSD, and others. The CAMIS is divided into two parts. Part I contains data on CAs that undergo cost comparison. Part II contains data on commercial activities converted to contract without a full cost comparison.

(2) The CAMIS report shall be submitted in accordance with the procedures in Appendix C.

(c) Congressional Data Reports on CA (Report Control Symbol DD-A&T(A&AR) 1949) and Reports on savings on Costs from Increased Use of DoD Civilian Personnel (Report Control Symbol DD-A&T(AR) 1950). To insure consistent application of the requirements stated in 10 U.S.C. 2461 and 2463, the following guidance is provided:

(1) The geographic scope of section 10 U.S.C. 2461 applies to the United States, its territories and possessions, the District of Columbia, and the Commonwealth of Puerto Rico.

(2) Section 10 U.S.C. 2461 applies to proposed conversions of DoD CAs that on October 1, 1980, were being performed by more than forty-five DoD civilian employees. 10 U.S.C. 2463 applies to conversions from contract to in-house involving 50 or more contractor employees.

(3) DoD Components must not proceed with a CA study until notification to Congress, as required by 10 U.S.C. 2461. DoD Components shall notify the ASD(ES) of any such intent at least 5 working days before congressional notification.

(4) DoD Components shall annotate announcements to Congress when a cost comparison is planned at an activity listed in the report to Congress on Core Logistics (see §169a.8(b)(1)(i)(2) of this part).

(5) The DoD Components shall notify Congress, at least 5 working days before sending the detailed summary report required by 10 U.S.C. 2461 to Congress. The detailed summary of the cost shall include: the amount of the offer accepted for the performance of the activity by the private contractor; the costs and expenditures that the Government will incur because of the contract; the estimated cost of performance of the activity by the most efficient Government organization; a statement indicating the life of the contract; and certifications that the entire cost comparison is available, and that the Government calculation for the cost of performance of such function by DoD employees is based on an estimate of the most efficient and cost-effective organization for performance of such function by DoD employees.

(6) The potential economic effect on the employees affected, the local community, and the Federal Government of contracting for performance of the function shall be included in the report to accompany the above certifications, if more than 75 total employees (including military and civilian, both permanent and temporary) are potentially affected. It is suggested that the Army Corps of Engineers' model (or equivalent) be used to generate this information. The potential impact on affected employees shall be included in the report, regardless of the number of employees involved. Also include in the report a statement that the decision was made to convert to contractor performance, the projected date of contract award, the projected contract start date, and the effect of contracting the function on the military mission of that function.

(7) By December 15th of each year, each DoD Component shall submit to the ASD(P&L) the data required by 10 U.S.C. 2461(c). In describing the extent to which CA functions were performed by DoD contractors during the preceding fiscal year, include the estimated number of work years for the in-house operation as well as for contract operation (including percentages) by major OSD functional areas in Appendix A to this part; such as, Social Services, Health Services, Installation Services, etc. For the estimate of the percentage of CA functions that will be performed in-house and those that will be performed by contract during the fiscal year during which the report is submitted, include the estimated work years for in-house CAs as well as for contracted CAs and the rationale for significant changes when compared to

the previous year's data. Also, include the number of studies you expect to complete in the next fiscal year showing total civilian and military FTEs.

[50 FR 40805, Oct. 7, 1985, as amended at 57 FR 29210, July 1, 1992; 60 FR 67329, Dec. 29, 1995]

### § 169a.22 Responsibilities.

The responsibilities for implementing the policies and procedures of the DoD CA Program are prescribed in DoD Directive 4100.15 (32 CFR part 169) and appropriate paragraphs of this part.

[57 FR 29210, July 1, 1992]

## APPENDIX A TO PART 169a—CODES AND DEFINITIONS OF FUNCTIONAL AREAS

This list of functional codes and their definitions does not restrict the applicability or scope of the commerical activity Program within DoD. Section B. of DoD Directive 4100.15 defines the applicability and scope of the program. The commerical activity program still applies to CAs not defined in this listing. These codes and definitions are a guide to assist reporting. As new functions are identified, codes will be added or existing definitions will be expanded.

*Social Services*

*G001 Care of Remains of Deceased Personnel and/or Funeral Services.* Includes CAs that provide mortuary services, including transportation from aerial port of embarkation (APOE) to mortuary of human remains received from overseas mortuaries, inpection, restoration, provision of uniform and insignia, dressing, flag, placement in casket, and preparation for onward shipment.

*G008 Commissary Store Operation.* Includes CAs that provide all ordering, receipt, storage, stockage, and retailing for commissaries. Excludes procurement of goods for issue or resale.

G008A: Shelf Stocking.
G008B: Check Out.
G008C: Meat Processing.
G008D: Produce Processing.
G008E: Storage and Issue.
G008F: Other.
G008G: Troop Subsistance Issue Point.

*G009 Clothing Sales Store Operation.* Includes commercial activities that provide ordering, receipt, storage, stockage, and retailing of clothing. Stores operated by the Army and Air Force Exchange Services, Navy Exchange Services, and Marine Corps Exchange Services are excluded.

*G010 Recreational Library Services.* Includes operation of libraries maintained primarily for off-duty use by military personnel and their dependents.

*G011 Other Morale, Welfare, and Recreation Services.* Operation of commercial activities maintained primarily for the off-duty use of military personnel and their dependents, including both appropriated and partially nonappropriated fund activities. The operation of clubs and messes, and morale support activities are included in code G011. Examples of activities performing G011 functions are arts and crafts, entertainment, sports and athletics, swimming, bowling, marina and boating, stables, youth activities, centers, and golf. DoD Directive 1015.1[1] contains amplification of the categories reflected below. (NOTE: commercial activities procedures are not mandatory for functions staffed solely by civilian personnel paid by nonappropriated funds.)

G011A: All Category II Nonappropriated Fund Instrumentalities (NAFIs), except Package Beverage Branch.
G011B: Package Beverage Branch.
G011C: All Category IIIa NAFIs.
G011D: All Category IIIb1, except Libraries.
G011E: Category IIIb2 Arts and Crafts.
G011F: Category IIIb2 Music & Theatre.
G011G: Category IIIb2 Outdoor Recreation.
G011H: Category IIIb2 Youth Activities.
G011I: Category IIIb2 Child Development Service.
G011J: Category IIIb2 Sports—Competitive.
G011K: All Category IIIb3 except Armed Forces Recreation Center (AFRC) Golf Bowling, and membership associations converted from Category VI.
G011L: Category IIIb3 AFRC.
G011M: Category IIIb3 Golf.
G011N: Category IIIb3 Bowling.
G011O: Category IIIb3 membership associations converted from Category VI.
G011P: Category III Information Tour and Travel (ITT).
G011Q: All Category IV.
G011R: All Category V.
G011S: All Category VI, except those converted to Category IIIb3.
G011T: All Category VII.
G011U: All Category VIII, except billeting and hotels.
G011V: Category VIII Billeting.
G011W: Category VIII Hotels.

*G012 Community Services.* DoD Directive 1015.1 contains further amplification of the categories.

G012A: Information and Referral.
G012B: Relocation Assistance.
G012C: Exceptionl Family Member.
G012D: Family Advocacy (Domestic Violence).
G012E: Foster Care.
G012F: Family Member Employment.
G012G: Installation Volunteer Coordination.
G012H: Outreach.

[1] See footnote 1 to § 169.1(a).

G012I: Volunteer Management.

G012J: Office Management.

G012K: Consumer Affairs/Financial Assistance.

G012L: General and Emergency Family Assistance.

*G900 Chaplain Activities and Support Services*. Includes commercial activities that provide non-military unique support services that supplement the command religious program such as non-pastoral counseling, organists, choir directors, and directions of religious education. The command religious program, which includes chaplains and enlisted support personnel, is a Governmental function and is excluded from this category.

*G901 Berthing BOQ/BEQ*. Includes commercial activities that provide temporary or permanent accommodations for officer or enlisted personnel. Management of the facility, room service, and daily cleaning are included.

*G904 Family Services*. Includes commercial activities that perform various social services for families, such as family counseling, financial counseling and planning, the operation of an abuse center, child care center, or family aid center.

*G999 Other Social Services*. This code will only be used for unusual circumstances and will not be used to report organizations or work that can be accommodated under a specifically defined code.

*Health Services*

*H101 Hospital Care*. Includes commercial activities that provide outpatient and inpatient care and consultative evaluation in the medical specialties, including pediatrics and psychiatry; the coordination of health care delivery relative to the examination, diagnosis, treatment, and disposition of medical inpatients.

*H102 Surgical Care*. Includes commercial activities that provide outpatient and inpatient care and consultative evaluation in the surgical specialties, including obstetrics, gynecology, ophthalmology and otorhinolaryngology; the coordination of health care delivery relative to the examination, treatment, diagnosis, and disposition of surgical patients.

*H105 Nutritional Care*. Includes commercial activities that provide hospital food services for inpatients and outpatients, dietetic treatment, counseling of patients, and nutritional education.

*H106 Pathology Services*. Includes commercial activities involved in the operation of laboratories providing comprehensive clinical and anatomical pathology services; DoD military blood program and blood bank activities; and area reference laboratories.

*H107 Radiology Services*. Includes commercial activities that provide diagnostic and therapeutic radiologic service to inpatients and outpatients, including the processing, examining, interpreting, and storage and retrieval of radiographs, fluorographs, and radiotherapy.

*H108 Pharmacy Services*. Includes commercial activities that produce, preserve, store, compound, manufacture, package, control, assay, dispense, and distribute medications (including intravenous solutions) for inpatients and outpatients.

*H109 Physical Therapy*. Includes commercial activities that provide care and treatment to patients whose ability to function is impaired or threatened by disease or injury; primarily serve patients whose actual impairment is related to neuromusculoskeletal, pulmonary, and cardiovascular systems; evaluate the function and impairment of these systems, and select and apply therapeutic procedures to maintain, improve, or restore these functions.

*H110 Materiel Services*. Includes commercial activities that provide or arrange for the supplies, equipment, and certain services necessary to support the mission of the medical facility; responsibilities include procurement, inventory control, receipt, storage, quality assurance, issue, turn-in, disposition, property accounting, and reporting actions for designated medical and nonmedical supplies and equipment.

*H111 Orthopedic Services*. Includes commercial activities that construct orthopedic appliances such as braces, casts, splints, supports, and shoes from impressions, forms, molds, and other specifications.

*H112 Ambulance Service*. Includes commercial activities that provide transportation for personnel who are injured, sick, or otherwise require medical treatment, including standby duty in support of military activities and ambulance bus services.

*H113 Dental Care*. Includes commercial activities that provide oral examinations, patient education, diagnosis, treatment, and care including all phases of restorative dentistry, oral surgery, prosthodontics, oral pathology, periodontics, orthodontics, endodontics, oral hygiene, preventive dentistry, and radiodontics.

*H114 Dental Laboratories*. Includes commercial activities that operate dental prosthetic laboratories required to support the provision of comprehensive dental care; services may include preparing casts and models, repairing dentures, fabricating transitional, temporary, or orthodontic appliances, and finishing dentures.

*H115 Clinics and Dispensaries*. Includes commercial activities that operate free-standing clinics and dispensaries that provide health care services. Operations are relatively independent of a medical treatment facility and are separable for in-house or contract performance. Health clinics, occupational health clinics, and occupational health nursing offices.

*H116 Veterinary Services*. Includes commercial activities that provide a complete wholesomeness and quality assurance food inspection program, including sanitation, inspection of food received, surveillance inspections, and laboratory examination and analysis; a complete zoonosis control program; complete medical care for Government-owned animals; veterinary medical support for biomedical research and development; support to other Federal agencies when requested and authorized; assistance in a comprehensive preventive medicine program; and determination of fitness of all foods that may have been contaminated by chemical, bacteriological, or radioactive materials.

*H117 Medical Records Transcription*. Includes commercial activities that transcribe, file, and maintain medical records.

*H118 Nursing Services*. Includes commercial activities that provide care and treatment for inpatients and outpatients not required to be performed by a doctor.

*H119 Preventive Medicine*. Includes commercial activities that operate wellness or holistic clinics (preventive medicine), information centers, and research laboratories.

*H120 Occupational Health*. Includes commercial activities that develop, monitor, and inspect installation safety conditions.

*H121 Drug Rehabilitation*. Includes commercial activities that operate alcohol treatment facilities, urine testing for drug content, and drug/alcohol counseling centers.

*H999 Other Health Services*. This code will only be used for unusual circumstances and will not be used to report organizations or work that can be accommodated under a specifically defined code.

*Intermediate, Direct, or General Repair and Maintenance of Equipment*

*Definition*. Maintenance authorized and performed by designated maintenance commercial activities in support of using activities. Normally, it is limited to replacement and overhaul of unserviceable parts, subassemblies, or assemblies. It includes (1) intermediate/direct/general maintenance performed by fixed activities that are not designed for deployment to combat areas and that provide direct support of organizations performing or designed to perform combat missions from bases in the United States, and (2) any testing conducted to check the repair procedure. Commercial activities engaged in intermediate/direct/general maintenance and/or repair of equipment are to be grouped according to the equipment predominantly handled, as follows:

*J501 Aircraft*. Aircraft and associated equipment. Includes armament, electronic and communications equipment, engines, and any other equipment that is an integral part of an aircraft.

*J502 Aircraft Engines*. Aircraft engines that are not repaired while an integral part of the aircraft.

*J503 Missiles*. Missile systems and associated equipment. Includes mechanical, electronics, and communication equipment that is an integral part of missile systems.

*J504 Vessels*. All vessels, including armament, electronics, communications and any other equipment that is an integral part of the vessel.

*J505 Combat Vehicles*. Tanks, armored personnel carriers, self-propelled artillery, and other combat vehicles. Includes armament, fire control, electronic, and communications equipment that is an integral part of a combat vehicle.

*J506 Noncombat Vehicles*. Automotive equipment, such as tactical, support, and administrative vehicles. Includes electronic and communications equipment that is an integral part of the noncombat vehicle.

*J507 Electronic and Communications Equipment*. Stationary, mobile, portable, and other electronic and communications equipment. Excludes electronic and communications equipment that is an integral part of another weapon/support system. Maintenance of Automatic Data Processing Equipment (ADPE) not an integral part of a communications system shall be reported under functional code W825; maintenance of tactical ADPE shall be reported under function code J999.

*J510 Railway Equipment*. Locomotives of any type or gauge, including steam, compressed air, straight electric, storage battery, diesel electric, gasoline, electric, diesel mechanical locomotives, railway cars, and cabooses. Includes electrical equipment for locomotives and cars, motors, generators, wiring supplies for railway tracks for both propulsion and signal circuits, and on-board communications and control equipment.

*J511 Special Equipment*. Construction equipment, weight lifting, power, and materiel handling equipment (MHE).

*J512 Armament*. Small arms, artillery and guns, nuclear munitions, chemical, biological, and radiological (CBR) items, conventional ammunition, and all other ordnance items. Excludes armament that is an integral part of another weapon or support system.

*J513 Dining Facility Equipment*. Dining facility kitchen appliances and equipment.

*J514 Medical and Dental Equipment*. Medical and dental equipment.

*J515 Containers, Textiles, Tents, and Tarpaulins*. Containers, tents, tarpaulins, other textiles, and organizational clothing.

*J516 Metal Containers*. Container Express (CONEX) containers, gasoline containers, and other metal containers.

*J517 Training Devices and Audiovisual Equipment*. Training devices and audiovisual equipment. Excludes maintenance of locally

fabricated devices and functions reported under codes T807 and T900.

*J519 Industrial Plant Equipment.* That part of plant equipment with an acquisition cost of $3,000 or more, used to cut, abrade, grind, shape, form, join, test, measure, heat, or otherwise alter the physical, electrical, or chemical properties of materiels, components, or end items entailed in manufacturing, maintenance, supply processing, assembly, or research and development operations.

*J520 Test, Measurement, and Diagnostic Equipment.* Test, measurement, and diagnostic equipment (TMDE) that has resident in it a programmable computer. Included is equipment referred to as automated test equipment (ATE).

*J521 Other Test, Measurement, and Diagnostic Equipment.* Test, measurement, and diagnostic equipment not classified as ATE or that does not contain a resident programmable computer. Includes such items as electronic meters, armament circuit testers, and other specialized testers.

*J522 Aeronautical Support Equipment.* Aeronautical support equipment excluding TMDE (and ATE). Includes such items as ground electrical power carts, aircraft tow tractors, ground air conditioners, engine stands, and trailers. Excludes aeronautical equipment reported under J501.

*J999 Other Intermediate, Direct, or General Repair and Maintenance of Equipment.* This code will only be used for unusual circumstances and will not be used to report organizations or work that can be accommodated under a specifically defined code.

*Depot Repair, Maintenance, Modification, Conversion, or Overhaul of Equipment*

*Definition.* The maintenance performed on materiel that requires major overhaul or a complete rebuild of parts, assemblies, subassemblies, and end items, including the manufacture of parts, modifications, testing, and reclamation, as required. Depot maintenance serves to support lower categories of maintenance. Depot maintenance provides stocks of serviceable equipment by using more extensive facilities for repair than are available in lower level maintenance activities. (See DoD Instruction 4151.15[2] for further amplification of the category definitions reflected below.) Depot or indirect maintenance functions are identified by the type of equipment maintained or repaired.

*K531 Aircraft.* Aircraft and associated equipment. Includes armament, electronics and communications equipment, engines, and any other equipment that is an integral part of an aircraft. Aeronautical support equipment not reported separately under code K548.

[2] See footnote 1 to §169a.1(a).

*K532 Aircraft Engines.* Aircraft engines that are not repaired while an integral part of the aircraft.

*K533 Missiles.* Missile systems and associated equipment. Includes mechanical, electronic, and communications equipment that is an integral part of missile systems.

*K534 Vessels.* All vessels, including armament, electronics, and communications equipment, and any other equipment that is an integral part of a vessel.

*K535 Combat Vehicles.* Tanks, armored personnel carriers, self-propelled artillery, and other combat vehicles. Includes armament, fire control, electronics, and communications equipment that is an integral part of a combat vehicle.

*K536 Noncombat Vehicles.* Automotive equipment, such as tactical support and administrative vehicles. Includes electronic and communications equipment that is an integral part of the vehicle.

*K537 Electronic and Communications Equipment.* Stationary, mobile, portable, and other electronics and communications equipment. Excludes electronic and communications equipment that is an integral part of another weapon/support system. Maintenance of ADPE, not an integral part of a communications system, is reported under functional code W825.

*K538 Railway Equipment.* Locomotives of any type or gauge, including steam, compressed air, straight electric, storage battery, diesel electric, gasoline, electric, diesel mechanical locomotives, railway cars, and cabooses. Includes electrical equipments for locomotives and cars, motors, generators, wiring supplies for railway tracks for both propulsion and signal circuits, and on-board communication and control equipment.

*K539 Special Equipment.* Construction equipment, weight lifting, power, and materiel-handling equipment.

*K540 Armament.* Small arms; artillery and guns; nuclear munitions, CBR items; conventional ammunition; and all other ordnance items. Excludes armament that is an integral part of another weapon or support system.

*K541 Industrial Plant Equipment.* That part of plant equipment with an acquisition cost of $3,000 or more, used to cut, abrade, grind, shape, form, join, test, measure, heat, or otherwise alter the physical, electrical, or chemical properties of materials, components, or end items entailed in manufacturing, maintenance, supply, processing, assembly, or research and development operations.

*K542 Dining Facility Equipment.* Dining facility kitchen applicances and equipment. This includes field feeding equipment.

*K543 Medical and Dental Equipment.* Medical and dental equipment.

*K544 Containers, Textiles, Tents and Tarpaulins.* Containers, tents, tarpaulins, and other textiles.

*K545 Metal Containers.* CONEX containers, gasoline containers, and other metal containers.

*K546 Test Measurement and Diagnostic Equipment.* Test measurement and diagnostic equipment (TMDE) that has resident in it a programmable computer. Included is equipment referred to as automated test equipment (ATE).

*K547 Other Test Measurement and Diagnostic Equipment.* Test measurement and diagnostic equipment not classfied as ATE or that does not contain a resident programmable computer. Includes such items as electronic meters, armament circuit testers, and other specialized testers.

*K548 Aeronautical Support Equipment.* Aeronautical support equipment excluding TMDE (and ATE). Includes such items as ground electrical power carts, aircraft tow tractors, ground air conditioners, engine stands, and trailers. Excludes aeronautical support equipment reported under code K531.

*K999 Other Depot Repair, Maintenance, Modification, Conversion, or Overhaul of Equipment.* This code will only be used for unusual circumstances and will not be used to report organizations or work that can be accommodated under a specifically defined code.

*Base Maintenance/Multifunction Contracts*

*P100 Base Maintenance/Multifunction Contracts.* Includes all umbrella-type contracts where the contractor performs more than one function at one or more installations. (Identify specific functions as nonadd entries.)

*Research, Development, Test, and Evaluation (RDT&E) Support*

*R660 RDT&E Support.* Includes all effort not reported elsewhere directed toward support of installation or operations required for research, development, test, and evaluation use. Included are maintenance support of laboratories, operation and maintenance of test ranges, and maintenance of test aircraft and ships.

*Installation Services*

*S700 Natural Resource Services.* Includes those commercial activities that provide products or services that implement natural resource management plans in the areas of fish, game, wildlife, forestry, watershed areas or ground water table, erosion control, and mineral deposit management. Natural resources planning and management is a governmental function and will not be reported.

*S701 Advertising and Public Relations Services.* Includes commercial activities responsible for advertising and public relations in support of public affairs offices, installation newspapers and publications, and information offices.

*S702 Financial and Payroll Services.* Includes commercial activities that prepare payroll, print checks, escrow, or change payroll accounts for personnnel. Includes other services normally associated with banking operations.

*S703 Debt Collection.* Includes commercial activities that monitor, record, and collect debts incurred by overdrafts, bad checks, or delinquent accounts.

*S706 Installation Bus Services.* Includes commercial activities that operate local, intrapost, and interpost scheduled bus services. Includes scheduled movement of personnel over regular routes by administrative motor vehicles to include taxi and dependent school bus services.

S706A Scheduled Bus Services.
*S706B* Unscheduled Bus Services
*S706C* Dependent School Bus Services.
*S706D* Other Bus Services.

*S708 Laundry and Dry Cleaning Services.* Including commercial activities that operate and maintain laundry and dry cleaning facilities.

*S709 Custodial Services.* Includes commercial activities that provide janitorial and housekeeping services to maintain safe and sanitary conditions and preserve property.

*S710 Pest Management.* Includes commercial activities that provide control measures directed against fungi, insects, rodents, and other pests.

*S712 Refuse Collection and Disposal Services.* Includes commercial activities that operate incinerators, sanitary fills, and regulated dumps, and perform all other approved refuse collection and disposal services.

*S713 Food Services.* Includes commercial activities engaged in the operation and administration of food preparation and serving facilities. Excludes operation of central bakeries, pastry kitchens, and central meat processing facilities that produce a product and are reported under functional area X934. Excludes hospital food service operations (under code H105).

S713A: Food Preparation and Administration.
S713B: Mess Attendants and Housekeeping Services.

*S714 Furniture.* Includes commercial activities that repair and refurbish furniture.

*S715 Office Equipment.* Includes commercial activities that maintain and repair typewriters, calculators, and adding machines.

*S716 Motor Vehicle Operation.* Includes commercial activities that operate local administrative motor transportation services. Excludes installation bus services reported in functional area S706.

S716A: Taxi Service.
S716B: Bus Service (unless in S706).

S716C: Motor Pool Operations.

S716D: Crane Operation (includes rigging, excludes those listed in T800G).

S716E: Heavy Truck Operation.

S716F: Construction Equipment Operation.

S716I: Driver/Operator Licensing & Test.

S716J: Other Vehicle Operations (Light Truck/Auto).

S716K: Fuel Truck Operations.

S716M: Tow Truck Operations.

*S717 Motor Vehicle Maintenance*. Includes commercial activities that perform maintenance on automotive equipment, such as support and administrative vehicles. Includes electronic and communications equipment that are an integral part of the vehicle.

S717A: Upholstery Maintenance and Repair.

S717B: Glass Replacement and Window Repair.

S717C: Body Repair and Painting.

S717D: Accessory Overhaul.

S717E: General Repairs/Minor Maintenance.

S717F: Battery Maintenance and Repair.

S717G: Tire Maintenance and Repair.

S717H: Major Component Overhaul.

S717I: Material Handling Equipment Maintenance.

S717J: Crane Maintenance.

S717K: Construction Equipment Maintenance.

S717L: Frame and Wheel Alignment.

S717M: Other Motor Vehicle Maintenance.

*S718 Fire Prevention and Protection*. Includes commercial activities that operate and maintain fire protection and preventive services. Includes routine maintenance and repair of fire equipment and the installation of fire prevention equipment.

S718A: Fire Protection Engineering.

S718B: Fire Station Administration.

S718C: Fire Prevention.

S718D: Fire Station Operations.

S718E: Crash and Rescue.

S718F: Structural Fire Suppression.

S718G: Fire & Crash/Rescue Equipment Major Maintenance.

S718H: Other Fire Prevention and Protection.

*S719: Military Clothing*. Includes commercial activities that order, receive, store, issue, and alter military clothing and repair military shoes. Excludes repair of organizational clothing reported under code J515.

*S724: Guard Service*. Includes commercial activities engaged in physical security operations that provide for installation security and intransit protection of military property from loss or damage.

S724A: Ingress and egress control. Regulation of persons, material, and vehicles entering or exiting a designated area to provide protection of the installation and Government property.

S724B: Physical security patrols and posts. Mobile and static physical security guard activities that provide protection of installation or Government property.

S724C: Conventional arms, ammunition, and explosives (CAAE) security. Dedicated security guards for CAAE.

S724D: Animal control. Patrolling for, capture of, and response to complaints about uncontrolled, dangerous, and disabled animals on military installations.

S724E: Visitor information services. Providing information to installation resident and visitors about street, agency, unit, and activity locations.

S724F: Vehicle impoundment. Removal, accountability, security, and processing of vehicles impounded on military installations.

S724G: Registration functions. Administration, filing, processing, and retrieval information about privately owned items that must be registered on military installations.

S724S: Other guard service.

*S725 Electrical Plants and Systems*. Includes commercial activities that operate, maintain, and repair Government-owned electrical plants and systems.

*S726 Heating Plants and Systems*. Includes commercial activities that operate, maintain, and repair Government-owned heating plants and systems over 750,000 British Thermal Unit (BTU) capacity. Codes Z991 or Z992 will be used for systems under 750,000 BTU capacity, as applicable.

*S727 Water Plants and Systems*. Includes commercial activities that operate, maintain, and repair Government-owned water plants and systems.

*S728 Sewage and Waste Plants and Systems*. Includes commercial activities that operate, maintain, and repair Government-owned sewage and waste plants and systems.

*S729 Air Conditioning and Refrigeration Plants*. Includes commercial activities that operate, maintain, and repair Government-owned air conditioning and refrigeration plants over 5-ton capacity. Codes Z991 or Z992 shall be used for plants under 5-ton capacity as applicable.

*S730 Other Services or Utilities*. Includes commercial activities that operate, maintain, and repair other Government-owned services or utilities.

*S731 Base Supply Operations*. Includes commercial activities that operate centralized installation supply functions providing supplies and equipment to all assigned or attached units. Performs all basic supply functions to determine requirements for all requisition, receipt, storage, issuance, and accountability for materiel.

*S732 Warehousing and Distribution of Publications*. Includes commercial activities that receive, store, and distribute publications and blank forms.

*S740 Installation Transportation Office*. Includes technical, clerical, and administrative

commercial activities that support traffic management services related to the procurement of freight and passenger service from commercial ''for hire'' transportation companies. Excludes restricted functions that must be performed by Government employees such as the review, approval, and signing of documents related to the obligation of funds; selection of mode or carrier; evaluation of carrier performance; and carrier suspension. Excludes installation transportation functions described under codes S706, S716, S717, T810, T811, T812, and T814.

S740A: Installation Transportation Management and Administration.

S740B: Materiel Movements.

S740C: Personnel Movements.

S740D: Personal Property Activities.

S740E: Quality Control and Inspection.

S740F: Unit Movements.

*S750 Museum Operations.*

*S760 Contractor-Operated Parts Stores and Contractor-Operated Civil Engineering Supply Stores.*

*S999 Other Installation Services.* This code will only be used for unusual circumstances and will not be used to report organizations or work that can be accommodated under a specifically defined code.

*Other Nonmanufacturing Operations*

*T800 Ocean Terminal Operations.* Includes commercial activities that operate terminals transferring cargo between overland and sealift transportation. Includes handling of Government cargo through commercial water terminals.

T800A: Pier Operations. Includes commercial activities that provide stevedore and shipwright carpentry operations supporting the loading, stowage, and discharge of cargo and containers on and off ships, and supervision of operations at commercial piers and military ocean terminals.

T800B: Cargo Handling Equipment. Includes commercial activities that operate and maintain barge derricks, gantries, cranes, forklifts, and other materiel handling equipment used to handle cargo within the terminal area.

T800C: Port Cargo Operations. Includes commercial activities that load and unload railcars and trucks, pack, repack, crate, warehouse, and store cargo moving through the terminal, and stuff and unstuff containers.

T800D: Vehicle Preparation. Includes commercial activites that prepare Government and privately owned vehicles (POVs) for ocean shipment, inspection, stowage in containers, transportation to pier, processing, and issue of import vehicles to owners.

T800E: Lumber Operations. Includes commercial activities that segregate reclaimable lumber from dunnage removed from ships, railcars, and trucks; remove nails; even lengths; inspect; and return the lumber to inventory for reuse. Includes receipt, storage, and issue of new lumber.

T800F: Materiel Handling Equipment (MHE) Operations. Includes commercial activities that deliver MHE to user agencies, perform onsite fueling, and operate special purpose and heavy capacity equipment.

T800G: Crane Operations. Includes commercial activities that operate and perform first-echelon maintenance of barge derricks, gantries, and truck-mounted cranes in support of vessels and terminal cargo activities.

T800H: Breakbulk Cargo Operations. Includes commercial activities that provide stevedoring, shipwright carpentry, stevedore transportation, and the loading and unloading of noncontainerized cargo.

T800I: Other Ocean Terminal Operations.

*T801 Storage and Warehousing.* Includes commercial activities that receive materiel into depots and other storage and warehousing facilities, provide care for supplies, and issue and ship materiel. Excludes installation supply in support of unit and tenet activities described in S731.

T801A: Receipt. Includes commercial activities that receive supplies and related documents and information. This includes materiel handling and related actions, such as materials segregation and checking, and tallying incident to receipt.

T801B: Packing and Crating of Household Goods. Includes commercial activities performing packing and crating operations described in T801H, incident to the movement or storage of household goods.

T801C: Shipping. Includes commercial activities that deliver stocks withdrawn from storage to shipping. Includes onloading and offloading of stocks from transportation carriers, blocking, bracing, dunnage, checking, tallying, and materiel handling in central shipping area and related documentation and information operations.

T801D: Care, Rewarehousing, and Support of Materiel. Includes commercial activities that provide for actions that must be taken to protect stocks in storage, including physical handling, temperature control, assembly placement and preventive maintenance of storage aids, and realigning stock configuration; provide for movement of stocks from one storage location to another and related checking, tallying, and handling; and provide for any work being performed within general storage support that cannot be identified clearly as one of the subfunctions described above.

T801E: Preservation and Packaging. Includes commercial activities that preserve, represerve, and pack materiel to be placed in storage or to be shipped. Excludes application of final (exterior) shipping containers.

T801F: Unit and Set Assembly and Disassembly. Includes commercial activities that gather or bring together items of various nomenclature (parts, components, and

basic issue items) and group, assemble, or restore them to or with an item of another nomenclature (such as parent end item or assemblage) to permit shipment under a single document. This also includes blocking, bracing, and packing preparations within the inner shipping container; physical handling and loading; and reverse operation of assembling such units.

T801G: Special Processing of Non Stock Fund-Owned Materiel. Includes commercial activities performing special processing actions described below that must be performed on Inventory Control Point (ICP)-controlled, nonstock fund-owned materiel by technically qualified depot maintenance personnel, using regular or special maintenance tools or equipment. Includes disassembly or reassembly or reserviceable ICP-controlled materiel being readied for movement, in-house storage, or out-of-house location such as a port to a commercial or DoD-operated maintenance or storage facility, property disposal or demilitarization activity, including blocking, bracing, cushioning, and packing.

T801H: Packing and Crating. Includes commercial activities that place supplies in their final, exterior containers ready for shipment. Includes the nailing, strapping, sealing, stapling, masking, marking, and weighing of the exterior container. Also, includes all physical handling, unloading, and loading of materiel, within the packing and shipping area; checking and tallying material in and out; all operations incident to packing, repacking, or recrating for shipment, including on-line fabrication of tailored boxes, crates, bit inserts, blocking, bracing and cushioning shrouding, overpacking, containerization, and the packing of materiel in transportation containers. Excludes packing of household goods and personnel effects reported under code T801B.

T801I: Other Storage and Warehousing.

*T802 Cataloging*. Includes commercial activity that prepare supply catalogs and furnish cataloging data on all items of supply for distribution to all echelons worldwide. Includes catalog files, preparation, and revision of all item identifications for all logistics functions; compilation of Federal catalog sections and allied publication; development of Federal item identification guides, and procurement identification descriptions. Includes printing and publication of Federal supply catalogs and related allied publications.

*T803 Acceptance Testing*. Includes commercial activities that inspect and test supplies and materiel to ensure that products meet minimum requirements of applicable specifications, standards, and similar technical criteria; laboratories and other facilities with inspection and test capabilities; and activities engaged in production acceptance testing of ammunition, aircraft armament, mobility material, and other military equipment.

T803A: Inspection and Testing of Oil and Fuel.

T803B: Other Acceptance Testing.

*T804 Architect-Engineering Services*. Includes commercial activities that provide Architect/Engineer (A/E) services. Excludes Engineering Technical Services (ETS) reported in functional area T813, and those required under 40 U.S.C. 541–554.

*T805 Operation of Bulk Liquid Storage*. Includes commercial activities that operate bulk petroleum storage facilities. Includes operation of off-vessel discharging and loading facilities, fixed and portable bulk storage facilities, pipelines, pumps, and other related equipment within or between storage facilities or extended to using agencies (excludes aircraft fueling services); handling of drums within bulk fuel activities. Excludes aircraft fueling services reported under code T814.

*T806 Printing and Reproduction*. Includes commercial activities that print, duplicate, and copy. Excludes user-operated office copying equipment.

*T807 Audiovisual and Visual Information Services*. Includes commercial activities that provide base audiovisual (AV) and visual information (VI) support, production, depositories, technical documentation, and broadcasting.

T807A: Base VI Support. Includes commercial activities that provide production activities that provide general support to all installation, base, facility or site, organizations or activities. Typically, they supply motion picture, still photography, television, and audio recording for nonproduction documentary purposes, their laboratory support, graphic arts, VI libraries, and presentation services.

T807B: AV Production. Includes commercial activities that provide a self-contained, complete presentation, developed according to a plan or script, combining sound with motion media (film, tape or disc) for the purpose of conveying information to, or communicating with, an audience. (An AV production is distinguished from a VI production by the absence of combined sound and motion media in the latter.)

T807C: VI Depositories. Includes commercial activities that are especially designed and constructed for the low-cost and efficient storage and furnishing of reference service on semicurrent records pending their ultimate disposition. Includes records centers.

T807D: VI Technical Documentation. Includes commercial activities that provide a technical documentation (TECDOC) which is a continuous visual recording (with or without sound as an integral documentation

component) of an actual event made for purposes of evaluation. Typically, TECDOC contributes to the study of human or mechanical factors, procedures and processes in the context of medicine, science logistics, research, development, test and evaluation, intelligence, investigations and armament delivery.

T807E: Electronic Media Transmission. Includes commercial activities that transmit and receive audio and video signals for closed circuit local and long distance multistation networking and broadcast operations.

T807F: VI Documentation. Includes commercial activities that provide motion media (film or tape) still photography and audio recording of technical and nontechnical events, as they occur, usually not controlled by the recording crew. VI documentation (VIDOC) encompasses Operational Documentation (OPDOC) and TECDOC. OPDOC is VI (photographic or electronic) recording of activities, or multiple perspectives of the same activity, to convey information about people, places and things.

T807G: AV Central Library (Inventory Control Point). Includes commercial activities that receive, store, issue, and maintain AV products at the central library level. May or may not include records center operations for AV products.

T807K: AV or VI Design Service. Includes commercial activities that provide professional consultation services involving the selection, design, and development of AV or VI equipment or facilities.

*T808 Mapping and Charting*. Includes commercial activities that design, compile, print, and disseminate cartographic and geodetic products.

*T809 Administrative Telephone Service*. Includes commercial activities that operate and maintain the common-user, administrative telephone systems at DoD installations and activities. Includes telephone operator services; range communications; emergency action consoles; and the cable distribution portion of a fire alarm, intrusion detection, emergency monitoring and control data, and similar systems that require use of a telephone system.

*T810 Air Transportation Services*. Includes commercial activities that operate and maintain nontactical aircraft that are assigned to commands and installations and used for administrative movement of personnel and supplies.

*T811 Water Transportation Services*. Includes commercial activities that operate and maintain nontactical watercraft that are assigned to commands and installations and are used for administrative movement of personnel and supplies.

T811A: Water Transportation Services (except tug operations).

T811B: Tug Operations.

*T812 Rail Transportation Services*. Includes commercial activities that operate and maintain nontactical rail equipment assigned to commands and installation and used for administrative movement of personnel and supplies.

*T813 Engineering and Technical Services*. Includes commercial activities that advise, instruct, and train DoD personnel in the installation, operation, and maintenance of DoD weapons, equipment, and systems.

These services include transmitting the technical skill capability to DoD personnel in order for them to install, maintain, and operate such equipment and keep it in a high state of military readiness.

T813A: Contractor Plant Services. Includes commercial manufacturers of military equipment contracted to provide technical and engineering services to DoD personnel. Qualified employees of the manufacturer furnish these services in the manufacturer plants and facilities. Through this program, the special skills, knowledge, experience, and technical data of the manufacturer are provided for use in training, training aid programs, and other essential services directly related to the development of the technical capability required to install, operate, maintain, supply, and store such equipment.

T813B: Contract Field Services (CFS). Includes commercial activities that provide services of qualified contractor personnel who provide onsite technical and engineering services to DoD personnel.

T813C: In-house Engineering and Technical Services. Includes commercial activities that provide technical and engineering services described in codes T813A and T813B above that are provided by Government employees.

T813D: Other Engineering and Technical Services.

*T814 Fueling Service (Aircraft)*. Includes commercial activities that distribute aviation petroleum/oil/lubricant products. Includes operation of trucks and hydrants.

*T815 Scrap Metal Operation*. Includes commercial activities that bale or shear metal scrap and melt or sweat aluminum scrap.

*T816 Telecommunication Centers*. Includes commercial activities that operate and maintain telecommunication centers, nontactical radios, automatic message distribution systems, technical control facilities, and other systems integral to the communication center. Includes operations and maintenance of air traffic control equipment and facilities.

*T817 Other Communications and Electronics Systems*. Includes commercial activities that operate and maintain communications and electronics systems not included in T809 and T816.

*T818 Systems Engineering and Installation of Communications Systems*. Includes commercial activities that provide engineering and

installation services, including design and drafting services associated with functions specified in T809, T816, and T817.

*T819 Preparation and Disposal of Excess and Surplus Property*. Includes commercial activities that accept, classify, and dispose of surplus Government property, including scrap metal.

*T820 Administrative Support Services*. Includes commercial activities that provide centralized administrative support services not included specifically in another functional category. These activities render services to multiple activities throughout an organization or to multiple organizations; such as, a steno or typing pool rather than a secretary assigned to an individual. Typical activities included are word processing centers, reference and technical libraries, microfilming, messenger service, translation services, publication distribution centers, etc.

T820A: Word Processing Centers.

T820B: Reference and Technical Libraries.

T820C: Microfilming.

T820D: Internal Mail and Messenger Services.

T820E: Translation Services.

T820F: Publication Distribution Centers.

T820G: Field Printing and Publication. Includes those activities that print or reproduce official publications, regulations, and orders. Includes management and operation of the printing facility.

T820H: Compliance Auditing.

T820I: Court Reporting.

*T821 Special Studies and Analyses*. Includes commercial activities that perform research, collect data, conduct time-motion studies, or pursue some other planned methodology in order to analyze a specific issue, system, device, boat, plane, or vehicle for management. Such activities may be temporary or permanent in nature.

T821A: Cost Benefit Analyses.

T821B: Statistical Analyses.

T821C: Scientific Data Studies.

T821D: Regulatory Studies.

T821E: Defense, Education, Energy Studies.

T821F: Legal/Litigation Studies.

T821G: Management Studies.

*T900 Training Devices and Simulators*. Includes commercial activities that provide training aids, devices, simulator design, fabrication, issue, operation, maintenance, support, and services.

T900A: Training Aids, Devices, and Simulator Support. Includes commercial activities that design, fabricate, stock, store, issue, receive, and account for and maintain training aids, devices, and simulators (does not include audiovisual production and associated services or audiovisual support).

T900B: Training Device and Simulator Operation. Includes commercial activities that operate and maintain training device and simulator systems.

*T999 Other Nonmanufacturing Operations*.

*Education and Training*

Includes commercial activities that conduct courses of instruction attended by civilian or military personnel of the Department of Defense. Terminology of categories and subcategories primarily for military personnel (marked by an asterisk) follows the definitions of the statutory *Military Manpower Training Report* submitted annually to the Congress. This series includes only the conduct of courses of instruction; it does not include education and training support functions (that is, Base Operations Functions in the S series and Nonmanufacturing Operations in the T series). A course is any separately identified instructional entity or unit appearing in a formal school or course catalog.

*U100 Recruit Training*.* The instruction of recruits.

*U200 Officer Acquisition Training*.* Programs concerned with officer acquisition training.

*U300 Specialized Skill Training*.* Includes Army One-Station Unit Training, Naval Apprenticeship Training, and health care training.

*U400 Flight Training*.* Includes flight familiarization training.

*U500 Professional Development Education**

*U510 Professional Military Education*.* Generally, the conduct of instruction at basic, intermediate, and senior Military Service schools and colleges and enlisted leadership training does not satisfy the requirements of the definition of a DoD CA and is excluded from the provision of this Instruction.

*U520 Graduate Education, Fully Funded, Full-Time**

*U530 Other Full-Time Education Programs**

*U540 Off-Duty (Voluntary) and On-Duty Education Programs*.* Includes the conduct of Basic Skills Education Program (BSEP), English as a Second Language (ESL), skill development courses, graduate, undergraduate, vocational/technical, and high school completion programs for personnel without a diploma.

*U600 Civilian Education and Training*. Includes the conduct of courses intended primarily for civilian personnel.

*U700 Dependent Education*. Includes the conduct of elementary and secondary school courses of instruction for the dependents of DoD overseas personnel.

*U800 Training Development and Support* (not reported elsewhere)

*U999 Other Training*. This code will only be used for unusual circumstances and will not be used to report organizations or work that can be accommodated under a specifically defined code.

*Automatic Data Processing*

*W824 Data Processing Services*. Includes commercial activities that provide ADP

processing services by using Government-owned or -leased ADP equipment; or participating in Government-wide ADP sharing program; or procuring of time-sharing processing services (machine time) from commercial sources. Includes all types of data processing services performed by general purpose ADP and peripheral equipment.

W824A: Operation of ADP Equipment.

W824B: Production Control and Customer Services.

W824C: ADP Magnetic Media Library.

W824D: Data Transcription/Data Entry Services.

W824E: Transmission and Teleprocessing Equipment Services.

W824F: Acceptance Testing and Recovery Systems.

W824G: Punch Card Processing Services.

W824H: Other ADP Operations and Support.

*W825 Maintenance of ADP Equipment*. Includes commercial activities that maintain and repair all Government-owned ADP equipment and peripheral equipment.

*W826 Systems Design, Development, and Programing Services*. Includes commercial activities that provide software services associated with nontactical ADP operation.

W826A: Development and Maintenance of Applications Software.

W826B: Development and Maintenance of Systems Software.

*W827 Software Services for Tactical Computers and Automated Test Equipment*. Includes commercial activities that provide software services associated with tactical computers and TMDE and ATE hardware.

*W999 Other Automatic Data Processing*. This code will only be used for unusual circumstances and will not be used to report organizations or work that can be accommodated under a specifically defined code.

*Products Manufactured and Fabricated In-House*

Commercial activities that manufacture and/or fabricate products in-house are grouped according to the products predominantly handled as follows:

*X931 Ordnance Equipment*. Ammunition and related products.

*X932 Products Made from Fabric or Similar Materials*. Including the assembly and manufacture of clothing, accessories, and canvas products.

*X933 Container Products and Related Items*. Including the design, engineering, and manufacture of wooden boxes, crates, and other containers; includes the fabrication of fiberboard boxes, and assembly of paperboard boxes with metal straps. Excludes on-line fabrication of boxes and crates reported in functional area T801.

*X934 Food and Bakery Products*. Including the operation of central meat processing plants, pastry kitchens, and bakery facilities. Excludes food services reported in functional areas S713 and H105.

*X935 Liquid, Gaseous, and Chemical Products*. Including the providing of liquid oxygen and liquid nitrogen.

*X936 Rope, Cordage, and Twine Products; Chains and Metal Cable Products*

*X937 Logging and Lumber Products*. Logging and sawmill operations.

*X938 Communications and Electronic Products*.

*X939 Construction Products*. The operation of quarries and pits, including crushing, mixing, and concrete and asphalt batching plants.

*X940 Rubber and Plastic Products*.

*X941 Optical and Related Products*.

*X942 Sheet Metal Products*.

*X943 Foundry Products*.

*X944 Machined Parts*.

*X999 Other Products Manufactured and Fabricated In-House*. This code will only be used for unusual circumstances and will not be used to report organizations or work that can be accommodated under a specifically defined code.

*Maintenance, Repair, Alteration, and Minor Construction of Real Property*.

*Z991 Buildings and Structures—Family Housing*. Includes commercial activities that are engaged in exterior and interior painting and glazing; roofing, interior plumbing; interior electric; interior heating equipment, including heat sources under 750,000 BTU capacity; installed food service and related equipment, air conditioning and refrigeration under a 5-ton capacity; elevators; and other equipment affixed as part of the building and not included in other activities. Includes fencing, flagpoles, and other miscellaneous structures associated with family housing.

Z991A: Rehabilitation—Tenant Change.

Z991B: Roofing.

Z991C: Glazing.

Z991D: Tiling.

Z991E: Exterior Painting.

Z991F: Interior Painting

Z991G: Flooring.

Z991H: Screens, Blinds, etc.

Z991I: Appliance Repair.

Z991J: Electrical Repair. Includes elevators, escalators, and moving walks.

Z991K: Plumbing.

Z991L: Heating Maintenance.

Z991M: Air Conditioning Maintenance.

Z991N: Emergency/Service Work.

Z991T: Other Work.

*Z992 Buildings and Structures (Other Than Family Housing)*. Includes commercial activities that are engaged in exterior and interior painting and glazing; roofing, interior plumbing; interior electric; interior heating equipment, including heat sources under 750,000 BTU capacity; installed foor service and related equipment; air conditioning and

refrigeration under a 5-ton capacity; elevators; and other equipment affixed as part of the building and not reported under other functional codes. Includes fencing, flagpoles, guard and watchtowers, grease racks, unattached loading ramps, training facilities other than buildings, monuments, grandstands and bleachers, elevated garbage racks, and other miscellaneous structures.

Z992A: Rehabilitation—Tenant Change.
Z992B: Roofing.
Z992C: Glazing.
Z992D: Tiling.
Z992E: Exterior Painting.
Z992F: Interior Painting.
Z992G: Flooring.
Z992H: Screens, Blinds, etc.
Z992I: Appliance Repair.
Z992J: Electrical Repair. Includes elevators, escalators, and moving walkways.
Z992K: Plumbing.
Z992L: Heating Maintenance.
Z992M: Air Conditioning Maintenance.
Z992N: Emergency/Service Work.
Z992T: Other Work.

*Z993 Grounds and Surfaced Areas*. Commercial activities that maintain, repair, and alter grounds and surfaced areas defined in codes Z993A, B, and C, below.

Z993A: Grounds (Improved). Includes improved grounds, including lawns, drill fields, parade grounds, athletic and recreational facilities, cemeteries, other ground areas, landscape and windbreak plants, and accessory drainage systems.

Z993B: Grounds (Other than Improved). Small arms ranges, antenna fields, drop zones, and firebreaks. Also grounds such as wildlife conservation areas, maneuver areas, artillery ranges, safety and security zones, desert, swamps, and similar areas.

Z993C: Surfaced Areas. Includes airfield pavement, roads, walks, parking and open storage areas, traffic signs and markings, storm sewers, culverts, ditches, and bridges. Includes sweeping and snow removal from streets and airfields.

*Z997 Railroad Facilities*. Includes commercial activities that maintain, repair, and alter narrow and standard gauge two-rail tracks, including spurs, sidings, yard, turnouts, frogs, switches, ties, ballast, and roadbeds, with accessories and appurtenances, drainage facilities, and trestles.

*Z998 Waterways and Waterfront Facilities*. Includes commercial activities that maintain, repair, and alter approaches, turning basin, berth areas and maintenance dredging, wharves, piers, docks, ferry racks, transfer bridges, quays, bulkheads, marine railway dolphins, mooring, buoys, seawalls, breakwaters, causeways, jetties, revetments, etc. Excludes waterways maintained by the Army Corps of Engineers (COE) rivers and harbors programs. Also excludes buildings, grounds, railroads, and surfaced areas located on waterfront facilities.

*Z999 Other Maintenance, Repair, Alteration, and Minor Construction of Real Property*. This code will only be used for unusual circumstances and will not be used to report organizations or work that can be accommodated under a specifically defined code.

[50 FR 40805, Oct. 7, 1985, as amended at 57 FR 29210, July 1, 1992]

## APPENDIX B TO PART 169a—COMMERCIAL ACTIVITIES INVENTORY REPORT AND FIVE-YEAR REVIEW SCHEDULE

### *A. General Instructions*

1. Forward your inventory report before January 1 to the Director, Installations Management, 400 Army Navy Drive, Room 206, Arlington, VA 22202–2884. Use Report Control Symbol ''DD-A&T(A) 1540'' as your authority to collect this data.

2. Transmit by use of floppy diskette. Data files must be in American Standard Code Information Interchange text file format on a MicroSoft-Disk Operating System formatted 3.5 inch floppy diskette. Provide submissions in the Defense Utility Energy Reporting System format as specified below.

3. *Data Format: In-House DoD Commercial Activities*

| Data element | Tape positions | Field | Type data [1] |
|---|---|---|---|
| Designator | 1 | A | A |
| Installation | ..... | A1 | |
| —State, territory, or possession. | 2–3 | A1a | N |
| —Place | 4–9 | A1b | A/N |
| +Function | 10–14 | A2 | A/N |
| In-house civilian workload. | 15–20 | A3 | N |
| Military workload | 21–26 | A4 | N |
| +Reason for in-house operation. | 49 | A8 | A |
| +Most recent year in-house operation approved. | 50–51 | A9 | N |
| +Year DoD CA scheduled for next review. | 52–53 | A10 | N |
| Installation name | 76–132 | A11 | A |

[1] A=Alpha; N=Numeric. A and A/N data shall be left justified space filled, N data shall be right justified and zero filled. +Items marked with a cross (+) have been registered in the DoD Data Element Dictionary.

4. When definite coding instructions are not provided, reference must be made to DoD 5000.12–M.[1] Failure to follow the coding instructions contained in this document, or those published in DoD 5000.12–M makes the DoD Component responsible for noncompliance of required concessions in data base communication.

[1] See Footnote 1 to §169a.1(a).

*B. Entry Instructions*

| Field | Instruction |
|---|---|
| A | Enter an A to designate that the data to follow on this record pertains to a particular DoD CA. |
| A1a | Enter the two-position numeric code for State (Data element reference ST-GA) or U.S. territory or possession, as shown in attachment 1 to Appendix B of this part. |
| A1b | Enter the unique alpha-numeric code established by the DoD Component for military installation, named populated place, or related entity where the CA workload was performed during the fiscal year covered by this submission. A separate look-up listing or file should be provided showing each unique place code and its corresponding place name. |
| A2 | Enter the function code from Appendix A to this part that best describes the type of CA workload principally performed by the CA covered by this submission. Left justify. |
| A3 | Enter total (full- and part-time) in-house civilian workyear equivalents applied to the performance of the function during fiscal year. Round off to the nearest whole workyear equivalent. (If amount is equal to or greater than .5, round up. If amount is less than .5, round down. Amounts between zero and 0.9 should be entered as one). Right justify. Zero fill. |
| A4 | Enter total military workyear equivalents applied to the performance of the function in the fiscal year. Round off to the nearest whole workyear equivalent. (Amounts between zero and one should be entered as one). Right justify. Zero fill. |
| A8 | Enter the reason for in-house operation of the CA, as shown in attachment 2 to Appendix B of this part. |
| A9 | Enter the last two digits of the most recent fiscal year corresponding to the reason for in-house operation of the CA, as stated in Field A8. |
| A10 | Enter the last two digits of the fiscal year the function is scheduled for study or next review. (Data element reference YE-NA.) |
| A11 | Enter the named populated place, or related entity, where the CA workload was performed. |

ATTACHMENT 1 TO APPENDIX B TO PART 169a—CODES FOR DENOTING STATES, TERRITORIES, AND POSSESSIONS OF THE UNITED STATES.

*a. Numeric State Codes (Data element reference ST-GA)*

Code

01 Alabama
02 Alaska
04 Arizona
05 Arkansas
06 California
08 Colorado
09 Connecticut
10 Delaware
11 District of Columbia
12 Florida
13 Georgia
15 Hawaii
16 Idaho
17 Illinois
18 Indiana
19 Iowa
20 Kansas
21 Kentucky
22 Louisiana
23 Maine
24 Maryland
25 Massachusetts
26 Michigan
27 Minnesota
28 Mississippi
29 Missouri
30 Montana
31 Nebraska
32 Nevada
33 New Hampshire
34 New Jersey
35 New Mexico
36 New York
37 North Carolina
38 North Dakota
39 Ohio
40 Oklahoma
41 Oregon
42 Pennsylvania
44 Rhode Island
45 South Carolina
46 South Dakota
47 Tennessee
48 Texas
49 Utah
50 Vermont
51 Virginia
53 Washington
54 West Virginia
55 Wisconsin
56 Wyoming

*b. Numeric Codes for Territories and Possessions (FIPS 55–2)*

60 American Samoa
66 Guam
69 Northern Marianna Islands
71 Midway Islands
72 Puerto Rico
75 Trust Territory of the Pacific Islands
76 Navassa Islands
78 Virgin Islands
79 Wake Island
81 Baker Island
86 Jarvis Island
89 Kingman Reef
95 Palmyra Atoll

ATTACHMENT 2 TO APPENDIX B TO PART 169a—CODES FOR DENOTING COMPELLING REASONS FOR IN-HOUSE OPERATIONS OF PLANNED CHANGES IN METHOD OR PERFORMANCE

1. PERFORMANCE (for entry in field A8)

| Code | Explanation |
|---|---|
| A | Indicates that the DoD CA has been retained in-house for national defense reasons in accordance with paragraph E.2.a(1) of DoD Instruction 4100.33, other than CAs reported under code "C" of this attachment. |

| Code | Explanation |
|---|---|
| C | Indicates that the DoD CA is retained in-house because the CA is essential for training or experience in required military skills, or the CA is needed to provide appropriate work assignments for a rotation base for overseas or sea-to-shore assignments, or the CA is necessary to provide career progression to a needed military skill level in accordance with paragraph E.2.a(1)(a) of DoD Instruction 4100.33. |
| D | Indicates procurement of a product or service from a commercial source would cause an unacceptable delay or disruption of an essential DoD program. |
| E | Indicates that there is no satisfactory commercial source capable of providing the product or service needed. |
| F | Indicates that a cost comparison has been conducted and that the Government is providing the product or service at a lower total cost as a result of a cost comparison. |
| G | Indicates that the CA is being performed by DoD personnel now, but decision to continue in-house or convert to contract is pending results of a scheduled cost comparison. |
| H | Indicates that the CA is being performed by DoD employees now, but will be converted to contract because of cost comparison results. |
| J | Indicates that the CA is being performed by DoD hospital and, in the best interest of direct patient care, is being retained in-house. |
| K | Indicates that the CA is being performed by DoD employees now, but a decision has been made to convert to contract for reasons other than cost. |
| N | Indicates that the CA is performed by DoD employees now, but a review is in progress pending a decision. (i.e., base closure, realignment, or consolidation). |
| X | Indicates that the Installation commander is not scheduling this CA for cost study under the provisions of congressional authority. |
| Y | Indicates that the CA is retained in-house because the cost study exceeded the time limit prescribed by law. |
| Z | Indicates that the CA is retained in-house for reasons not included above. (i.e., a law, Executive order, treaty, or international agreement). |

2. USE OF OTHER CODES. Other codes may be assigned as designated by the ODASD (I).

[50 FR 40805, Oct. 7, 1985, as amended at 57 FR 29210, July 1, 1992; 60 FR 67329, Dec. 29, 1995]

## APPENDIX C TO PART 169a—SIMPLIFIED COST COMPARISON AND DIRECT CONVERSION OF CAS

A. This appendix provides guidance on procedures to be followed in order to convert a commercial activity employing 45 or fewer DoD civilian employees to contract performance without a full cost comparison. DoD Components may directly convert functions with 10 or fewer civilian employees without conducting a simplified cost comparison. Simplified cost comparisons may only be conducted on activities with 45 or fewer DoD civilian employees.

B. Direct conversions with 10 or fewer DoD civilian employees must meet the following criteria:

1. The activity is currently performed by 10 or fewer civilian employees.

2. The direct conversion makes sense from a management or performance standpoint.

3. The direct conversion is cost effective.

4. The installation commander should attempt to place or retrain displaced DoD civilian employees by

a. Placing or retraining employees in available permanent vacant positions, or

b. Assigning displaced employees to valid temporary or over-hire positions in similar activities for gainful employment until permanent vacancies are available. The type of employee appointment (e.g., career, career-conditional, etc., or change from competitive to excepted service or vice versa) must not change, or

c. Where no vacancies exist or are projected, offer employees retraining opportunities under the Job Training Partnership Act or similar retraining programs for transitioning into the private sector.

5. The function to be directly converted does not include any DoD civilian positions that were as a result of DoD Component streamlining plans and/or were removed with buyout offers that satisfied Section 5 of the Federal Workforce Restructuring Act requirements.

C. The following provides general guidance for completion of a simplified cost comparison:

1. Estimated contractor costs should be based on either the past history of similar contracts at other installations or on the contracting officer's best estimate of what would constitute a fair and reasonable price.

2. For activities small in total size (45 or fewer civilian and military personnel):

a. Estimated in-house cost generally should not include overhead costs, as it is unlikely that they would be a factor for a small activity.

b. Similarly, estimated contractor costs generally should not include contract administration, on-time conversion costs, or other contract price add-ons associated with full cost comparisons.

3. For activities large in total size (including those with a mix of civilian and military personnel) all cost elements should be considered for both in-house and contractor estimated costs.

4. In either case, large or small, the 10 percent conversion differential contained in part IV of the Supplement to OMB Circular No. A–76 should be applied.

5. Part IV of the Supplement to OMB Circular No. A–76 shall be utilized to define the specific elements of cost to be estimated.

6. Clearance for CA simplified cost comparison decisions are required for Agencies without their own Legislative Affairs (LA)

and Public Affairs (PA) offices. Those Agencies shall submit their draft decision brief to the Deputy Assistant Secretary of Defense (Installations) room 3E813, the Pentagon, Washington, DC 20301 for release to Congress.

7. Provide CA simplified cost comparison approvals containing a certification of the MEO analysis, a copy of the approval to convert, a copy of the cost comparison, with back-up data, before conversion to the following:

a. Committee on Appropriations of the House of Representatives and the Senate (11–45 civilian employees only).

b. Copies of the following:

(1) Assistant Secretary of Defense (LA), room 3D918, the Pentagon, Washington, DC 20301.

(2) Assistant Secretary of Defense (PA), room 2E757, the Pentagon, Washington, DC 20301.

(3) Office of Economic Adjustment, room 4C767, the Pentagon, Washington, DC 20301.

(4) Deputy Assistant Secretary of Defense, (Installations), room 3E813, the Pentagon, Washington, DC 20301. (exception—no copies required from Agencies that do not have legislative and public affairs offices).

8. Most Efficient and Cost-Effective Analysis for Contractor Performance of an Activity (Report Control Symbol DD-A&T(AR) 1951. The installation commander must certify that the estimated in-house cost for activities involving 11 to 45 DoD civilian employees are based on a completed most efficient and cost effective organization analysis. Certification of this MEO analysis, as required by Public Law 103–139, shall be provided to the Committee on Appropriations of the House of Representatives and the Senate before conversion to contract performance.

[57 FR 29212, July 1, 1992, as amended at 60 FR 67329, Dec. 29, 1995]

## APPENDIX D TO PART 169a—COMMERCIAL ACTIVITIES MANAGEMENT INFORMATION SYSTEM (CAMIS)

Each DoD Component shall create and manage their CAMIS data base. The CAMIS data base shall have a comprehensive edit check on all input data in the computerized system. All data errors in the CAMIS data base shall be corrected as they are found by the established edit check program. The data elements described in this appendix represents the DoD minimum requirements.

On approval of a full cost comparison, a simplified cost comparison, or a direct conversion CA, the DoD Component shall create the initial entry using the data elements in part I for full cost comparisons and data elements in part II for all other conversions. Within 30 days of the end of each quarter the DoD Component shall submit a floppy diskette. Data files must be in American Standard Code Information Interchange text file format on a MicroSoft-Disk Operating System formatted 3.5 inch floppy diskette. Provide submissions in the Defense Utility Energy Reporting System format. The data shall be submitted in the Director, Installations Management (D,IM), 400 Army Navy Drive, Room 206, Arlington, VA 22202–2884 at least 60 days prior to the end of the quarter. The D,IM shall use the automated data to update the CAMIS. If the DoD Component is unable to provide data in an automated format, the D,IM shall provide quarterly printouts of cost comparison records (CCR) and conversion and/or comparison records (DCSCCR) that may be annotated and returned within 30 days of the end of each quarter to the D,IM. The D,IM then shall use the annotated printouts to update the CAMIS.

### PART I—COST COMPARISON

The record for each cost comparison is divided into six sections. Each of these sections contains information provided by the DoD Components. The first five sections are arranged in a sequence of milestone events occurring during a cost comparison. Each section is completed immediately following the completion of the milestone event. These events are as follows:

1. Cost comparison is approved by DoD Component.
2. Solicitation is issued.
3. In-house and contractor costs are compared.
4. Contract is awarded/solicitation is canceled.
5. Contract starts.

The events are used as milestones because upon their completion some elements of significant information concerning the cost comparison become known.

A sixth section is utilized for CCRs that result in award of a contract. This section contains data elements on contract cost and information on subsequent contract actions during the second and third year of contract operation.

The data elements that comprise these six sections are defined in this enclosure.

### PART II—DIRECT CONVERSIONS AND SIMPLIFIED COST COMPARISONS

The record for each direct conversion and simplified cost comparison is divided into six sections. Each of the first five sections is completed immediately following the completion of the following events:

1. DoD Component approves CA action.
2. The solicitation is issued.
3. In-house and contractor costs are compared.
4. Contract is awarded or solicitation is canceled.
5. Contract starts.

A sixth section is utilized for tracking historical data after the direct conversion or simplified cost comparison is completed. This section contains data elements on contracts and cost information during the second and third performance period. The data elements that comprise the six sections in part II, of this Appendix, are defined in the CAMIS Entry and Update Instruction, Part II—Direct Conversions and Simplified Cost Comparisons.

CAMIS ENTRY AND UPDATE INSTRUCTIONS

PART I—COST COMPARISONS

The bracketed number preceding each definition in sections one through five is the DoD data element number. All date fields should be in the format MMDDYY (such as, June 30, 1983 = 063083).

Section One

Event: DoD Component Approves Conducting a Cost Comparison

All entries in this section of CCR shall be submitted by DoD Components on the first quarter update after approving the start of a cost comparison.

These entries shall be used to establish the CCR and to identify the geographical, organizational, political, and functional attributes of the activity (or activities) undergoing cost comparison as well as to provide an initial estimate of the manpower associated with the activity (or activities). The initial estimate of the manpower in this section of the CCR will be in all cases those manpower figures identified in the correspondence approving the start of the cost comparison.

DoD Components shall enter the following data elements to establish a CCR:

[1] Cost Comparison Number. The number assigned by the DoD Component to uniquely identify a specific cost comparison. The first character of the cost comparison number must be a letter designating DoD Component as noted in data element [3], below. The cost comparison number may vary in length from five to ten characters, of which the second and subsequent may be alpha or numeric and assigned under any system desired by the DoD Component.

[2] Announcement and/or approval date. Date Congress is notified when required by 10 U.S.C. 2461, of this part or date DoD Component approves studies being performed by 45 or fewer DoD civilian employees.

[3] DOD Component Code. Use the following codes to identify the Military Service or Defense Agency conducting the cost comparison:

A—Department of the Army
B—Defense Mapping Agency
C—Strategic Defense Initiatives Organization
D—Civilian Health and Medical Program of the Uniformed Services (CHAMPUS) [3D1]
E—Defense Advanced Research Projects Agency
F—Department of the Air Force
G—National Security Agency/Central Security Service
H—Defense Nuclear Agency
J—Joint Chiefs of Staff (including the Joint Staff, Unified and Specified Commands, and Joint Service Schools)
K—Defense Information Systems Agency (DISA)
L—Defense Intelligence Agency
M—United States Marine Corps
N—United States Navy
R—Defense Contract Audit Agency
S—Defense Logistics Agency
T—Defense Security Assistance Agency
V—Defense Investigative Service
W—Uniform Services University of the Health Sciences
X—Inspector General, Department of Defense
Y—On Site Inspection Agency (OSIA)
2—Defense Finance & Accounting Service (DFAS)
3—Defense Commissary Agency (DeCA)
4—Defense Technical Information Center (DTIC)
5—U.S. Army Corps of Engineers (USACE) Civil Works

[4] Command code. The code established by the DoD Component headquarters to identify the command responsible for operating the commercial activity undergoing cost comparison.

[5] Installation code. The code established by the DoD Component headquarters to identify the installation where the CA(s) under cost comparison is and/or are located physically. Two or more codes (for cost comparison packages encompassing more than one installation) should be separated by commas.

[6] State code. A two-position numeric code for the State (Data element reference ST-GA.) or U.S. Territory (FIPS 55–2), as shown in attachment 1 to appendix B to this part, where element [5] is located. Two or more codes shall be separated by commas.

[7] Congressional District (CD). Number of the congressional district(s) where [5] is located. If representatives are elected ''at large,'' enter ''01'' in this data element; for a delegate or resident commissioner (such as, District of Columbia or Puerto Rico) enter ''98.'' If the installation is located in two or more CDs, all CDs should be entered and separated by commas.

[8] [Reserved]

[9] Title of Cost Comparison. The title that describes the commercial activity(s) under cost comparision (for instance, ''Facilities Engineering Package,'' ''Installation Bus Service,'' or ''Motor Pool''). Use a clear title, not acronyms of function codes in this data element.

[10] DOD Functional Area Code(s). The four of five alpha/numeric character designators listed in Appendix A of this part that describe the type of CA undergoing cost comparison. There would be one code for a single CA or possible several codes for a large cost comparison package. A series of codes shall be separated by commas.

[11] Prior Operation Code. A single alpha character that identifies the mode of operation for the activity at the time the cost comparison is started. Despite the outcome of the cost comparison, this code does not change. The coding as as follows:

I—In-house
C—Contract
N—New requirement
E—Expansion

[12] Cost Comparison Status Code. A single alpha character that identifies the current status of the cost comparison. Enter one of the following codes:

P—In progress
C—Complete
X—Canceled. The CCR shall be excluded from future updates.
Z—Consolidated. The cost comparison has been consolidated with one or more other cost comparisons into a single cost comparison package. The CCR for the cost comparison that has been consolidated shall be excluded from future updates. (See data element [15].)
B—Broken out. The cost comparison package has been broken into two or more separate cost comparisons. The previous CCR shall be excluded from future updates. (See data element [15].)

[13] Announcement—personnel estimate civilian, and [14] announcement—personnel estimate military. The number of civilian and military personnel allocated to the CAs undergoing cost comparison when the cost comparison is approved by the DoD Component or announced to Congress. This number in all cases shall be those personnel figures identified in the correspondence announcing the start of a cost comparison and will include authorized positions, temporaries, and borrowed labor. The number is used to give a preliminary estimate of the size of the activity.

[15] Revised and/or original cost comparison number. When a consolidation occurs, create a new CCR containing the attributes of the consolidated cost comparison. In the CCR of each cost comparison being consolidated, enter the cost comparison number of the new CCR in this data element and code ''Z'' in data element [12] of this attachment. In the new CCR, this data element should be blank and data element [12] of this attachment should denote the current status of the cost comparison. Once the consolidation has occurred, only the new CCR requires future updates. When a single cost comparison is being broken into multiple cost comparisons, create a new CCR for each cost comparison broken out from the original cost comparison. Each new CCR shall contain its own unique set of attributes; in data element [15] of this attachment enter the cost comparison number of the original cost comparison from which each was derived, and in data element [12] of this attachment enter the current status of each cost comparison. For the original cost comparison, data element [15] of this attachment, should be blank and data element [12] of this attachment should have a code ''B'' entry. Only the derivative record entries require future updates. When a consolidation or a breakout occurs, an explanatory remark shall be entered in data element [57] of this attachment (such as, ''part of SW region cost comparison,'' or, ''separated into three cost comparisons'').

Section Two

Event: The Solicitation is Issued

The entries in this section of the CCR provide information on the personnel authorized to perform the workload in the PWS, the number of workyears used to accomplish the workload in the PWS, and the type and kind of solicitation.

The DoD Component shall enter the following data elements at the first quarterly update subsequent to the issuance of the solicitation:

[17] [Reserved]

[18] Solicitation-Type Code. A one-character alpha designator that identifies the type of solicitation used to obtain contract bids or offers. Use either the CBD as the source document or information received from the contracting officer for this entry. Solicitations under section 8(a) of the Small Business Act are negotiated. Enter one of the following codes:

S—Sealed Bid
N—Negotiated

[19] Solicitation Kind Code. A one-character (or two-character, if ''W'' suffix is used) alpha designator indicating whether the competition for the contract has been limited to a specific class of bidders or offerors. Use either the CBD as the source document or information received from the contracting officer to enter one of the following codes:

A—Restrict to small business
B—Small Business Administration 8(a) Set Aside
C—Javits-Wagner-O'Day Act (JWOD)
D—Other mandatory sources
U—Unrestricted
W—(optional suffix) Unrestricted after initial restriction

[20] Current Authorized Civilians and [21] Current Authorized Military. The number of

civilian and military authorizations allocated on the DoD Component's manpower documents to perform the work described in the PWS. This number refines the initial authorization estimate (section one, data elements [13] and [14]).

[22] Baseline Annual Workyears Civilian and [23] Baseline Annual Workyears Military. The number of annual workyears it has taken to perform the work described by the PWS before the DoD Component conducts the MEO study of the in-house organizations; do not include contract monitor requirements. Military workyears include assigned, borrowed, diverted, and detailed personnel.

An annual workyear is the use of 2,087 hours (including authorized leave and paid time off for training). For example, when full-time employees whose work is completely within the PWS are concerned, ''one workyear'' normally is comparable to ''one employee'' or two part-time employees, each working 1,043 hours in a fiscal year. Also include in this total the workyears for full-time employees who do not work on a full-time basis on the work described by the PWS. For example, some portion of the workload is performed by persons from another work center who are used on an ''as needed'' basis. Their total hours performing this workload is 4,172 hours. This would be reflected as two workyears. Less than one-half year of effort should be rounded down, and one-half year or more should be rounded up.

These workyear figures shall be the baseline for determining the manpower savings identified by the management study.

Section Three

Event: The In-House and the Contractor Costs of Operation are Compared

The entries in this section provide information on the date of the cost comparison (initial decision), the preliminary results, the number of bids or offers received, and the costing method used in the cost comparison.

The DoD Component shall enter the following data elements in the first quarterly update subsequent to the date of the comparison of in-house and contractor costs (date of initial decision):

[24] Scheduled Initial Decision Date. Date the initial decision is scheduled at the start of a cost comparison.

[24A] Actual Initial Decision Date. Date the initial decision is announced. The initial decision is based on the apparent low bid or offer and is subject to preaward surveys and resolution of all appeals and protests. In a sealed bid procurement, the initial decision is announced at bid opening. In a negotiated procurement, the initial decision is announced when the cost comparison is made between the in-house estimate and the proposal of the selected offeror.

[25] Cost Comparison Preliminary Results Code. A one-character alpha designator indicating the results of the cost comparison as announced by the contracting officer at the time the bids or offers are compared. The entries are limited to two possibilities:

I—In-house
C—Contract

[26]–[27] [Reserved]

Section Four

Event: The Contracting Officer Either Awards the Contract or Commercial Activity Cancels the Solicitation

The entries in this section identify the final result, information on the contract, the in-house bid, and costing information from the cost comparison record.

The DoD Component shall enter the following data elements in the first quarterly update subsequent to the date the contracting officer either awards a contract or cancels the solicitation:

[28] Contract Award/Solicitation Commercial Activity Cancellation Date. For conversions to contract, this is the date a contract was awarded in a sealed bid solicitation or the date the contractor was authorized to proceed on a conditional award contract in a negotiated solicitation. For retentions in-house, this is the date the solicitation was canceled (when the contracting officer publishes an amendment to the solicitation canceling it).

[29] Cost Comparison Final Result Code. A one-character alpha designator identifying the final result of the comparison between in-house and contractor costs; the contracting officer either awards the contract or cancels the solicitation. Enter one of the following codes:

I—In-house
C—Contract

[30] Decision Rationale Code. A one-character alpha designator that identifies the rationale for awarding a contract or canceling the solicitation. The work shall be performed in-house or by contractor, based on cost, or the work shall be performed in-house because no satisfactory commercial source was available (no bids or offers were received or the preaward survey resulted in the determination that no commercial sources were responsive or responsible). Enter one of the following codes:

C—Cost
N—No satisfactory commercial source
O—Other

[31] [Reserved]

[31a] Prime Contractor Size. Enter one of the following

S—Small or small/disadvantaged business
L—Large business

[32] MEO Workyears. The number of annual workyears it takes to perform the work described in the PWS after the MEO study has been conducted. Do not include the minimum cost differential (line 14 in CCF or line 16 in the ENCR CCF) in the computation of any of these data elements.

For data elements [33] through [36], enter all data after all adjustments required by appeals board decisions. Do not include the minimum cost differential (line 31 old CCF or line 14 new CCF or line 16 new ENRC form) in the computation of any of these data elements. If a valid cost comparison was not conducted (that is, all bidders or offerors disqualified, no bids or offers received, etc.) do not complete data elements [33] through [36]. Explain lack of valid cost data in data element [57], DOD Component Comments.

[33] First Performance Period. Expressed in months, the length of time covered by the contract. Do not include any option periods.

[34] Cost Comparison Period. Expressed in months, the total period of operation covered by the cost comparison; this is the period used as the basis for data elements [35] and [36], below.

[35] Total in-house Cost ($000). Enter the total cost of in-house performance in thousands of dollars, rounded to the nearest thousand. This is the total of line 6 of the new CCF or line 8 of the ENCR CCF. An entry is required although the activity remains in-house due to absence of a satisfactory commercial source.

[36] Total Contract Cost ($000). Enter the total cost of contract performance in thousands of dollars, rounded to the nearest thousand. This is the total of line 13 of the CCF or line 15 of the ENCR CCF.

[37] Scheduled Contract or MEO Start Date. Date the contract and/or MEO was scheduled to start at the beginning of a cost comparison.

Section Five

Event: The Contract/MEO Starts

The entries in this section identify the contract or MEO start date and the personnel actions taken as a result of the cost comparison.

The DoD Component shall enter the following data elements in the first quarterly update subsequent to the start of the contract:

[38] Contract/MEO Start Date. The actual date the contractor began operation of the contract or the Government implements the MEO.

[39] Permanent Employees Reassigned to Equivalent Positions. The number of permanent employees who were reassigned to positions of equivalent grade as of the contract start date.

[40] Permanent Employee Changed To Lower Positions. The number of permanent employees who were reassigned to lower grade positions as of the contract start date.

[41] Employees Taking Early Retirement. The number of employees who took early retirement as of the contract start date.

[42] Employees Taking Normal Retirement. The number of employees who took normal retirement as of the contract start date.

[43] Permanent Employees Separated. The number of permanent employees who were separated from Federal employment as of the contract start date.

[44] Temporary Employees Separated. The number of temporary employees who were separated from Federal employment as of the contract start date.

[45] Employees Entitled to Severance Pay. The estimated number of employees entitled to severance pay on their separation from Federal employment as of the contract start date.

[46] Total Amount of Severance Entitlements ($000). The total estimated amount of severance to be paid to all employees, in thousands of dollars, rounded to the nearest thousand, as of the contract start date.

[47] Number Of Employees Hired by The Contractor. The number of estimated DoD civilian employees (full-time or otherwise) that will be hired by the contractors, or their subcontractors, at the contract start date.

*Administrative Appeal*

[48] Filed. Were administrative appeals filed?

N—No
Y—Yes

[49] Source. Who filed the appeal?

B—Both
C—Contractor
I—In-house

[50] Result. Were the appeals finally upheld? (If both appealed, explain result in data element [57], of this section).

N—No
P—Still in progress
Y—Yes

*GAO Protest*

[51] Filed. Was a protest filed with GAO?

N—No
Y—Yes

[52] Source. Who filed the protest?

B—Both
C—Contractor
I—In-house

[53] Result. Was the protest finally upheld? (Explain result in data element [57], below).

N—No
P—Still in progress
Y—Yes

*Arbitration*

[54] Requested. Was there a request for arbitration?

N—No

Y—Yes

[55] Result. Was the case found arbitrable? (Explain result in data element [57], below).

N—No

P—Still in progress

Y—Yes

*General Information*

+[56] Total Staff-Hours Expended. Enter the estimated number of staff-hours expended by the installation for the cost comparison. Include direct and indirect hours expended from the time of PWS until a final decision is made.

+[56a] Estimated Cost Of Conducting The Cost Comparison. Enter the estimated cost of the total staff-hours identified in data element [56] of this section non-labor (travel, reproduction costs, etc.) associated with the cost comparision.

+Data elements [56] and [56A] will only be completed by DoD Components that are participating in the pilot test of these data elements.

[57] DoD Component Comments. Enter comments, as required, to explain situations that affect the conduct of the cost comparision. Where appropriate, precede each comment with the CAMIS data element being referenced.

[58] Effective Date. ''As of'' date of the most current update for the cost comparison. This data element will be completed by the DMDC.

[59] (Leave blank, for DoD computer program use).

Section Six

Event: Quarter Following Contract and/or Option Renewal

The entries in this section identify original costs, savings, information on subsequent performance periods and miscellaneous contract data. The DoD Component shall enter the following data elements in the first quarterly update annually.

[60] Original Cost of Function(s) ($000). The estimated total cost of functions before to development of an MEO in thousands of dollars, rounded to the nearest thousand for the base year and option years. (Begin entry when study began for data element [2] after 1 October 1989).

[60A] Estimated Dollar Savings ($000). The DoD Component's estimated savings from the cost comparison for the base year plus option years, in thousands of dollars, rounded to the nearest thousand, for either in-house or contract performance. Documentation will be available at the DoD Component level. (Begin entry after 1 October 1989).

[61] Contract Or In-House Bid First Performance Period ($000). For studies resulting in continued in-house performance, enter the total in-house cost (Line 6 from the CCF) for the first performance period. For studies resulting in conversion to contract performance, enter the contract price (Line 7 from the CCF) for the first performance period. Figures shall be shown in thousands of dollars, rounded to the nearest thousand.

[61A] Actual Contract or In-House Costs First Performance Period ($000). Enter the actual first performance period contract cost including all change orders (Plus changes in the scope of work) or actual in-house performance cost including changes in the scope of work, in thousands of dollars, rounded to the nearest thousand. No entry is required for actual in-house performance during the second and third performance periods.

[61B] Adjusted Contract Costs First Performance Period ($000). Enter an adjusted first performance period contract cost that includes actual DoL wage increases and costs for omissions and/or errors in the original PWS, but exclude new requirement costs and their associated wage increases, in thousands of dollars, rounded to the nearest thousand. (Begin entry after 1 October 1989).

[61C] Adjusted In-House Costs First Performance Period ($000). Enter the total first performance period in-house cost of the MEO, including civil service pay increases, but excluding increases associated with new mission requirements not included in the original scope of work of the function. Show costs in thousands of dollars, rounded to the nearest thousand. Entry is required even if the function went to contract. (Begin entry after 1 October 1989).

[62] Contract Or In-House Bid Second Performance Period ($000). For studies resulting in continued in-house performance, enter the total in-house cost (Line 6 from the CCF) for the second performance period. For studies resulting in conversion to contract performance, enter the contract price (Line 7 from the CCF) for the second performance period. Figures shall be shown in thousands of dollars, rounded to the nearest thousand.

[62A] Actual Contract Costs Second Performance Period ($000). Enter the actual second performance period contract cost including all change orders (Plus changes in the scope of work), in thousands of dollars, rounded to the nearest thousand. No entry is required when the function remained in-house.

[62B] Adjusted Contract Costs Second Performance Period ($000). Enter an adjusted second performance period contract cost that includes actual DoL wage increases and costs for omissions and/or errors in the original PWS, but exclude new requirement costs and their associated wage increases, in thousands of dollars, rounded to the nearest thousand. (Begin entry after 1 October 1989).

[62] Adjusted In-House Costs Second Performance Period ($000). Enter the total second performance period in-house cost of the MEO, including civil service pay increases, but excluding increases associated with new mission requirements not included in the original scope of work of the function. Show costs in thousands of dollars, rounded to the nearest thousand. Entry is required even if the function went to contract. (Begin entry after 1 October 1989).

[63] Contract Or In-house Bid Third Performance Period ($000). For studies resulting in continued in-house performance, enter the total in-house cost (Line 6 from the CCF) for the third performance period. For studies resulting in conversion to contract performance, enter the contract price (Line 7 from the CCF) for the third performance period. Figures shall be shown in thousands of dollars, rounded to the nearest thousand.

[63A] Actual Contract Costs Third Performance Period ($000). Enter the actual third performance period contract cost including all change orders (Plus changes in the scope of work), in thousands of dollars, rounded to the nearest thousand. No entry is required when the function remained in-house.

[63B] Adjusted Contract Costs Third Performance Period ($000). Enter an adjusted third performance period contract cost that includes actual DoL wage increases and costs for omissions and/or errors in the original PWS, but exclude new requirement costs and their associated wage increases, in thousands of dollars, rounded to the nearest thousand (Begin entry after 1 October 1989).

[63C] Adjusted In-House Costs Third Performance Period ($000). Enter the total third performance period in-house cost of the MEO, including civil service pay increases, but excluding increases associated with new mission requirements not included in the original scope of work of the function. Show costs in thousands of dollars, rounded to the nearest thousand. Entry is required even if the function went to contract (Begin entry after 1 October 1989).

[64] Contractor Change. Enter one of the following alpha designators to indicate whether the contract for the second or third performance period has changed from the original contractor.

N—No, the contractor has not changed.

Y—Yes, the contractor has changed.

Data elements [65] through [66] of this section are not required if the answer to [64] of this section is no (N).

[65] New Contractor Size (If data element [66] of this section contains the alpha designator ''I'' or ''R,'' no entry is required).

L—New contractor is large business.

S—New contractor is small and/or small disadvantaged business.

[66] Reason For Change. DoD Components shall enter one of the following designators listed in this section, followed by the last two digits of the fiscal year which the change occurred.

C—Contract workload consolidated with other existing contract workload.

D—New contractor takes over because original contractor defaults.

I—Returned in-house because original contractor defaults within 12 months of start date and in-house bid is the next lowest.

N—New contractor replaced original contractor because Government opted not to renew contract in option years.

R—Returned in-house temporarily pending resolicitation due to contract default, etc.

U—Contract workload consolidated into a larger (umbrella) cost comparison.

X—Other-function either returned in-house or eliminated because of base closure, realignment, budget reduction or other change in requirements.

[67] Contract Administration Staffing. The actual number of contract administration personnel hired to administer the contract.

## CAMIS ENTRY AND UPDATE INSTRUCTION

## PART II—DIRECT CONVERSIONS AND SIMPLIFIED COST COMPARISONS

The bracketed number preceding each definition in sections One through six of this section, is the DoD data element number. All date fields should be in the format YYMMDD (Data element reference DA-FA).

### Section One

### Event: DoD Component Approves the CA Action

All entries in this section of the DCSCCR record shall be submitted by DoD Components on the first quarter update after approving the start of a cost comparison. These entries shall be used to establish the DCSCCR and to identify the geographical, organizational, political, and functional attributes of the activity (or activities) undergoing conversion and/or comparison as well as to provide an initial estimate of the manpower associated with the activity (or activities). The initial estimate of the personnel in this section of the DCSCCR will be, in all cases, those personnel figures identified in the correspondence approving the start of the conversion and/or comparison. DoD Components shall enter the following data elements to establish a DCSCCR:

[1] Direct Conversion/Simplified Cost Comparison Number. The number assigned by the DoD Component to uniquely identify a specific conversion and/or comparison. The first character of the conversion and/or comparison number must be a letter designating the DoD Component as noted in data element [3]

of this section. The conversion and/or comparison number may vary in length from five to ten characters, of which the second and subsequent may be alpha or numeric and assigned under any system desired by the DoD Component.

[2] Approval Date. The date has simplified cost comparison or direct conversion was approved.

[3] DoD Component Code. Use the following codes to identify the Military Service or Defense Agency and/or Field Activity conducting the cost comparison:

A—Department of the Army
B—Defense Mapping Agency (DMA)
D—Civilian Health and Medical Program of the Uniformed Services (CHAMPUS) [3D1]
D—Washington Headquarters Service (WHS) [3D2]
F—Department of the Air Force
G—National Security Agency/Central Security Service (NSA/CSS)
H—Defense Nuclear Agency (DNA)
J—Joint Chiefs of Staff (JCS) (including the Joint Staff, Unified and Specified Commands, and Joint Service Schools)
K—Defense Information Systems Agency (DISA)
L—Defense Intelligence Agency (DIA)
M—United States Marine Corps (USMC)
N—United States Navy (USN)
R—Defense Contract Audit Agency (DCAA)
S—Defense Logistics Agency (DLA)
T—Defense Security Assistance Agency (DSAA)
V—Defense Investigative Service (DIS)
W—Uniformed Services University of the Health Sciences (USUHS)
Y—On Site Inspection Agency (OSIA)
2—Defense Finance & Accounting Service (DFAS)
3—Defense Commissary Agency (DeCA)
4—Defense Technical Information Center (DTIC)
5—U.S. Army Corps of Engineers (USACE) Civil Works

[4] Command code. The code established by the DoD Component headquarters to identify the command responsible for operating the commercial activity undergoing cost comparison.

[5] Installation code. The code established by the DoD Component headquarters to identify the installation where the CA(s) under cost comparison is and/or are located physically. Two or more codes (for cost comparison packages encompassing more than one installation) should be separated by commas.

[6] State Code. A two-position numeric code for the State (Data element reference ST-GA.) or U.S. Territory (FIPS 55–2), as shown in attachment 1 to appendix B of this part, where element [5] is located. Two or more codes shall be separated by commas.

[7] Congressional District (CD). Number of the CDs where [5] of this section, is located. If representatives are elected ''at large,'' enter ''01'' in this data element; for a delegate or resident commissioner (i.e., District of Columbia or Puerto Rico) enter ''98.'' If the installation is located in two or more CDs, all CDs should be entered and separated by commas.

[8] (Leave blank)

[9] Title of Conversion and/or Comparison. The title that describes the CA(s) under conversion/comparison (for instance, ''Facilities Engineering Package'', ''Installation Bus Service,'' or ''Motor Pool''). Use a clear title, not acronyms or function codes in this data element.

[10] DoD Functional Area Code(s). The four- or five-alpha and/or numeric character designators listed in appendix A of this part that describes the type of CA undergoing conversion and/or comparison. This would be one code for a single CA or possibly several codes for a large cost comparison package. A series of codes shall be separated by commas.

[11] Prior Operation Code. A single alpha character that identifies the mode of operation for the activity at the time the conversion and/or comparison is started. Despite the outcome of the conversion and/or comparison, this code does not change. The coding is as follows:

C—Contract
E—Expansion
I—In-house
N—New requirement

[12] Conversion and/or Comparison Status Code. A single alpha character that identifies the current status of the conversion and/or comparison. Enter one of the following codes:

B—Broken out. The cost comparison package has been broken into two or more separate cost comparisons. The previous DCSCCR shall be excluded from future updates. (See data element [15] of this section.)
C—Complete
P—In progress
X—Canceled. The DCSCCR shall be excluded from future updates.
Z—Consolidated. The cost comparison has been consolidated with one or more other cost comparisons into a single cost comparison package. The DCSCCR for the cost comparison that has been consolidated shall be excluded from future updates. (See data element [15] of this section.)

[13] Announcement—personnel estimate civilian, and [14] announcement—personnel estimate military. The number of civilian and military personnel allocated to the CAs undergoing conversion and/or comparison at the time the start of the conversion and/or comparison is approved. This number is all cases shall be those personnel figures identified when the conversion and/or comparison was approved and will include authorized positions, temporaries, and borrowed labor.

The number is used to give a preliminary estimate of the size of the activity.

[15] Revised and/or original cost comparison number. When a consolidation occurs, create a new DCSCCR containing the attributes of the consolidated conversion and/or comparison. In the DCSCCR of each conversion and/or comparison being consolidated, enter the conversion and/or comparison number of the new DCSCCR in this data element and code ''Z'' in data element [12] of this section. In the new DCSCCR, this data element should be blank and data element [12] of this section should denote the current status of the conversion and/or comparison. Once the consolidation has occurred, only the new DCSCCR requires future updates.

When a single conversion and/or comparison is being broken into multiple conversion and/or comparisons, create a new DCSCCR for each conversion and/or comparison broken out from the original conversion and/or comparison. Each new DCSCCR shall contain its own unique set of attributes; in data element [15] of this section enter the conversion and/or comparison number of the original conversion and/or comparison from which each was derived, and in data element [12] of this section enter the current status of each conversion and/or comparison. For the original conversion and/or comparison, data element [15] of this section should be blank and data element [12] of this section should have a code ''B'' entry. Only the derivative record entries require future updates.

When a consolidation or a breakout occurs, an explanatory remark shall be entered in data element [56] of this section (such as, ''part of SW region cost comparison,'' or, ''separated into three cost comparisons'').

[16] (Leave blank)

Section Two

Event: The Solicitation is Issued

The entries in this section of the DCSCCR provide information on the personnel authorized to perform the workload in the PWS, the number of workyears used to accomplish the workload in the PWS, and the type and kind of solicitation.

The DoD Component shall enter the following data elements at the first quarterly update subsequent to the issuance of the solicitation:

[17] (Leave blank)

[18] Solicitation-Type code. A one-character alpha designator that identifies the type of solicitation used to obtain contract bids or offers. Use either the CBD as the source document or information received from the contracting officer for this entry. Solicitations under section 8(a) of ''The Small Business Act'' are negotiated. Enter one of the following codes:

N—Negotiated
S—Sealed Bid

[19] Solicitation-Kind code. A one-character (or two-character, if ''W'' suffix is used) alpha designator indicating whether the competition for the contract has been limited to a specific class of bidders or offerors. Use either the CBD as the source document or information received from the contracting officer to enter one of the following codes:

A—Restrict to small business
B—Small Business Administration 8(a) Set Aside
C—''Javits-Wagner-O'Day Act'' (JWOD)
D—Other mandatory sources
U—Unrestricted
W—(Optional suffix) Unrestricted after initial restriction

[20] Current Authorized Civilians, and [21] Current Authorized Military. The number of civilian and military authorizations allocated on the DoD Component's manpower documents to perform the work described in the PWS. This number refines the initial authorization estimate (section one, data elements [13] and [14] of this section).

[22] Baseline Annual Workyears Civilian, and [23] Baseline Annual Workyears Military. The number of annual workyears it has taken to perform the work described by the PWS before the DoD Component conducts the MEO analysis of the in-house organization. Do not include contract monitor requirements. Military workyears include assigned, borrowed, diverted, and detailed personnel. Less than one-half a year of effort should be rounded down, and one-half a year or more should be rounded up. These workyear figures shall be the baseline for determining the personnel savings identified by the most efficient organization analysis.

Section Three

Event: The In-House And The Contractor Costs Of Operations Are Compared

The entries in this section provide information on the date of the conversion and/or comparison (initial decision), the preliminary results, the number of bids or offers received, and the costing method used in the conversion and/or comparison.

The DoD Component shall enter the following data elements in the first quarterly update subsequent to the date of the comparison of in-house and contractor costs (date of initial decision):

[24] Scheduled Initial Decision Date. Date the initial decision is scheduled at the start of a conversion and/or comparison

[24A] Actual Initial Decision Date. Date the initial decision is announced. The initial decision is based on the apparent low bid or offer and is subject to preaward surveys and resolution of all appeals and protests. In a sealed bid procurement, the initial decision is announced at bid opening. In a negotiated

procurement, the initial decision is announced when the cost comparison is made between the in-house estimate and the proposal of the selected offeror. In a conversion, the initial decision is announced when the in-house cost estimate is evaluated against proposed contractor proposals.

[25] Cost Comparison Preliminary Results Code. A one-character alpha designator indicating the results of the cost comparison as announced by the contracting officer at the time of the comparison (No entry required for a direct conversion). The entries are limited to two possibilities:

C—Contract
I—In-house

[26] (Leave blank)

[27] (Leave blank)

Section Four

Event: The Contracting Officer Either Awards The Contract or Cancels The Solicitation

The entries in this section identify the final result, information on the contract, the in-house bid, and costing information from the direct conversion and/or simplified cost comparison fact sheet.

The DoD Component shall enter the following data elements in the first quarterly update subsequent to the date the contracting officer either awards a contract or cancels the solicitation:

[28] Contract Award or Solicitation Cancellation Date. For conversions to contract, this is the date a contract was awarded in a sealed bid solicitation or the date the contractor was authorized to proceed on a conditional award contract in a negotiated solicitation. For retentions in-house, this is the date the solicitation was canceled (when the contracting officer publishes an amendment to cancel the solicitation).

[29] Cost Comparison Final Result Code. A one-character alpha designator identifying the final result of the comparison between in-house and contractor costs; the contracting officer either awards the contract or cancels the solicitation. Enter one of the following codes:

C—Contract
I—In-house

[30] Decision Rationale Code. A one-character alpha designator that identifies the rationale for awarding a contract or canceling the solicitation. The work shall be performed in-house or by contractor based on cost, for other than cost, or the work shall be performed in-house because no satisfactory commercial source was available (no bids or offers were received or the pre-award survey resulted in the determination that no commercial sources were responsive or responsible). Enter one of the following codes:

C—Cost
N—No satisfactory commercial source
O—Other

[31] (Leave blank)

[31A] Prime Contractor Size. Enter one of the following:

L—Large business
S—Small or small and/or disadvantaged business

[32] MEO Workyears. The number of annual workyears it takes to perform the work described in the PWS after the MEO analysis has been conducted. This entry will be equal to the number of annual workyears in the in-house bid (No entry required for a direct conversion).

For data elements [33] through [36] of this section enter all data after all adjustments required by appeal board decisions. Do not include minimum cost differential in the computation of any of these data elements. If a valid conversion and/or comparison was not conducted (i.e., all bidders or offerors disqualified, no bids or offers received, etc.) do not complete data elements [33], [34] and [36] of this section. Explain lack of valid cost data in data element [56], ''DoD Component Comments'' of this section.

[33] First Performance Period. Expressed in months, the length of time covered by the contract. Do not include any option periods.

[34] Conversion and/or Comparison Period. Expressed in months, the total period of operation covered by the conversion or cost comparison; this is the period used as the basis for data elements [35] and [36] of this section.

[35] Total In-House Cost ($000). Enter the total estimated cost of in-house performance for the base year plus option years, in thousands of dollars, rounded to the nearest thousand. An entry is required although the activity remains in-house due to absence of a satisfactory commercial source (No entry required for a direct conversion).

[36] Total Contract Cost ($000). Enter the total estimated cost of contract performance for the base year plus option years, in thousands of dollars, rounded to the nearest thousand.

[37] Scheduled Contract or MEO Start Date. Date the contract and/or MEO was scheduled to start at the beginning of a conversion and/or comparison.

Section Five

Event: The Contract MEO Starts.

The entries in this section identify the contract or MEO start date and the personnel actions taken as a result of the conversion and/or comparison.

The DoD Component shall enter the following data elements in the first quarterly update subsequent to the start of the contract:

[38] Contract and/or MEO Start Date. The actual date the contractor began operation

of the contract or the Government implements the MEO.

[39] Permanent Employees Reassigned to Equivalent Positions. The number of permanent employees who were reassigned to positions of equivalent grade as of the contract start date.

[40] Permanent Employees Changed to Lower Positions. The number of permanent employees who were reassigned to lower grade positions as of the contract start date.

[41] Employees Taking Early Retirement. The number of employees who took early retirement as of the contract start date.

[42] Employees Taking Normal Retirement. The number of employees who took normal retirement as of the contract start date.

[43] Permanent Employees Separated. The number of permanent employees who were separated from Federal employment as of the contract start date.

[44] Temporary Employees Separated. The number of temporary employees who were separated from Federal employment as of the contract start date.

[45] Employees Entitled to Severance Pay. The estimated number of employees entitled to severance pay on their separation from Federal employment as of the contract start date.

[46] Total Amount of Severance Entitlements ($000). The total estimated amount of severance to be paid to all employees, in thousands of dollars, rounded to the nearest thousand, as of the contract start date.

[47] Number of Employees Hired by the Contractor. The number of estimated DoD civilian employees (full-time or otherwise) that will be hired by the contractors, or their subcontractors, at the contract start date.

Administrative Appeal

[48] Filed. Were administrative appeals filed?

N—No
Y—Yes

[49] Source. Who filed the appeal?

B—Both
C—Contractor
I—In-House

[50] Result. Were the appeals finally upheld? (if both appealed, explain result in data element [56] of this section).

N—No
P—Still in Progress
Y—Yes

GAO Protest

[51] Filed. Was a protest filed with GAO?

N—No
Y—Yes

[52] Source. Who filed the protest?

B—Both
C—Contractor
I—In-House

[53] Result. Was the protest finally upheld? (explain result in data element [56], of this section).

N—No
P—Still in Progress
Y—Yes

Arbitration

[54] Requested. Was there a request for arbitration?

N—No
Y—Yes

[55] Result. Was the case found arbitrable? (explain result in data element [56], of this section).

N—No
P—Still in Progress
Y—Yes

General Information

[56] DoD Component Comments. Enter comments, as required, to explain situations that affect the conduct of the conversion and/or comparison. Where appropriate, precede each comment with the CAMIS data element being referenced.

[57] Effective Date. ''As of'' date of the most current update for the conversion and/or comparison. This data element will be completed by the DMDC.

[58] (Leave blank, for DoD computer program use).

Section Six

Event: Quarter Following Contract and/or Option Renewal

The entries in this section identify information on subsequent performance periods and miscellaneous contract data. The DoD Component shall enter the following data elements in the first quarterly update annually:

[59] Actual Contract Cost First Performance Period ($000). Enter the actual contractor cost for the first performance period, in thousands of dollars, rounded to the nearest thousand.

[60] Actual Contract Cost Second Performance Period ($000). Enter the actual contractor cost for the second performance period, in thousands of dollars, rounded to the nearest thousand.

[61] Actual Contract Cost Third Performance Period ($000). Enter the actual contractor cost for the third performance period, in thousands of dollars, rounded to the nearest thousand.

[62] Contractor Change. Enter one of the following alpha designators to indicate whether the contractor for the second or third performance period has changed from the original contractor.

N—No, the contractor has not changed
Y—Yes, the contractor has changed

Data elements [63] through [64] of this section are not required if the answer to [62] of this section is no (N).

[63] New Contractor Size. (If data element [64] of this section contains the alpha designator ''I'' or ''R,'' no entry is required)

L—New contractor is large business
S—New contractor is small and/or small disadvantaged business.

[64] Reason For Change. DoD Components shall enter one of the following designators listed in the following, followed by the last two digits of the FY in which the change occurred.

C—Contract workload consolidated with other existing contract workload.
D—New contractor takes over because original contractor defaults.
I—Returned in-house because of original contractor defaults; etc., within 6 months of start date and in-house bid is the next lowest.
N—New contractor replaced original contractor because Government opted not to renew contract in option years.
R—Returned in-house temporarily pending resolicitation due to contract default, etc.
U—Contract workload consolidated with other existing contract workload.
X—Other-Function either returned in-house or eliminated because of base closure, realignment, budget reduction or other change in requirements.

[65] Contract Administration Staffing. The actual number of contract administration personnel hired to administer the contract.

[50 FR 40805, Oct. 7, 1985, as amended at 57 FR 29212, July 1, 1992; 60 FR 67329, Dec. 29, 1995]

# PART 171—IMPLEMENTATION OF WILDFIRE SUPPRESSION AIRCRAFT TRANSFER ACT OF 1996

Sec.
171.1 Background and purpose.
171.2 Applicability.
171.3 Restrictions.
171.4 Qualifications.
171.5 Sale procedures.
171.6 Reutilization and transfer procedures.
171.7 Reporting requirements.
171.8 Expiration.

AUTHORITY: 10 U.S.C. 2576 note.

SOURCE: 68 FR 8823, Feb. 26, 2003, unless otherwise noted.

## § 171.1 Background and purpose.

The Wildfire Suppression Aircraft Transfer Act of 1996 (the ''Act''), as amended, allows the Department of Defense (DOD), during the period 1 October 1996 through 30 September 2005, to sell aircraft and aircraft parts to entities that contract with the Federal Government for the delivery of fire retardant by air in order to suppress wildfire. This part implements the Act.

## § 171.2 Applicability.

The regulations in this part apply to aircraft and aircraft parts determined to be DOD excess under the definition of the Federal Property Management Regulations (FPMR) and listed in Attachment 1 of Chapter 4 of DOD 4160.21–M as Category A aircraft authorized for commercial use.

## § 171.3 Restrictions.

Aircraft and aircraft parts sold under the Act shall be used only for wildfire suppression purposes and shall not be flown or removed from the U.S. unless dispatched by the National Interagency Fire Center in support of an international agreement to assist in wildfire suppression, or for other purposes jointly approved in advance, in writing, by the Secretary of Defense and the Secretary of Agriculture.

## § 171.4 Qualifications.

The Secretary of Agriculture must certify in writing to the Secretary of Defense prior to sale that the person or entity is capable of meeting the terms and conditions of a contract to deliver fire retardant by air.

(a) Prior to sales offerings of aircraft or aircraft parts, the U.S. Department of Agriculture (USDA) must provide to the Defense Reutilization and Marketing Service (DRMS), in writing, a list of persons or entities eligible to bid under this Act, including expiration date of each USDA contract, and locations covered by the USDA contract.

(b) This requirement may not be delegated to the U.S. Forest Service (USFS).

## § 171.5 Sale procedures.

Disposal of aircraft and aircraft parts must be in accordance with the provisions of Chapter 4 of DOD 4160.21–M, paragraph B2, and with other pertinent parts of this manual, with the following changes and additions:

(a) Sales shall be limited to the aircraft types listed in Attachment 1 of

Chapter 4 of DOD 4160.21–M, and parts thereto (*i.e.*, no aircraft or aircraft parts listed as Munitions List Items on the State Department's U.S. Munitions List).

(b) Sales shall be made at fair market value (FMV), as determined by the Secretary of Defense and, to the extent practicable, on a competitive basis.

(1) DRMS must conduct sales utilizing FMVs that are either provided by the Military Services on the Disposal Turn-In Documents (DTIDs) or based on DRMS' professional expertise and knowledge of the market. Advice regarding FMV shall be provided to DRMS by USDA, as appropriate.

(2) If the high bid for a sale item does not equal or exceed the FMV, DRMS is vested with the discretion to reject all bids and reoffer the item:

(i) On another wildfire suppression sale if there is indication that reoffer may be successful, or,

(ii) With DLA concurrence, as normal surplus under the FPMR if there is no such indication.

(3) Disposition of proceeds from sale of aircraft under the Act will be as prescribed in guidance from the Under Secretary of Defense (Comptroller).

(c) Purchases shall certify that aircraft and aircraft parts will be used only in accordance with conditions stated in § 171.3.

(1) Sales solicitations will require bidders to submit end-use certificates with their bids, stating the intended use and proposed areas of operations.

(2) The completed end-use certificates shall be used in the bid evaluation process.

(d) Sales contracts shall include terms and conditions for verifying and enforcing the use of the aircraft and aircraft parts in accordance with provisions of this guidance.

(1) The DRMS Sales Contracting Officer (SCO) is responsible for verifying and enforcing the use of aircraft and aircraft parts in accordance with the terms and conditions of the sales contract.

(i) Sales contracts include provisions for on-site visits to the purchaser's place(s) of business and/or worksite(s).

(ii) Sales contracts require the purchaser to make available to the SCO, upon his or her request, all records concerning the use of aircraft and aircraft parts.

(2) USDA shall nominate in writing, and the SCO shall appoint, qualified Government employees (not contract employees) to serve as Contracting Officer's Representatives (CORs) for the purpose of conducting on-site verification and enforcement of the use of aircraft and aircraft parts for those purposes permitted by the sales contract.

(i) COR appointments must be in writing and must state the COR's duties, the limitations of the appointment, and the reporting requirements.

(ii) USDA bears all COR costs.

(iii) The SCO may reject any COR nominee for cause, or terminate any COR appointment for cause.

(3) Sales contracts require purchasers to comply with the Federal Aviation Agency (FAA) requirements in Chapter 4 of DOD 4160.21–M, paragraphs B 2 b (4)(d)2 through (40)(d)5.

(4) Sales contracts require purchasers to comply with the Flight Safety Critical Aircraft Parts regime in Chapter 4 of DOD 4160.21–M, paragraph B 26 c and d, and in Attachment 3 of Chapter 4 of DOD 4160.21–M.

(5) Sales contracts require purchasers to obtain the prior written consent of the SCO for resale of aircraft or aircraft parts purchased from DRMS under this Act. Resales are only permitted to other entities which, at time of resale, meet the qualifications required of initial purchasers. The SCO must seek, and USDA must provide, written assurance as to the acceptability of a prospective repurchaser before approving resale. Resales will normally be approved for airtanker contracts which have completed their contracts, or which have had their contracts terminated, or which can provide other valid reasons for seeking resale which are acceptable to the SCO.

(i) If it is determined by the SCO that there is no interest in the aircraft or aircraft parts being offered for resale among entities deemed qualified repurchasers by USDA, the SCO may permit resale to entities outside the airtanker industry.

(ii) When an aircraft or aircraft parts are determined to be uneconomically

repairable and suitable only for cannibalization and/or scrapping, the purchaser shall advise the SCO in writing and provide evidence in the form of a technical inspection document from a qualified FAA airframe and powerplant mechanic, or equivalent.

(iii) The policy outlined in paragraph (d)(5) of this section also applies to resales by repurchasers, and to all other manner of proposed title transfer (including, but no limited to, exchange and barters).

(iv) Sales of aircraft and aircraft parts under the Act are intended for principals only. Sales offerings will caution prospective purchasers not to buy with the expectation of acting as brokers, dealers, agents, or middlemen for other interested parties.

(6) The failure of a purchaser to comply with the sales contract terms and conditions may be cause for suspension and/or debarment, in addition to other administrative, contractual, civil, and criminal (including, but not limited to, 18 U.S.C. 1001) remedies which may be available to DOD.

(7) Aircraft parts will be made available in two ways:

(i) DRMS may, based on availability and demand, offer for sale under the Act whole unflyable aircraft, aircraft carcasses for cannibalization, or aircraft parts, utilizing substantially the same provisions outlined in paragraphs (a) through (d)(6) of this section for flyable aircraft.

(A) If USDA directs that DRMS set aside parts for sale under the Act, USDA must provide listings of parts required, by National Stock Number and Condition Code.

(B) Only qualified airtanker operators which fly the end-term aircraft will be allowed to purchase unflyable aircraft, aircraft carcasses, or aircraft parts applicable to that end-item.

(C) FMVs are not required for aircraft parts. DRMS must utilize historic prices received for similar parts in making sale determinations.

(ii) As an agency of the Federal Government, USDA remains eligible to receive no-cost transfers of excess DOD aircraft parts under the FPMR.

**§ 171.6 Reutilization and transfer procedures.**

Prior to any sales effort, the Secretary of Defense shall, to the maximum extent practicable, consult with the Administrator of GSA, and with the heads of other Federal departments and agencies as appropriate, regarding reutilization and transfer requirements for aircraft and aircraft parts under this Act (see Chapter 4 of DOD 4160.21–M, paragraphs B 2 b (1) through B 2 b (3)).

(a) DOD reutilization:

(1) USDA shall notify Army, Navy, and/or Air Force, in writing, of their aircraft requirements as they arise, by aircraft type listed in Attachment 1 of Chapter 4 of DOD 4160.21–M.

(2) If a DOD requirement exists, the owning Military Service shall advise USDA, in writing, that it will be issuing the aircraft to satisfy the DOD reutilization requirement. If USDA disputes the validity of the DOD requirement, it shall send a written notice of dispute to the owning Military Service and ADUSD(L&MR/SCI) within thirty (30) days of its notice from the Military Service. ADUSD(L&MR/SCI) shall then resolve the dispute, in writing. The aircraft may not be issued until the dispute has been resolved.

(b) Federal agency transfer:

(1) The Military Service must report aircraft which survive reutilization screening to GSA Region 9 on a Standard Form 120. GSA shall screen for Federal agency transfer requirements in accordance with the FPMR.

(2) If a Federal agency requirement exists, GSA shall advise USDA, in writing, that it will be issuing the aircraft to satisfy the Federal agency requirement. If USDA disputes the validity of the Federal requirement, it shall send a written notice of dispute to the owning Military Service and ADUSD(L&MR/SCI) within thirty (30) days of its notice from the Military Service. ADUSD(L&MR/SCI) shall then resolve the dispute, in writing. The aircraft cannot be issued until the dispute has been resolved.

(c) The Military Services shall:

(1) Report aircraft which survive transfer screening and are ready for sale to Headquarters, Defense Reutilization and Marketing Service, ATTN:

DRMS-LMI, Federal Center, 74 Washington Avenue North, Battle Creek, Michigan 49017–3092. The Military Services must use a DD Form 1348–1A, DTID, for this purpose.

(2) Transfer excess DOD aircraft to the Aerospace Maintenance and Regeneration Center (AMARC), Davis-Monthan AFB, AZ, and place the aircraft in an ''excess'' storage category while aircraft are undergoing screening and/or wildfire suppression aircraft sale. Aircraft shall not be available nor offered to airtanker operators from the Military Service's airfield. The Military Service shall be responsible for the AMARC aircraft induction charges. The gaining customer will be liable for all AMARC withdrawal charges, to include any aircraft preparation required from AMARC. Sale of parts required for aircraft preparation is limited to those not required for the operational mission forces, and only if authorized by specific authority of the respective Military Service's weapon system program manager.

[68 FR 8823, Feb. 26, 2003; 68 FR 11633, Mar. 11, 2003]

### § 171.7 Reporting requirements.

Not later than 31 March 2000, the Secretary of Defense must submit to the Committee on Armed Services of the Senate and the Committee on National Security of the House of Representatives a report setting forth the following:

(a) The number and type of aircraft sold under this authority, and the terms and conditions under which the aircraft were sold.

(b) The persons or entities to which the aircraft were sold.

(c) An accounting of the current use of the aircraft sold.

(d) USDA must submit to Headquarters, Defense Reutilization and Marketing Service, ATTN: DRMS-LMI, Federal Center, 74 Washington Avenue North, Battle Creek, Michigan, 49017–3092, not later than 1 February 2000, a report setting forth an accounting of the current disposition of all aircraft sold under the authority of the Act.

(e) DRMS must compile the report, based on sales contract files and (for the third report element) input from the USDA. The report must be provided to HQ DLA not later than 1 March 2000. HQ DLA shall forward the report to DOD not later than 15 March 2000.

### § 171.8 Expiration.

This part expires on 30 September 2005.

## PART 172—DISPOSITION OF PROCEEDS FROM DOD SALES OF SURPLUS PERSONAL PROPERTY

Sec.
172.1 Purpose.
172.2 Applicability and scope.
172.3 Policy.
172.4 Responsibilities.
172.5 Procedures.
172.6 Information requirements.

APPENDIX A TO PART 172—EFFORTS AND COSTS ASSOCIATED WITH THE DISPOSAL OF RECYCLABLE MATERIAL

APPENDIX B TO PART 172—DISPOSITION OF AMOUNTS COLLECTED FROM SUCCESSFUL BIDDERS

AUTHORITY: 40 U.S.C. 484 and 485, 10 U.S.C. 2577.

SOURCE: 54 FR 35483, Aug. 28, 1989, unless otherwise noted.

### § 172.1 Purpose.

This document provides revised and expanded instructions on the collection and disposition of cash and cash equivalents received by the DoD Components for the DoD sale of surplus personal property.

### § 172.2 Applicability and scope.

This part:

(a) Applies to the Office of the Secretary of Defense (OSD), the Military Departments, the Joint Chiefs of Staff (JCS) and the Joint Staff, the Unified and Specified Commands, the Inspector General of the Department of Defense (IG, DoD), the Defense Agencies, and DoD Field Activities (hereafter referred to collectively as ''DoD Components'').

(b) Applies to the proceeds resulting from sales made under authority of Public Law 152 and to the following:

(1) Personal property governed by DoD 4160.21–M.

(2) Surplus Government-owned personal property in the possession of contractors, as described in FAR subpart 45.6.

(3) Recyclable material governed by 10 U.S.C. 2577. Such materials would otherwise be sold as scrap or discarded as waste, but are capable of being reused after undergoing some type of physical or chemical processing. The recycling of hazardous materials or hazardous waste shall be accomplished with due recognition of the types of materials being processed and the applicable regulation governing the handling and disposal of such materials. Qualified recyclable materials do not include the following:

(i) Precious metal-bearing scrap and those items that may be used again for their original purposes or functions without any special processing; e.g., used vehicles, vehicle or machine parts, bottles (not scrap glass), electrical components, and unopened containers of oil or solvent.

(ii) Ships, planes, or weapons that must undergo demilitarization or mutilation before sale.

(iii) Scrap generated from DoD industrial fund (IF) operations that has been routinely sold with the proceeds being used to offset customer costs.

(iv) Bones, fats, and meat trimmings generated by a commissary store or exchange.

### § 172.3 Policy.

(a) Cash or cash equivalents in the prescribed amounts shall accompany bid deposits for a bid to be considered responsive. Similarly, cash or cash equivalents for the total sales price shall be received by the DoD Components or, in authorized cases, by contractors before the transfer of physical possession to the successful bidder.

(b) Amounts collected by the DoD Components in connection with the sale of excess and surplus property shall be deposited promptly to the U.S. Treasury accounts prescribed in accordance with this instruction. The use of suspense accounts shall be minimal. If the account, ultimately to be credited with the proceeds of a sale, can be determined reasonably at the time funds are collected, the deposit shall be made immediately to that account.

(c) The Secretary of each Military Department shall establish qualified recycling programs. The effort associated with the collecting, processing and selling of recyclable material is in appendix A to this part.

(1) Proceeds from the sale of recyclable material shall be used to reimburse installation-level costs incurred in operation of the recyclable program.

(2) After reimbursement of the cost incurred by the installation to operate the recycling program, installation commanders may use up to 50 percent of remaining sale proceeds for pollution abatement, energy conservation, and occupational safety and health activities. A project may not be carried out for an amount greater than 50 percent of the amount established by law as the maximum amount for a minor construction project.

(3) Any sale proceeds remaining after paragraphs (c)(1) and (2) of this section may be transferred to installation morale or welfare activities.

### § 172.4 Responsibilities.

The *Heads of DoD Components* that sell surplus personal property shall implement the procedures prescribed in this part for the disposition of cash and cash equivalents received in connection with such sales.

### § 172.5 Procedures.

(a) *Required bid deposits*. When a sale conducted by a DoD Component provides for bid deposit with subsequent removal, the following procedures shall apply:

(1) *Term bid*. This type of bid deposit is applicable when the sale involves the purchase of scrap or disposable material that will be generated over time with periodic removal by the successful bidder. The amount of the bid deposit required to accompany such bids is the average estimated quantity of such material to be generated during a 3 month period multiplied by 20 percent of the bid price. The calculation is illustrated, as follows:

| | |
|---|---|
| Estimated quantity of material to be generated each quarter (pounds). | 3,000 |
| Bid price—$1.00 per pound ..... | × $1.00 |
| Subtotal ..... | $3,000 |
| 20 percent of bid price ..... | 20 |
| Amount to accompany bid | $600 |

(2) *Other than term bid*. With the exception of term bids, payment in the

amount of 20 percent of the bid shall accompany the bid.

(b) *Payment terms*. When a sale conducted by a DoD Component provides for immediate pickup, the entire amount of the sales price shall be collected from the buyer at the conclusion of the sale. If the sale provides for a bid deposit, the balance of the bid price shall be paid before removal of the property.

(c) *Form of payment*—(1) *Cash and certified checks*. When a sale is conducted by a DoD Component, cash or its equivalent shall be collected for bid deposits and for remaining amounts due. Guaranteed negotiable instruments, such as cashiers checks, certified checks, travelers checks, bank drafts, or postal money orders are acceptable as a cash equivalent.

(2) *Personal checks*. Personal checks may be accepted by a DoD Component only when a performance bond or a bank letter of credit is on hand that will cover the amount due. If the check is dishonored, amounts due shall be collected from the issuer of the performance bond or letter of credit.

(i) If a bidder intends to use a bond or letter of credit without an accompanying personal check, the claim against the performance bond or letter of credit shall be made for any amounts due.

(ii) If personal checks are used, the bond or letter of credit shall be returned intact after the applicable personal checks are honored, unless other instructions have been received from the bidder.

(2) *Credit cards*. Approved credit cards may be accepted by a DoD Component for payment.

(i) Before initiating any credit card transactions, the selling DoD Component shall enter into an agreement with a network commercial bank. Currently, the Treasury has approved the use of ''Master Card'' and ''Visa'' charge cards. Changes or additions to approved credit cards are announced in Comptroller of the Department of Defense (C, DoD) memoranda or in changes to the TFM. Except for equipment and communication costs, the Treasury pays any fees normally charged to sellers. If the Treasury policy of paying such charges is changed, any charges for the processing of approved credit card transactions shall be assessed to the buyer.

(ii) If a credit card is used for the bid deposit and authorization is declined, the bid shall be rejected as nonresponsive and other bidders considered.

(iii) Approval for charges against credit cards shall be processed as follows:

(A) The credit card presented shall be passed through the DoD installation's credit card swiper. The swiper is connected electronically with the network commercial bank selected by the DoD Component, and keys are provided to enter the proposed charge amount. If the charge is approved, the swiper will provide an approval number that shall be recorded on the charge slip.

NOTE: A swiper is an electronic device that is used to capture the magentic information contained on a credit card and transmit it to the network commercial bank for validation and authorization of a sale. The information captured normally includes the account number, issuing bank, date of expiration of the card, and any credit restrictions that may apply.

(B) The bidder shall sign a standard credit card charge form at the sale contracting office. A copy of this form shall be returned to the card holder at that time. A copy of the charge slip shall be retained by the selling DoD activity as a record of the sale. On the following business day, the installation finance and accounting officer or the activity providing accounting support shall submit the signed credit card forms with a supporting cover sheet showing the total charges to the network commercial bank. Accounting control must be maintained over such in-transit deposits.

(C) On receipt of the credit card charge forms, the network commercial bank shall charge the bidder's credit card account and deposit the funds to the Treasury general account. The network commercial bank also is required to forward a copy of the deposit slip to the DoD installation making the sale within 1 business day. On receipt of the deposit slip, the in-transit account shall be cleared and appropriate accounts credited following the procedures in paragraph (d) of this section:

(iv) If a contractor's bid is provided by message, mail, or telephone to the U.S. Government using a credit card instead of other forms of payment, the following information is required:

(A) Account number.

(B) Bidders name, as it appears on the credit card.

(C) Date of expiration of the card.

(D) Issuing bank.

(E) Type of card.

Any additional cost incurred by the Department of Defense in connection with the use of the charge card, such as telephone calls to obtain approval from the network bank, shall be billed to the purchaser as an additive charge.

(d) *Disposition of proceeds.* (1) Proceeds from the sale of surplus personal property shall be deposited by the collecting DoD Component promptly to the U.S. Treasury accounts prescribed in appendix B to this part. The use of suspense accounts shall be minimal. If the account ultimately to be credited with the proceeds of a sale can be determined reasonably at the time the funds are collected, the deposit shall be made immediately to that account.

(2) See paragraph (f) of this section for special instructions on the processing of proceeds resulting from the sale of recyclable material.

(e) *Return of bid deposits to unsuccessful bidders.* (1) Cash collected from unsuccessful bidders by a DoD Component shall be deposited to account X6875, ''Suspense,'' and a check shall be drawn on that account to reimburse unsuccessful bidders.

(2) Normally, noncash bid deposits shall be returned to unsuccessful bidders by DoD Components through the mail. However, when a bidder has requested expedited return and has provided the name of a carrier and a charge account number, the designated carrier shall be called to pick up the deposit with the explicit condition that applicable carrier costs will be charged to the bidder's account.

(f) *Sales of recyclable material.* The efforts associated with collection and processing of recyclable material are reflected in appendix A to this part. The following transactions for others (TFO) procedures apply:

(1) Proceeds from the sale of recyclable material shall be deposited in F3875, ''Budget Clearing Account (Suspense).'' The deposit to F3875 shall identify the fiscal station and the name of the installation (use the full name and do not abbreviate) that is to receive the proceeds. Deposits that do not provide the necessary information shall be referred formally to the property disposal cashier for the required information.

(2) The Military Department's finance and accounting office receiving the sales proceeds shall mail a copy of the cash collection voucher to the fiscal station shown on the collection voucher. This advance copy shall be used by the fiscal station to record the collection of proceeds to its account and shall be used for followup purposes, as necessary. The copy received through the financial network shall be used to clear the undistributed collection. These vouchers shall be mailed in the weekly TFO cycle.

(3) The Military Department's finance and accounting office shall:

(i) Report weekly transactions to the responsible fiscal station cited on the collection voucher.

(ii) Report the collections within the same month in the ''Statement of Transactions'' to the Treasury.

(g) *Contractor sales of surplus Government-furnished property.* (1) DFARS §245.610 provides overall direction for crediting proceeds from contractor conducted sales of surplus Government furnished property. Paragraph (g)(5) of this section provides the procedures that shall be used to ensure proper accounting for such proceeds.

(2) The contractor making the sale may follow normal company policy on bid deposits and form of payment. However, any loss associated with dishonored payment shall be the contractor's responsibility.

(3) The plant clearance officer (PLCO) is responsible for notifying the appropriate accounting office of the amounts collected by the contractor. The PLCO shall also notify the accounting office whether such collections:

(i) Represent an increase in the dollar value of the applicable contract(s).

(ii) Were made instead of disbursements on the applicable contract(s).

(iii) Were returned to miscellaneous receipt account 972651, ''Sale of Scrap and Salvage, Materials, Defense.''

(4) The accounting office for the contract is identified in the accounting classification code. See DoD 7220.9–M, chapter 17 for additional information.

(5) The accounting office shall prepare the source documents necessary to account properly for the transaction. The value of applicable Government property general-ledger-asset accounts shall be reduced for each alternative set forth in paragraph (g)(3) of this section. Additionally, for alternatives (addressed in paragraph (g)(3)(i) or (g)(3)(ii) of this section, an accounting entry shall be made to reflect the creation of reimbursable obligational authority and the use of such authority.

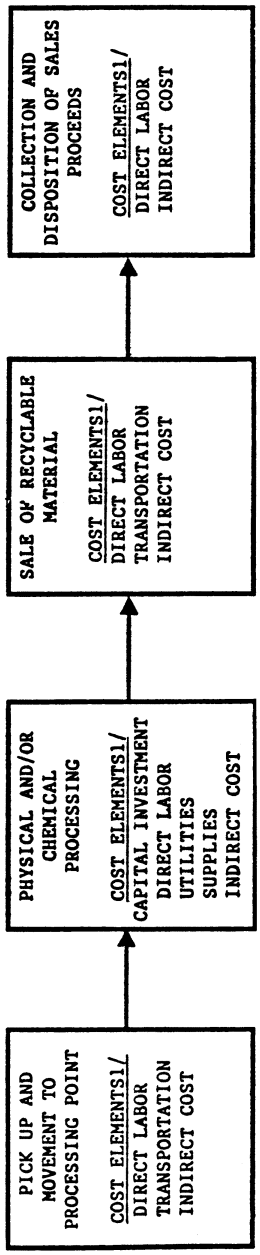
### § 172.6 Information requirements.

The reports cited in §§ 172.5(f)(3) (i) and (ii) of this part are exempt from licensing in accordance with paragraph E.4g. of DoD 7750.5–M.

APPENDIX A TO PART 172—EFFORTS AND COSTS ASSOCIATED WITH THE DISPOSAL OF RECYCLABLE MATERIAL

APPENDIX A -

EFFORTS AND COSTS ASSOCIATED WITH THE DISPOSAL OF RECYCLABLE MATERIAL




1/ The proceeds of sales of DoD-purchased materials, labor, and assets shall be recouped on the basis of a sale to "Another Federal Agency," as prescribed in DoD 7220.9-M, chapter 26 (reference (h)). This procedure excludes capital investment costs. Such costs may be paid from recyclable material sales proceeds in their entirety. Therefore, amortization of capital items is not applicable.

## APPENDIX B TO PART 172—DISPOSITION OF AMOUNTS COLLECTED FROM SUCCESSFUL BIDDERS

| Type of property | Disposition of: | |
|---|---|---|
| | (20%) bid deposit | (80%) remaining balance |
| 1. Scrap turned in by industrial fund (IF) activities | IF | IF. |
| 2. Usable personal property purchased by and turned in by IF activities. | IF | IF. |
| 3. Property purchased with funds from trust fund __ X8420, ''Surcharge Collections, Sales of Commissary Stores''. | __ X8420 | __ X8420. |
| 4. Automatic data processing equipment owned by the General Services Administration (GSA) and leased to DoD. | __ F3875, Budget Clearing Account (Suspense). | __ F3875. Upon receipt of the entire amount due from the bidder, a check shall be drawn on the suspense account and forwarded to GSA at the following address: General Services Administration Office of Finance (WBCRC), Collections and Securities, 7th and I Streets NW., Washington, DC 20407. |
| 5. Section 605(d) the Foreign Assistance Act of 1965, provides that proceeds from the sale of defense articles shall be credited to the appropriation, fund or account used to procure the article or to the account currently available for the same general purpose. | | |
| a. Pre-MAP merger (Pre FY 82) property issued under the Military Assistance Program (MAP) and returned as no longer needed, and all MAP funded personal property belong to Security Assistance Offices (SAO). | 11__1082, ''Foreign Military Financing Program'' (Effective 1 October 1989 the 11__1080, ''Military Assitance,'' account is no longer available for the receipt of proceeds). | 11__1082. |
| b. Security Assistance Offices (SAO) personal property purchased with Foreign Military Sales Administrative Funds (11x8242). | 978242 XDM__ S843000 | 978242 XDM__ S843000. |
| 6. Coast Guard property under the physical control of the Coast Guard at the time of sale. | __ F3875 | __ F3875. Upon receipt of the entire amount due from the bidder, a check shall be drawn on the suspense account and forwarded to the Coast Guard at the following address: Commandant, U.S. Coast Guard (GFAC), Washington, DC 20593. |
| 7. Property owned by nonappropriated fund instrumentalities, excluding garbage suitable for animal consumption that is disposed of under a multiple-pickup contract. | __ X6874, ''Suspense'' | __ X6875. Upon receipt of the entire amount due from the bidder, a check shall be drawn on the suspense account and forwarded to the applicable instrumentality. |
| 8. Recyclable material | __ F3875 [1] | __ F3875.[1] Upon receipt of the entire amount due from the bidder, deposit total proceeds to the accounts designated by the DoD Military Installation that gave the material up for disposal. |
| 9. Lost, abandoned, or unclaimed privately owned personal property. | 972651,''Sale of Scrap and Salvage Materials, Defense''. | __ X6001, ''Proceeds of Sales of Lost, Abandoned or Unclaimed Personal Property.'' The owner(s) of lost, abandoned, or unclaimed property may claim the net proceeds from sale of that property within 5 years of the date of the sale by providing proof of ownership to the government. After 5 years from the date of the sale, any unclaimed net proceeds shall be transferred from __ X6001 to general fund miscellaneous receipt account __1060, ''Forfeitures of Unclaimed Money and Property.'' |

| Type of property | Disposition of: | |
|---|---|---|
| | (20%) bid deposit | (80%) remaining balance |
| 10. Property owned by a country or international organization. | Operation and maintenance appropriation of the DoD Component that sells the property. (This is reimbursement for selling expenses.). | X6875. Upon receipt of the entire amount due from the bidder, a check for 80% of the sales price shall be drawn on the suspense account and forwarded to the applicable foreign country or international organization. |
| 11. Bones, fats, and meat trimmings generated by a commissary store. | Stock Fund | Stock Fund. |
| 12. Government furnished property sold by contractors. | (2) | (2). |
| 13. All other property | 972651 | 972651. |

[1] 10 U.S.C. 2577 limits the amounts which can be held in F3875 at the end of any fiscal year resulting from the program to $2 million. Amounts in excess of $2 million are to be transferred to Miscellaneous Receipts of the Treasury. This instruction provides for immediate distribution of all sales proceeds received from the recyclable program.
[2] See subsection D.7. of the basic Instruction.

[55 FR 13903, Apr. 13, 1990]

# PART 173—COMPETITIVE INFORMATION CERTIFICATE AND PROFIT REDUCTION CLAUSE

Sec.
173.1 Scope.
173.2 Competitive Information Certification.
173.3 Profit reduction clause.
APPENDIX TO PART 173—LIST OF CONTRACTORS FOR WHOM CERTIFICATION IS REQUIRED

AUTHORITY: 10 U.S.C. 2202.

SOURCE: 53 FR 42948, Oct. 25, 1988, unless otherwise noted.

## § 173.1 Scope.

(a) The purpose of the Competitive Information Certificate is to provide the Contracting Officer sufficient information and assurance to support award of a contract in those circumstances where certification is required.

(b) Although a Competitive Information Certificate provides reasonable assurance to the Government, the possibility remains that even a diligent internal review by the contractor may fail to identify illegal or improper actions. The purpose of the Profit Reduction Clause is to ensure effective protection of the Government's interest in making contract awards when a Competitive Information Certification is required. The Profit Reduction Clause is required in all competitively awarded new contracts over $100,000 when a Competitive Information Certificate is required prior to award.

## § 173.2 Competitive Information Certification.

(a) The Competitive Information Certificate is required prior to award of all competitively awarded new contracts of a value exceeding $100,000 to contractors subject to the requirement.

(1) Corporate activities required to provide the Certificate are corporations or corporate divisions which have been the subject of search warrants, or as to which other official information indicates such certification should be required, and their subsidiaries and affiliates. A list of contractors from whom certification is required is maintained and published as required under authority of the Department of Defense Procurement Task Force.

(2) The requirement to provide the Certificate may be further limited to certain divisions or subsidiaries, contracts or programs upon the basis of official information, furnished by the contractor or otherwise, sufficient to establish to the satisfaction of the Department of Defense that the investigation is so limited. Such information may include copies of search warrants, subpoenas and affidavits from corporate officials concerning the scope and conduct of the investigation. The sufficiency of such information is solely within the discretion of the Department of Defense.

(3) Contractors from whom certification in certain instances is required

will be relieved of the certification requirement when the Department of Defense determines that information developed in the ''Ill Wind'' investigation has been resolved in such a manner that certification is no longer required to protect the interests of the Government.

(4) A Certificate will not be required prior to the exercise of options or noncompetitive award of contracts. This does not limit in any manner the Government's ability to inquire into, or require information concerning, the circumstances surrounding an underlying competitive award.

(b) With respect to information disclosed under paragraph (1) of the Certificate, the offeror must attach to the Certificate a written statement detailing what information was obtained, and how, when, and from whom it was obtained. This information shall be evaluated at the levels prescribed by the contracting component to determine whether award of the contract should be made to the offeror. If during this review it is determined that the offeror may have obtained an unfair competitive advantage from the information and that there is no other reason for denying award to the offeror, the reviewing authority shall consider whether action may be taken to neutralize the potential unfair competitive advantage. Any decision to deny award to an offeror based upon information disclosed in the Certificate shall be reviewed and approved by the Service Acquisition Executive.

(c) This certificate and any accompanying statements required, must be executed by the offeror's corporate president or his designee at no more than one level below the president's level.

(d) If a contractor from whom certification is required is uncertain as to whether competitive information otherwise required to be disclosed was generally available to offerors, the uncertainty should be resolved by disclosure.

(e) Contracting Officers may continue to accept Certificates of Business Ethics and Integrity complying with the Interim rule in lieu of Competitive Information Certificates.

(f) The Competitive Information Certificate shall be in the following form:

Competitive Information Certificate

(1) (Name of the offeror) certifies, to the best of its knowledge and belief, that

(i) With the exception of any information described in an attachment to this certificate, and any information the offeror reasonably believes was made generally available to prospective offerors, the offeror has not knowingly obtained, directly or indirectly from the Government, any written information or oral extract or account thereof relating to this solicitation which was

(A) Submitted to the Government by offerors or potential offerors in response to the Government's solicitation for bid or proposal;

(B) Marked by an offeror or potential offeror to indicate the information was submitted to the Government subject to an assertion of privilege against disclosure;

(C) Marked or otherwise identified by the Government pursuant to law or regulation as classified, source selection sensitive, or for official use only; or

(D) The disclosure of which to the offeror or potential offeror by a Government employee would, under the circumstances, otherwise violate law or regulation.

(ii) The offeror named above

(A) Determined the prices in its offer independently, without, for the purpose of restricting competition, any consultation, communications, or agreement, directly or indirectly, with any other offeror or competitor relating to (*1*) those prices, (*2*) the intention to submit an offer, or (*3*), the methods or factors used to calculate the prices offered;

(B) Has not knowingly disclosed the prices in its offer, directly or indirectly, to any other offeror or competitor before bid opening (in the case of a sealed bid solicitation) or contract award (in the case of a negotiated solicitation) unless otherwise required by law;

(C) Has not attempted to induce any other concern to submit or not to submit an offer for the purpose of restricting competition.

(iii) The offeror has attached an accurate description of the internal review forming the basis for the certifications provided herein.

Corporate President or Designee.

### § 173.3 Profit reduction clause.

The following profit reduction clause is required in all competitively awarded new contracts over $100,000 when a Competitive Information Certificate is required prior to award.

Profit Reduction for Illegal or Improper Activity

(a) The government, at its election, may reduce the contract price by the amount of any anticipated profit determined as set forth in paragraph (b) of this section; if

(1) A person or business entity is convicted for violating 18 U.S.C. 201–224 (bribery, graft, and conflicts of interest), 18 U.S.C. 371 (conspiracy), 18 U.S.C. 641 (theft of public money, property, or records), 18 U.S.C. 1001 (false statements), 18 U.S.C. 1341 (fraud), 18 U.S.C. 1343 (fraud by wire) for any act in connection with or related to the obtaining of this contract; or

(2) The Secretary of Defense, or his designee, determines that the Competitive Information Certificate submitted by the offeror in connection with award of this contract

(i) Was materially false at the time it was filed, or

(ii) Notwithstanding the offeror's best knowledge and belief, was materially incomplete or inaccurate.

Prior to making such a determination, the Secretary or his designee, shall provide to the contractor a written statement of the action being considered and the basis therefor. The contractor shall have not less than 30 calendar days after receipt to submit in person, in writing, or through a representative, information and argument in opposition to the proposed reduction. The Secretary or his designee may, upon good cause shown, determine to reduce the contract price by less than the amount of any profit determined under paragraph (b) of this section.

(b) The amount of anticipated profits referred to in § 173.3(a) shall be:

(1) In the case of a cost-plus-fixed-fee contract, the amount of the fee specified in the contract at the time of award;

(2) In the case of fixed-price-incentive-profit or cost-plus-incentive-fee contract, the amount of the target profit or fee specified in the contract at the time of award; or

(3) In the case of a firm-fixed-price contract, the amount of anticipated profit determined by the contracting officer, after notice to the contractor and opportunity to comment, from records or documents in existence prior to the date of the award of the contract.

(c) The rights and remedies of the government provided in this cluase shall not be exclusive and are in addition to any other rights and remedies provided by law or under this contract.

## APPENDIX TO PART 173—LIST OF CONTRACTORS FOR WHOM CERTIFICATION IS REQUIRED

Armtec, Incorporated, 410 Highway 19 South, Palatka, FL 32077

Cubic Corporation, 9333 Balboa Avenue, San Diego, CA 92123 as to contracts originating in the following division:

Cubic Defense Systems, Incorporated, San Diego, CA

Executive Resource Associates, 2011 Crystal Drive, suite 813, Arlington, VA 22202

Hazeltine Corporation, 500 Commack Road, Commack, NY 11725 and all divisions and subsidiaries as follows:

Hazeltine Corporation, Electro-Acoustic Division, 115 Bay State Drive, Braintree, MA 02184

Hazeltine Corporation, Government Systems & Products Division, Cuba Hill Road, Greenlawn, NY 11740

Hazeltine Research, Incorporated, 188 Industrial Drive, Elmhurst, IL 60126

Kane Paper Corporation, 2365 Milburn Avenue, Baldwin, NY 11510

Litton Data Systems, Incorporated, 8000 Woodley Ave., Van Nuys, CA 91408

Loral Defense Systems Akron, 1210 Massillon Rd., Akron, OH 44315

McDonnel Douglas Corporation, Banshee Rd., P.O. Box 516, St. Louis, MO 63166 as to contracts originating in the following division:

McDonnell Aircraft Company, St. Louis, MO

Northrop Corporation, Ventura Division, 1515 Rancho Conejo Boulevard, Newbury Park, CA 91320

Teledyne Electronics, 649 Lawrence Drive, Newbury Park, CA 91320

Unisys Corporation, One Unisys Place, Detroit, MI 48232, as to contracts originating in the following divisions or subsidiaries:

Unisys Corporation, Defense Systems Division, 3333 Pilot Knob Road, Eagan, MN

Unisys Corporation, Defense Systems Division, Neil Armstrong Boulevard, Eagan, MN

Unisys Shipboard & Ground Systems Group, Marquis Avenue, Great Neck, NY 11020

United Technologies Corporation, UT Bldg., Hartford, CT 06101 as to contracts originating in the following divisions or subsidiaries:

Norden Systems, Incorporated

Pratt & Whitney

Varian Associates, Incorporated, 611 Hansen Way, Palo Alto, CA as to contracts originating in the following division:

*Continental Electronics Manufacturing Company, Dallas, TX

Whittaker Corporation (Lee Telecommunications Corporation (LTC), Route 1, Farmington, AR 72730)

Zubier Enterprises, 6201 Pine Street, Harrisburg, PA.

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*Firm suspended as of July 6, 1988.

# SUBCHAPTER H—CLOSURES AND REALIGNMENT

## PART 174—REVITALIZING BASE CLOSURE COMMUNITIES AND ADDRESSING IMPACTS OF REALIGNMENT

### Subpart A—General

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174.1 Purpose.
174.2 Applicability.
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### Subpart B—Policy

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174.6 LRA and the redevelopment plan.

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174.7 Retention for DoD Component use and transfers to other Federal agencies.
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174.10 Consideration for economic development conveyances.
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### Subpart E—Personal Property

174.13 Personal property.

### Subpart F—Maintenance and Repair

174.14 Maintenance and repair.

### Subpart G—Environmental Matters

174.15 Indemnification under Section 330 of the National Defense Authorization Act for Fiscal Year 1993.
174.16 Real property containing explosive or chemical agent hazards.
174.17 NEPA.
174.18 Historic preservation.

AUTHORITY: 10 U.S.C. 113 and 10 U.S.C. 2687 *note*.

SOURCE: 71 FR 9919, Feb. 28, 2006, unless otherwise noted.

## Subpart A—General

### § 174.1 Purpose.

This part:

(a) Establishes policy, assigns responsibilities, and implements base closure laws and associated provisions of law relating to the closure and the realignment of installations. It does not address the process for selecting installations for closure or realignment.

(b) Authorizes the publication of DoD 4165.66–M, ''Base Redevelopment and Realignment Manual,'' in accordance with DoD 5025.1–M[1], ''DoD Directive System Procedures,'' March 2003.

### § 174.2 Applicability.

This part applies to:

(a) The Office of the Secretary of Defense, the Military Departments, 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 in the Department of Defense (hereafter referred to collectively as the ''DoD Components'').

(b) Installations in the United States selected for closure or realignment under a base closure law.

(c) Federal agencies and non-Federal entities that seek to obtain real or personal property on installations selected for closure or realignment.

### § 174.3 Definitions.

(a) *Base closure law*. This term has the same meaning as provided in 10 U.S.C. § 101(a)(17)(B) and (C).

(b) *Closure*. An action that ceases or relocates all current missions of an installation and eliminates or relocates all current personnel positions (military, civilian, and contractor), except for personnel required for caretaking, conducting any ongoing environmental cleanup, or property disposal. Retention of a small enclave, not associated

[1] Copies may be obtained at *http://www.dtic.mil/whs/directives/corres/publ.html*.

with the main mission of the base, is still a closure.

(c) *Consultation*. Explaining and discussing an issue, considering objections, modifications, and alternatives; but without a requirement to reach agreement.

(d) *Date of approval*. This term has the same meaning as provided in section 2910(8) of the Defense Base Closure and Realignment Act of 1990, Pub. L. 101–510.

(e) *Excess property*. This term has the same meaning as provided in 40 U.S.C. § 102(3).

(f) *Installation*. This term has the same meaning as provided in the definition for ''military installation'' in section 2910(4) of the Defense Base Closure and Realignment Act of 1990, Pub. L. 101–510.

(g) *Local Redevelopment Authority* (LRA). This term has the same meaning as provided in the definition for ''redevelopment authority'' in section 2910(9) of the Defense Base Closure and Realignment Act of 1990, Pub. L. 101–510.

(h) *Military Department*. This term has the same meaning as provided in 10 U.S.C. 101(a)(8).

(i) *National Environmental Policy Act (NEPA)*. The National Environmental Policy Act of 1969, Pub. L. 91–190, 42 U.S.C. 4321 *et seq.*, as amended.

(j) *Realignment*. This term has the same meaning as provided in section 2910(5) of the Defense Base Closure and Realignment Act of 1990, Pub. L. 101–510.

(k) *Secretary concerned*. This term has the same meaning as provided in 10 U.S.C. 101(a)(9)(A), (B), and (C).

(l) *Surplus property*. This term has the same meaning as provided in 40 U.S.C. 102(10).

(m) *Transition coordinator*. This term has the same meaning as used in section 2915 of the National Defense Authorization Act for Fiscal Year 1994, Public Law 103–160.

## Subpart B—Policy

### § 174.4 Policy.

It is DoD policy to:

(a) Act expeditiously whether closing or realigning. Relocating activities from installations designated for closure will, when feasible, be accelerated to facilitate the transfer of real property for community reuse. In the case of realignments, the Department will pursue aggressive planning and scheduling of related facility improvements at the receiving location.

(b) Fully utilize all appropriate means to transfer property. Federal law provides the Department with an array of legal authorities, including public benefit transfers, economic development conveyances at cost and no cost, negotiated sales to state or local government, conservation conveyances, and public sales, by which to transfer property on closed or realigned installations. Recognizing that the variety of types of facilities available for civilian reuse and the unique circumstances of the surrounding communities does not lend itself to a single universal solution, the Department will use this array of authorities in a way that considers individual circumstances.

(c) Rely on and leverage market forces. Community redevelopment plans and military conveyance plans should be integrated to the extent practical and should take account of any anticipated demand for surplus military land and facilities.

(d) Collaborate effectively. Experience suggests that collaboration is the linchpin to successful installation redevelopment. Only by collaborating with the local community can the Department close and transfer property in a timely manner and provide a foundation for solid economic redevelopment.

(e) Speak with one voice. The Department of Defense, acting through the DoD Components, will provide clear and timely information and will encourage affected communities to do the same.

(f) Work with communities to address growth. The Department will work with the surrounding community so that the public and private sectors can provide the services and facilities needed to accommodate new personnel and their families. The Department recognizes that installation commanders and local officials, as appropriate (*e.g.*, State, county, and tribal), need to integrate and coordinate elements of their

local and regional growth planning so that appropriate off-base facilities and services are available for arriving personnel and their families.

### § 174.5 Responsibilities.

(a) The Under Secretary of Defense for Acquisition, Technology, and Logistics shall issue DoD Instructions as necessary to further implement applicable public laws affecting installation closure and realignment implementation and shall monitor compliance with this part. All authorities and responsibilities of the Secretary of Defense—

(1) Vested in the Secretary of Defense by a base closure law, but excluding those provisions relating to the process for selecting installations for closure or realignment;

(2) Delegated from the Administrator of General Services relating to base closure and realignment matters;

(3) Vested in the Secretary of Defense by any other provision relating to base closure and realignment in a national defense authorization act, a Department of Defense appropriations act, or a military construction appropriations act, but excluding section 330 of the National Defense Authorization Act for Fiscal Year 1993; or

(4) Vested in the Secretary of Defense by Executive Order or regulation and relating to base closure and realignment, are hereby delegated to the Under Secretary of Defense for Acquisition, Technology, and Logistics.

(b) The authorities and responsibilities of the Secretary of Defense delegated to the Under Secretary of Defense for Acquisition, Technology, and Logistics under paragraph (a) of this section are hereby re-delegated to the Deputy Under Secretary of Defense (Installations and Environment).

(c) The Heads of the DoD Components shall ensure compliance with this part and any implementing guidance.

(d) Subject to the delegations in paragraphs (a) and (b) of this section, the Secretaries concerned shall exercise those authorities and responsibilities specified in subparts C through G of this part.

(e) The cost of recording deeds and other transfer documents is the responsibility of the transferee.

## Subpart C—Working with Communities and States

### § 174.6 LRA and the redevelopment plan.

(a) The LRA should have broad-based membership, including, but not limited to, representatives from those jurisdictions with zoning authority over the property. Generally, there will be one recognized LRA per installation.

(b) The LRA should focus primarily on developing a comprehensive redevelopment plan based upon local needs. The plan should recommend land uses based upon an exploration of feasible reuse alternatives. If applicable, the plan should consider notices of interest received under a base closure law. This section shall not be construed to require a plan that is enforceable under state and local land use laws, nor is it intended to create any exemption from such laws.

(c)(1) The Secretary concerned will develop a disposal plan and, to the extent practicable, complete the appropriate environmental documentation no later than 12 months after receipt of the redevelopment plan. The redevelopment plan will be used as part of the proposed Federal action in conducting environmental analyses required under NEPA.

(2) In the event there is no LRA recognized by DoD or if a redevelopment plan is not received from the LRA within 9 months from the date referred to in section 2905(b)(7)(F)(iv) of Pub. L. 101–510, (unless an extension of time has been granted by the Deputy Under Secretary of Defense (Installations and Environment)), the Secretary concerned shall, after required consultation with the governor and heads of local governments, proceed with the disposal of property under applicable property disposal and environmental laws and regulations.

## Subpart D—Real Property

### § 174.7 Retention for DoD Component use and transfer to other Federal agencies.

(a) To speed the economic recovery of communities affected by closures and

realignments, the Department of Defense will identify DoD and Federal interests in real property at closing and realigning installations as quickly as possible. The Secretary concerned shall identify such interests. The Secretary concerned will keep the LRA informed of these interests. This section establishes a uniform process, with specified timelines, for identifying real property that is available for use by DoD Components (which for purposes of this section includes the United States Coast Guard) or is excess to the needs of the Department of Defense and available for use by other Federal agencies, and for the disposal of surplus property for various purposes.

(b) The Secretary concerned should consider LRA input, if provided, in making determinations on the retention of property (location and size of cantonment area).

(c) Within one week of the date of approval of the closure or realignment, the Secretary concerned shall issue a notice of availability to the DoD Components and other Federal agencies covering closing and realigning installation buildings and property available for transfer to the DoD Components and other Federal agencies. The notice of availability should describe the property and buildings available for transfer. Withdrawn public domain lands which the Secretary of the Interior has determined are suitable for return to the jurisdiction of the Department of the Interior (DoI) will not be included in the notice of availability.

(d) To obtain consideration of a requirement for such available buildings and property, a DoD Component or Federal agency is required to provide a written, firm expression of interest for buildings and property within 30 days of the date of the notice of availability. An expression of interest must explain the intended use and the corresponding requirement for the buildings and property.

(e)(1) Within 60 days of the date of the notice of availability, the DoD Component or Federal agency expressing interest in buildings or property must submit an application for transfer of such property to a Military Department or Federal agency. In the case of a DoD Component that would normally, under the circumstances, obtain its real property needs from the Military Department disposing of the real property, the application should indicate the property would not transfer to another Military Department but should be retained by the current Military Department for the use of the DoD Component. To the extent a different Military Department provides real property support for the requesting DoD Component, the application must indicate the concurrence of the supporting Military Department.

(2) Within 90 days of the notice of availability, the Federal Aviation Administration (FAA) should survey the air traffic control and air navigation equipment at the installation to determine what is needed to support the air traffic control, surveillance, and communications functions supported by the Military Department, and to identify the facilities needed to support the National Airspace System. FAA requests for property to manage the National Airspace System will not be governed by paragraph (h) of this section. Instead, the FAA shall work directly with the Military Department to prepare an agreement to assume custody of the property necessary for control of the airspace being relinquished by the Military Department.

(f) The Secretary concerned will keep the LRA informed of the progress in identifying interests. At the same time, the LRA is encouraged to contact Federal agencies which sponsor public benefit conveyances for information and technical assistance. The Secretary concerned will provide to the LRA points of contact at the Federal agencies.

(g) DoD Components and Federal agencies are encouraged to discuss their plans and needs with the LRA, if an LRA exists. If an LRA does not exist, the consultation should be pursued with the governor or the heads of the local governments in whose jurisdiction the property is located. DoD Components and Federal agencies are encouraged to notify the Secretary concerned of the results of this consultation. The Secretary concerned, the Transition Coordinator, and the DoD Office of Economic Adjustment Project Manager are available to help

facilitate communication between the DoD Components and Federal agencies, and the LRA, governor, and heads of local governments.

(h) An application for property from a DoD Component or Federal agency must contain the following information:

(1) A completed GSA Form 1334, *Request for Transfer* (for requests from DoD Components, a DD Form 1354 will be used). This must be signed by the head of the Component or agency requesting the property. If the authority to acquire property has been delegated, a copy of the delegation must accompany the form;

(2) A statement from the head of the requesting Component or agency that the request does not establish a new program (*i.e.*, one that has never been reflected in a previous budget submission or Congressional action);

(3) A statement that the requesting Component or agency has reviewed its real property holdings and cannot satisfy its requirement with existing property. This review must include all property under the requester's accountability, including permits to other Federal agencies and outleases to other organizations;

(4) A statement that the requested property would provide greater long-term economic benefits for the program than acquisition of a new facility or other property;

(5) A statement that the program for which the property is requested has long-term viability;

(6) A statement that considerations of design, layout, geographic location, age, state of repair, and expected maintenance costs of the requested property clearly demonstrate that the transfer will prove more economical over a sustained period of time than acquiring a new facility;

(7) A statement that the size of the property requested is consistent with the actual requirement;

(8) A statement that fair market value reimbursement to the Military Department will be made at the later of January of 2008, or at the time of transfer, unless this obligation is waived by the Office of Management and Budget and the Secretary concerned, or a public law specifically provides for a non-reimbursable transfer (this requirement does not apply to requests from DoD Components);

(9) A statement that the requesting DoD Component or Federal agency agrees to accept the care and custody costs for the property on the date the property is available for transfer, as determined by the Secretary concerned; and

(10) A statement that the requesting agency agrees to accept transfer of the property in its existing condition, unless this obligation is waived by the Secretary concerned.

(i) The Secretary concerned will make a decision on an application from a DoD Component or Federal agency based upon the following factors:

(1) The requirement must be valid and appropriate;

(2) The proposed use is consistent with the highest and best use of the property;

(3) The proposed transfer will not have an adverse impact on the transfer of any remaining portion of the installation;

(4) The proposed transfer will not establish a new program or substantially increase the level of a Component's or agency's existing programs;

(5) The application offers fair market value for the property, unless waived;

(6) The proposed transfer addresses applicable environmental responsibilities to the satisfaction of the Secretary concerned; and

(7) The proposed transfer is in the best interest of the Government.

(j) When there is more than one acceptable application for the same building or property, the Secretary concerned shall consider, in the following order—

(1) The need to perform the national defense missions of the Department of Defense and the Coast Guard;

(2) The need to support the homeland defense mission; and

(3) The LRA's comments as well as other factors in the determination of highest and best use.

(k) If the Federal agency does not meet its commitment under paragraph (h)(8) of this section to provide the required reimbursement, and the requested property has not yet been

transferred to the agency, the requested property will be declared surplus and disposed of in accordance with the provisions of this part.

(l) Closing or realigning installations may contain ''public domain lands'' which have been withdrawn by the Secretary of the Interior from operation of the public land laws and reserved for use by the Department of Defense. Lands deemed suitable for return to the public domain are not real property governed by title 40, United States Code, and are not governed by the property management and disposal provisions of a base closure law. Public domain lands are under the jurisdiction of the Secretary of the Interior and administered by the Bureau of Land Management (BLM) unless the Secretary of the Interior has withdrawn the lands and reserved them for another Federal agency's use.

(1) The Secretary concerned will provide the BLM with information about which, if any, public domain lands will be affected by the installation's closure or realignment.

(2) The BLM will review the information to determine if any installations contain withdrawn public domain lands. The BLM will review its land records to identify any withdrawn public domain lands at the closing installations. Any records discrepancies between the BLM and Military Departments should be resolved. The BLM will notify the Secretary concerned as to the final agreed upon withdrawn and reserved public domain lands at an installation.

(3) Upon agreement as to what withdrawn and reserved public domain lands are affected at closing installations, the BLM will initiate a screening of DoI agencies to determine if these lands are suitable for programs of the Secretary of the Interior.

(4) The Secretary concerned will transmit a Notice of Intent to Relinquish (see 43 CFR Part 2370) to the BLM as soon as it is known that there is no DoD Component interest in reusing the public domain lands. The BLM will complete the suitability determination screening process within 30 days of receipt of the Secretary's Notice of Intent to Relinquish. If a DoD Component is approved to reuse the public domain lands, the BLM will be notified and BLM will determine if the current authority for military use of these lands needs to be modified or amended.

(5) If BLM determines the land is suitable for return, it shall notify the Secretary concerned that the intent of the Secretary of the Interior is to accept the relinquishment of the land by the Secretary concerned.

(6) If BLM determines the land is not suitable for return to the DoI, the land should be disposed of pursuant to base closure law.

(m) The Secretary concerned should make a surplus determination within six (6) months of the date of approval of closure or realignment, and shall inform the LRA of the determination. If requested by the LRA, the Secretary may postpone the surplus determination for a period of no more than six (6) additional months after the date of approval if the Secretary determines that such postponement is in the best interests of the communities affected by the closure or realignment.

(1) In unusual circumstances, extensions beyond six months can be granted by the Deputy Under Secretary of Defense (Installations and Environment).

(2) Extensions of the surplus determination should be limited to the portions of the installation where there is an outstanding interest, and every effort should be made to make decisions on as much of the installation as possible, within the specified timeframes.

(n) Once the surplus determination has been made, the Secretary concerned shall follow the procedures in part 176 of this title.

(o) Following the surplus determination, but prior to the disposal of property, the Secretary concerned may, at the Secretary's discretion, withdraw the surplus determination and evaluate a Federal agency's late request for excess property.

(1) Transfers under this paragraph shall be limited to special cases, as determined by the Secretary concerned.

(2) Requests shall be made to the Secretary concerned, as specified under paragraphs (h) and (i) of this section, and the Secretary shall notify the LRA of such late request.

(3) Comments received from the LRA and the time and effort invested by the LRA in the planning process should be considered when the Secretary concerned is reviewing a late request.

### § 174.8 Screening for properties covered by the Base Closure Community Redevelopment and Homeless Assistance Act of 1994, cross-reference.

The Departments of Defense and Housing and Urban Development have promulgated regulations to address state and local screening and approval of redevelopment plans for installations covered by the Base Closure Community Redevelopment and Homeless Assistance Act of 1994 (Pub. L. 103–421). The Department of Defense regulations can be found at part 176 of this title. The Department of Housing and Urban Development regulations can be found at 24 CFR part 586.

### § 174.9 Economic development conveyances.

(a) The Secretary concerned may transfer real property and personal property to the LRA for purposes of job generation on the installation. Such a transfer is an Economic Development Conveyance (EDC).

(b) For installations having a date of approval for closure after January 1, 2005, the Secretary concerned shall seek to obtain consideration in connection with any transfer under this section in an amount equal to the fair market value of the property.

(c) An LRA is the only entity able to receive property under an EDC.

(d) A properly completed application will be used to decide whether an LRA will be eligible for an EDC. An LRA may submit an EDC application only after it adopts a redevelopment plan. The Secretary concerned shall establish a reasonable time period for submission of an EDC application after consultation with the LRA. The Secretary will review the application and make a decision whether to make an EDC based on the criteria specified in paragraph (g) of this section; such decision will only be made after the Secretary has notified and obtained the concurrence of the Deputy Under Secretary of Defense (Installations & Environment) of the proposed decision. The terms and conditions of the EDC will be negotiated between the Secretary and the LRA.

(e) The application should explain why an EDC is necessary for job generation on the installation. In addition to the following elements, after the Secretary concerned reviews the application, additional information may be requested to allow for a better evaluation of the application:

(1) A copy of the adopted redevelopment plan.

(2) A project narrative including the following:

(A) A general description of the property requested.

(B) A description of the intended uses.

(C) A description of the economic impact of closure or realignment on the local community.

(D) A description of the financial condition of the community and the prospects for redevelopment of the property.

(E) A statement of how the EDC is consistent with the overall redevelopment plan.

(3) A description of how the EDC will contribute to short- and long-term job generation on the installation, including the projected number and type of new jobs it will assist in generating.

(4) A business/operational plan for the EDC parcel, including such elements as:

(A) A development timetable, phasing schedule, and cash flow analysis.

(B) A market and financial feasibility analysis describing the economic viability of the project, including an estimate of net proceeds over a fifteen-year period, the proposed consideration or payment to the Department of Defense, and the estimated present fair market value of the property.

(C) A cost estimate and justification for infrastructure and other investments needed for the development of the EDC parcel.

(D) Local investment and proposed financing strategies for the development.

(5) A statement describing why other authorities, such as public or negotiated sales and public benefit conveyances for education, parks, public health, aviation, historic monuments,

prisons, and wildlife conservation, cannot be used to accomplish the job generation goals.

(6) Evidence of the LRA's legal authority to acquire and dispose of the property.

(7) Evidence that the LRA has full authority to perform all of the actions required of it pursuant to the terms of the EDC, can demonstrate through agreements or assurances that the LRA has the appropriate local government approvals to implement the approved reuse plan, and that the officers executing the EDC documents on behalf of the LRA have full authority to do so.

(8) Proof the LRA has obtained sufficient financing for acquiring the EDC property and carrying out the LRA's redevelopment objectives.

(f) Upon receipt of an application for an EDC, the Secretary concerned will determine whether an EDC is needed for purposes of job generation and examine whether the terms and conditions proposed are fair and reasonable. The Secretary may also consider information independent of the application, such as views of other Federal agencies, appraisals, caretaker costs, and other relevant material. The Secretary may propose and negotiate any alternative terms or conditions that the Secretary considers necessary seeking always to obtain an amount equal to the fair market value.

(g) The following factors will be considered, as appropriate, in evaluating the application and the terms and conditions of the proposed transfer, including price, time of payment, and other relevant methods of compensation to the Federal government.

(1) Adverse economic impact of closure or realignment on the region and potential for economic recovery through an EDC.

(2) Extent of short- and long-term job generation.

(3) Consistency with the entire redevelopment plan.

(4) Financial feasibility of the development, including market analysis and need and extent of proposed infrastructure and other investments.

(5) Extent of state and local investment, level of risk incurred, and the LRA's ability to implement the plan.

(6) Current local and regional real estate market conditions.

(7) Incorporation of other Federal agency interests and concerns, and applicability of, and conflicts with, other Federal surplus property disposal authorities.

(8) Relationship to the overall Military Department disposal plan for the installation.

(9) Economic benefit to the Federal Government, including protection and maintenance cost savings and anticipated consideration from the transfer.

(10) Compliance with applicable Federal, state, interstate, and local laws and regulations.

(h) Before making an EDC, the Secretary concerned shall prepare an estimate of the fair market value of the property.

(1) In preparing the estimate of fair market value, the Secretary concerned shall use the most recent edition of the *Uniform Appraisal Standards for Federal Land Acquisitions*, published by the Appraisal Institute in cooperation with the U.S. Department of Justice.

(2) The Secretary concerned shall consult with the LRA on valuation assumptions, guidelines, and on instructions given to the appraiser.

(3) The Secretary concerned is fully responsible for completion of the valuation. The Secretary, in preparing the estimate of fair market value shall consider the proposed uses identified in the redevelopment plan to the extent that they are not inconsistent with the highest and best use.

### § 174.10 Consideration for economic development conveyances.

(a) For conveyances made pursuant to § 174.9 of this part, the Secretary concerned will review the application for an EDC and negotiate the terms and conditions of each transaction with the LRA. The Secretary will have the discretion and flexibility to enter into agreements that specify the form of payment and the schedule. The consideration may be in cash or in-kind and may be paid over time.

(b) The Secretary concerned shall seek to obtain consideration at least equal to the fair market value, as determined by the Secretary.

(c) Any amount paid in the future should take into account the time value of money and include repayment of interest.

(d) Additional provisions may be incorporated in the conveyance documents to protect the Department's interest in obtaining the agreed upon consideration, including such items as predetermined release prices, or other appropriate clauses designed to ensure payment and protect against fraudulent transactions.

(e)(1) An EDC without consideration may only be made if—

(i) The LRA agrees that the proceeds from any sale or lease of the property (or any portion thereof) received by the LRA during at least the first seven years after the date of the initial transfer of property shall be used to support economic redevelopment of, or related to, the installation; and

(ii) The LRA executes the agreement for transfer of the property and accepts control of the property within a reasonable time after the date of the property disposal record of decision.

(2) The following purposes shall be considered a use to support economic redevelopment of, or related to, the installation—

(i) Road construction;

(ii) Transportation management facilities;

(iii) Storm and sanitary sewer construction;

(iv) Police and fire protection facilities and other public facilities;

(v) Utility construction;

(vi) Building rehabilitation;

(vii) Historic property preservation;

(viii) Pollution prevention equipment or facilities;

(ix) Demolition;

(x) Disposal of hazardous materials generated by demolition;

(xi) Landscaping, grading, and other site or public improvements; and

(xii) Planning for or the marketing of the development and reuse of the installation.

(f) Every agreement for an EDC without consideration shall contain provisions allowing the Secretary concerned to recoup from the LRA such portion of the proceeds from its sale or lease as the Secretary determines appropriate if the LRA does not use the proceeds to support economic redevelopment of, or related to, the installation for the period specified in paragraph (e)(1) of this section.

### § 174.11 Leasing of real property to non-Federal entities.

(a) Leasing of real property to non-Federal entities prior to the final disposition of closing and realigning installations may facilitate state and local economic adjustment efforts and encourage economic redevelopment, but the Secretary concerned will always concentrate on the final disposition of real and personal property.

(b) In addition to leasing property at fair market value, to assist local redevelopment efforts the Secretary concerned may also lease real and personal property, pending final disposition, for less than fair market value if the Secretary determines that:

(1) A public interest will be served as a result of the lease; and,

(2) The fair market value of the lease is unobtainable or not compatible with such public benefit.

(c) Pending final disposition of an installation, the Secretary concerned may grant interim leases which are short-term leases that make no commitment for future use or ultimate disposal. When granting an interim lease, the Secretary will generally lease to the LRA but can lease property directly to other entities. If the interim lease (after complying with NEPA) is entered into prior to completion of the final disposal decisions, the term may be for up to five years, including options to renew, and may contain restrictions on use. Leasing should not delay the final disposal of the property. After completion of the final disposal decisions, the term of the lease may be longer than five years.

(d) If the property is leased for less than fair market value to the LRA and the interim lease permits the property to be subleased, the interim lease shall provide that rents from the subleases will be applied by the lessee to the protection, maintenance, repair, improvement, and costs related to the property at the installation consistent with 10 U.S.C. 2667.

**§ 174.12 Leasing of transferred real property by Federal agencies.**

(a) The Secretary concerned may transfer real property that is still needed by a Federal agency (which for purposes of this section includes DoD Components) to an LRA provided the LRA agrees to lease the property to the Federal agency in accordance with all statutory and regulatory guidance.

(b) The decision whether to transfer property pursuant to such a leasing arrangement rests with the Secretary concerned. However, a Secretary shall only transfer property subject to such a leasing arrangement if the Federal agency that needs the property agrees to the leasing arrangement.

(c) If the subject property cannot be transferred pursuant to such a leasing arrangement (*e.g.*, the relevant Federal agency prefers ownership, the LRA and the Federal agency cannot agree on terms of the lease, or the Secretary concerned determines that such a lease would not be in the Federal interest), such property shall remain in Federal ownership unless and until the Secretary concerned determines that it is surplus.

(d) If a building or structure is proposed for transfer pursuant to this section, that which is leased by the Federal agency may be all or a portion of that building or structure.

(e) Transfers pursuant to this section must be to an LRA.

(f) Either existing Federal tenants or Federal agencies desiring to locate onto the property after operational closure may make use of such a leasing arrangement. The Secretary concerned may not enter into such a leasing arrangement unless:

(1) In the case of a Defense Agency, the Secretary concerned is acting in an Executive Agent capacity on behalf of the Agency that certifies that such a leasing arrangement is in the interest of that Agency; or,

(2) In the case of a Military Department, the Secretary concerned certifies that such a leasing arrangement is in the best interest of the Military Department and that use of the property by the Military Department is consistent with the obligation to close or realign the installation in accordance with the recommendations of the Defense Base Closure and Realignment Commission.

(g) Property eligible for such a leasing arrangement is not surplus because it is still needed by the Federal Government. Even though the LRA would not otherwise have to include such property in its redevelopment plan, it should include the property in its redevelopment plan anyway to take into account the planned Federal use of such property.

(h) The terms of the LRA's lease to the Federal Government should afford the Federal agency rights as close to those associated with ownership of the property as is practicable. The requirements of the General Services Administration (GSA) Federal Acquisition Regulation (48 CFR part 570) are not applicable to the lease, but provisions in that regulation may be used to the extent they are consistent with this part. The terms of the lease are negotiable subject to the following:

(1) The lease shall be for a term of no more than 50 years, but may provide for options for renewal or extension of the term at the request of the Federal Government. The lease term should be based on the needs of the Federal agency.

(2) The lease, or any renewals or extensions thereof, shall not require rental payments.

(3) Notwithstanding paragraph (h)(2) of this section, if the lease involves a substantial portion of the installation, the Secretary concerned may obtain facility services for the leased property and common area maintenance from the LRA or the LRA's assignee as a provision of the lease.

(A) Such services and common area maintenance shall be provided at a rate no higher than the rate charged to non-Federal tenants of the transferred property.

(B) Such services and common area maintenance shall not include—

(*i*) Municipal services that a State or local government is required by law to provide to all landowners in its jurisdiction without direct charge, including police protection; or

(*ii*) Firefighting or security-guard functions.

(C) The Federal agency may be responsible for services such as janitorial, grounds keeping, utilities, capital maintenance, and other services normally provided by a landlord. Acquisition of such services by the Federal agency is to be accomplished through the use of Federal Acquisition Regulation procedures or otherwise in accordance with applicable statutory and regulatory requirements.

(4) The lease shall include a provision prohibiting the LRA from transferring fee title to another entity during the term of the lease, other than one of the political jurisdictions that comprise the LRA, without the written consent of the Federal agency occupying the leased property.

(5)(i) The lease shall include an option specifying that if the Federal agency no longer needs the property before the expiration of the term of the lease, the remainder of the lease term may be satisfied by the same or another Federal agency that needs property for a similar use. (''Similar use'' is a use that is comparable to or essentially the same as the use under the original lease, as determined by the Secretary concerned.)

(ii)(B) If the tenant is a DoD Component, before notifying GSA of the availability of the leasehold, it shall determine whether any other DoD Component has a requirement for the leasehold; in doing so, it shall consult with the LRA. If another DoD Component has a requirement for the leasehold, that DoD Component shall be allowed to assume the leasehold for the remainder of its term. If no DoD Component has a requirement for the leasehold, the tenant shall notify GSA in accordance with paragraph (h)(5)(ii)(A) of this section.

(A) The Federal tenant shall notify the GSA of the availability of the leasehold. GSA will then decide whether to exercise this option after consulting with the LRA or other property owner. The GSA shall have 60 days from the date of notification in which to identify a Federal agency to serve out the term of the lease and to notify the LRA or other property owner of the new tenant. If the GSA does not notify the LRA or other property owner of a new tenant within such 60 days, the leasehold shall terminate on a date agreed to by the Federal tenant and the LRA or other property owner.

(B) If the GSA decides not to exercise this option after consulting with the LRA or other property owner, the leasehold shall terminate on a date agreed to by the Federal tenant and the LRA or other property owner.

(6) The terms of the lease shall provide that the Federal agency may repair and improve the property at its expense after consultation with the LRA.

(i) Property subject to such a leasing arrangement shall be conveyed in accordance with the existing EDC procedures. The LRA shall submit the following in addition to the application requirements outlined in §174.9(e) of this part:

(1) A description of the parcel or parcels the LRA proposes to have transferred to it and then to lease to a Federal agency;

(2) A written statement signed by an authorized representative of the Federal agency that it agrees to accept the lease of the property; and,

(3) A statement explaining why such a leasing arrangement is necessary for the long-term economic redevelopment of the installation property.

(j) The exact amount of consideration, or the formula to be used to determine that consideration, as well as the schedule for payment of consideration must be agreed upon in writing before transfer pursuant to this section.

## Subpart E—Personal Property

### § 174.13 Personal property.

(a) This section outlines procedures to allow transfer of personal property to the LRA for the effective implementation of a redevelopment plan. Personal property does not include fixtures.

(b) The Secretary concerned, supported by DoD Components with personal property on the installation, will take an inventory of the personal property, including its condition, within 6 months after the date of approval of closure or realignment. This inventory will be limited to the personal property

located on the real property to be disposed of by the Military Department. The inventory will be taken in consultation with LRA officials. If there is no LRA, the Secretary concerned shall consult with the local government in whose jurisdiction the installation is wholly located, or a local government agency or a State government agency designated for that purpose by the Governor of the State. Based on these consultations, the installation commander will determine the items or category of items that have the potential to enhance the reuse of the real property.

(c) Except for property subject to the exemptions in paragraph (e) of this section, personal property with potential to enhance the reuse of the real property shall remain at an installation being closed or realigned until the earlier of:

(1) One week after the Secretary concerned receives the redevelopment plan;

(2) The date notified by the LRA that there will be no redevelopment plan;

(3) 24 months after the date of approval of the closure or realignment of the installation; or

(4) 90 days before the date of the closure or realignment of the installation.

(d) National Guard property under the control of the United States Property and Fiscal Officer is subject to inventory and may be made available for redevelopment planning purposes.

(e) Personal property may be removed upon approval of the installation commander or higher authority, as prescribed by the Secretary concerned, after the inventory required in paragraph (b) of this section has been sent to the LRA, when:

(1) The property is required for the operation of a unit, function, component, weapon, or weapons system at another installation;

(2) The property is uniquely military in character and is likely to have no civilian use (other than use for its material content or as a source of commonly used components). This property consists of classified items; nuclear, biological, and chemical items; weapons and munitions; museum property or items of significant historic value that are maintained or displayed on loan; and similar military items;

(3) The property is not required for the reutilization or redevelopment of the installation (as jointly determined by the Secretary concerned and the LRA);

(4) The property is stored at the installation for purposes of distribution (including spare parts or stock items) or redistribution and sale (DoD excess/surplus personal property). This property includes materials or parts used in a manufacturing or repair function but does not include maintenance spares for equipment to be left in place;

(5) The property meets known requirements of an authorized program of a DoD Component or another Federal agency that would have to purchase similar items, and is the subject of a written request by the head of the DoD Component or other Federal agency. If the authority to acquire personal property has been delegated, a copy of the delegation must accompany the request. (For purposes of this paragraph, ''purchase'' means the DoD Component or Federal agency intends to obligate funds in the current quarter or next six fiscal quarters.) The DoD Component or Federal agency must pay packing, crating, handling, and transportation charges associated with such transfers of personal property;

(6) The property belongs to a nonappropriated fund instrumentality (NAFI) of the Department of Defense; separate arrangements for communities to purchase such property are possible and may be negotiated with the Secretary concerned;

(7) The property is not owned by the Department of Defense, *i.e.*, it is owned by a Federal agency outside the Department of Defense or by non-Federal persons or entities such as a State, a private corporation, or an individual; or,

(8) The property is needed elsewhere in the national security interest of the United States as determined by the Secretary concerned. This authority may not be re-delegated below the level of an Assistant Secretary. In exercising this authority, the Secretary may transfer the property to any DoD Component or other Federal agency.

(f) Personal property not subject to the exemptions in paragraph (e) of this section may be conveyed to the LRA as

part of an EDC for the real property if the Secretary concerned makes a finding that the personal property is necessary for the effective implementation of the redevelopment plan.

(g) Personal property may also be conveyed separately to the LRA under an EDC for personal property. This type of EDC can be made if the Secretary concerned determines that the transfer is necessary for the effective implementation of a redevelopment plan with respect to the installation. Such determination shall be based on the LRA's timely application for the property, which should be submitted to the Secretary upon completion of the redevelopment plan. The application must include the LRA's agreement to accept the personal property after a reasonable period and will otherwise comply with the requirements of §§174.9 and 174.10 of this part. The transfer will be subject to reasonable limitations and conditions on use.

(h) Personal property that is not needed by a DoD Component or a tenant Federal agency or conveyed to an LRA (or a state or local jurisdiction in lieu of an LRA), or conveyed as related personal property together with the real property, will be transferred to the Defense Reutilization and Marketing Office for disposal in accordance with applicable regulations.

(i) Useful personal property not needed by the Federal Government and not qualifying for transfer to the LRA under an EDC may be donated to the community or LRA through the appropriate State Agency for Surplus Property (SASP) under 41 CFR part 102–37 surplus program guidelines. Personal property donated under this procedure must meet the usage and control requirements of the applicable SASP.

## Subpart F—Maintenance and Repair

### § 174.14 Maintenance and repair.

(a) Facilities and equipment located on installations being closed are often important to the eventual reuse of the installation. This section provides maintenance procedures to preserve and protect those facilities and items of equipment needed for reuse in an economical manner that facilitates installation redevelopment.

(b) In order to ensure quick reuse, the Secretary concerned, in consultation with the LRA, will establish initial levels of maintenance and repair needed to aid redevelopment and to protect the property for the time periods set forth in paragraph (c) of this section. Where agreement between the Secretary and the LRA cannot be reached, the Secretary will determine the required levels of maintenance and repair and its duration. In no case will these initial levels of maintenance:

(1) Exceed the standard of maintenance and repair in effect on the date of approval of closure or realignment;

(2) Be less than maintenance and repair required to be consistent with Federal Government standards for excess and surplus properties as provided in the Federal Management Regulations of the GSA, 41 CFR part 102;

(3) Be less than the minimum levels required to support the use of such facilities or equipment for nonmilitary purposes; or,

(4) Require any property improvements, including construction, alteration, or demolition, except when the demolition is required for health, safety, or environmental purposes, or is economically justified in lieu of continued maintenance expenditures.

(c) Unless the Secretary concerned determines that it is in the national security interest of the United States, the levels of maintenance and repair specified in paragraph (b) of this section shall not be changed until the earlier of:

(1) One week after the Secretary concerned receives the redevelopment plan;

(2) The date notified by the LRA that there will be no redevelopment plan;

(3) 24 months after the date of approval of the closure or realignment of the installation; or

(4) 90 days before the date of the closure or realignment of the installation.

(d) The Secretary concerned may extend the time period for the initial levels of maintenance and repair for property still under the Secretary's control for an additional period, if the Secretary determines that the LRA is actively implementing its redevelopment

plan, and such levels of maintenance are justified.

(e) Once the time period for the initial or extended levels of maintenance and repair expires, the Secretary concerned will reduce the levels of maintenance and repair to levels consistent with Federal Government standards for excess and surplus properties as provided in the Federal Management Regulations of the GSA, except in the case of facilities still being used to perform a DoD mission.

## Subpart G—Environmental Matters

### § 174.15 Indemnification under Section 330 of the National Defense Authorization Act for Fiscal Year 1993.

Section 330 of the National Defense Authorization Act for Fiscal Year 1993, Pub. L. 102–484, as amended, provides for indemnification of transferees of closing Department of Defense properties under circumstances specified in that statute. The authority to implement this provision of law has been delegated by the Secretary of Defense to the General Counsel of the Department of Defense; therefore, this provision of law shall only be referred to or recited in any deed, sales agreement, bill of sale, lease, license, easement, right-of-way, or transfer document for real or personal property after obtaining the written concurrence of the Deputy General Counsel (Environment and Installations), Office of the General Counsel, Department of Defense.

### § 174.16 Real property containing explosive or chemical agent hazards.

The DoD Component controlling real property known to contain or suspected of containing explosive or chemical agent hazards from past DoD military munitions-related or chemical warfare-related activities shall, prior to transfer of the property out of Department of Defense control, obtain the DoD Explosives Safety Board's approval of measures planned to ensure protectiveness from such hazards, in accordance with DoD Directive 6055.9E, *Explosives Safety Management and the DoD Explosives Safety Board*.

### § 174.17 NEPA.

At installations subject to this part, NEPA analysis shall comply with the promulgated NEPA regulations of the Military Department exercising real property accountability for the installation, including any requirements relating to responsibility for funding the analysis. See 32 CFR parts 651 (for the Army), 775 (for the Navy), and 989 (for the Air Force). Nothing in this section shall be interpreted as releasing a Military Department from complying with its own NEPA regulation.

### § 174.18 Historic preservation.

(a) The transfer, lease, or sale of National Register-eligible historic property to a non-Federal entity at installations subject to this part may constitute an ''adverse effect'' under the regulations implementing the National Historic Preservation Act (36 CFR 800.5(a)(2)(vii)). One way of resolving this adverse effect is to restrict the use that may be made of the property subsequent to its transfer out of Federal ownership or control through the imposition of legally enforceable restrictions or conditions. The Secretary concerned may include such restrictions or conditions (typically a real property interest in the form of a restrictive covenant or preservation easement) in any deed or lease conveying an interest in historic property to a non-Federal entity. Before doing so, the Secretary should first consider whether the historic character of the property can be protected effectively through planning and zoning actions undertaken by units of State or local government; if so, working with such units of State or local government to protect the property through these means is preferable to encumbering the property with such a covenant or easement.

(b) Before including such a covenant or easement in a deed or lease, the Secretary concerned shall consider—

(1) Whether the jurisdiction that encompasses the property authorizes such a covenant or easement; and

(2) Whether the Secretary can give or assign to a third party the responsibility for monitoring and enforcing such a covenant or easement.

## PART 175 [RESERVED]

## PART 176—REVITALIZING BASE CLOSURE COMMUNITIES AND COMMUNITY ASSISTANCE—COMMUNITY REDEVELOPMENT AND HOMELESS ASSISTANCE

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AUTHORITY: 10 U.S.C. 2687 note.

SOURCE: 62 FR 35346, July 1, 1997, unless otherwise noted.

### § 176.1 Purpose.

This part implements the Base Closure Community Redevelopment and Homeless Assistance Act, as amended (10 U.S.C. 2687 note), which instituted a new community-based process for addressing the needs of the homeless at base closure and realignment sites. In this process, Local Redevelopment Authorities (LRAs) identify interest from homeless providers in installation property and develop a redevelopment plan for the installation that balances the economic redevelopment and other development needs of the communities in the vicinity of the installation with the needs of the homeless in those communities. The Department of Housing and Urban Development (HUD) reviews the LRA's plan to see that an appropriate balance is achieved. This part also implements the process for identifying interest from State and local entities for property under a public benefit transfer. The LRA is responsible for concurrently identifying interest from homeless providers and State and local entities interested in property under a public benefit transfer.

### § 176.5 Definitions.

As used in this part:

*CERCLA.* Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601 *et seq.*).

*Communities in the vicinity of the installation.* The communities that constitute the political jurisdictions (other than the State in which the installation is located) that comprise the LRA for the installation. If no LRA is formed at the local level, and the State is serving in that capacity, the communities in the vicinity of the installation are deemed to be those political jurisdiction(s) (other than the State) in which the installation is located.

*Continuum of care system.*

(1) A comprehensive homeless assistance system that includes:

(i) A system of outreach and assessment for determining the needs and condition of an individual or family who is homeless, or whether assistance is necessary to prevent an individual or family from becoming homeless;

(ii) Emergency shelters with appropriate supportive services to help ensure that homeless individuals and families receive adequate emergency shelter and referral to necessary service providers or housing finders;

(iii) Transitional housing with appropriate supportive services to help those homeless individuals and families who are not prepared to make the transition to independent living;

(iv) Housing with or without supportive services that has no established limitation on the amount of time of residence to help meet long-term needs of homeless individuals and families; and,

(v) Any other activity that clearly meets an identified need of the homeless and fills a gap in the continuum of care.

(2) Supportive services are services that enable homeless persons and families to move through the continuum of care toward independent living. These services include, but are not limited to, case management, housing counseling, job training and placement, primary health care, mental health services, substance abuse treatment, child care, transportation, emergency food and clothing family violence services, education services, moving services, assistance in obtaining entitlements, and referral to veterans services and legal services.

*Consolidated Plan*. The plan prepared in accordance with the requirements of 24 CFR part 91.

*Day*. One calendar day including weekends and holidays.

*DoD*. Department of Defense.

*HHS*. Department of Health and Human Services.

*Homeless person*.

(1) An individual or family who lacks a fixed, regular, and adequate nighttime residence; and

(2) An individual or family who has a primary nighttime residence that is:

(i) A supervised publicly or privately operated shelter designed to provide temporary living accommodations (including welfare hotels, congregate shelters and transitional housing for the mentally ill);

(ii) An institution that provides a temporary residence for individuals intended to be institutionalized; or,

(iii) A public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings.

(3) This term does not include any individual imprisoned or otherwise detained under an Act of the Congress or a State law.

*HUD*. Department of Housing and Urban Development.

*Installation*. A base, camp, post, station, yard, center, homeport facility for any ship or other activity under the jurisdiction of DoD, including any leased facility, that is approved for closure or realignment under the Base Closure and Realignment Act of 1988 (Pub. L. 100–526). as amended, or the Defense Base Closure and Realignment Act of 1990 (Pub. L. 101–510), as amended (both at 10 U.S.C. 2687, note).

*Local redevelopment authority (LRA)*. Any authority or instrumentality established by State or local government and recognized by the Secretary of Defense, through the Office of Economic Adjustment, as the entity responsible for developing the redevelopment plan with respect to the installation or for directing implementation of the plan.

*NEPA*. National Environmental Policy Act of 1969 (42 U.S.C. 4320).

*OEA*. Office of Economic Adjustment, Department of Defense.

*Private nonprofit organization*. An organization, no part of the net earnings of which inures to the benefit of any member, founder, contributor, or individual; that has a voluntary board; that has an accounting system or has designated an entity that will maintain a functioning accounting system for the organization in accordance with generally accepted accounting procedures; and that practices nondiscrimination in the provision of assistance.

*Public benefit transfer*. The transfer of surplus military property for a specified public purpose at up to a 100-percent discount in accordance with 40 U.S.C. 471 *et seq*. or 49 U.S.C. 47151–47153.

*Redevelopment plan*. A plan that is agreed by the LRA with respect to the installation and provides for the reuse or redevelopment of the real property and personal property of the installation that is available for such reuse and redevelopment as a result of the closure of the installation.

*Representative(s) of the homeless*. A State or local government agency or private nonprofit organization, including a homeless assistance planning board, that provides or proposes to provide services to the homeless.

*Substantially equivalent*. Property that is functionally suitable to substitute for property referred to in an approved Title V application. For example, if the representative of the homeless had an approved Title V application for a building that would accommodate 100 homeless persons in an emergency shelter, the replacement facility would also have to accommodate 100 at a comparable cost for renovation.

*Substantially equivalent funding*. Sufficient funding to acquire a substantially equivalent facility.

*Surplus property*. Any excess property not required for the needs and the discharge of the responsibilities of all Federal Agencies. Authority to make this determination, after screening with all Federal Agencies, rests with the Military Departments.

*Title V*. Title V of the Steward B. McKinney Homeless Assistance Act of 1987 (42 U.S.C. 11411) as amended by the National Defense Authorization Act for Fiscal Year 1994 (Pub. L. 103–160).

*Urban county*. A county within a metropolitan area as defined at 24 CFR 570.3.

### § 176.10 Applicability.

(a) *General*. This part applies to all installations that are approved for closure/realignment by the President and Congress under Pub. L. 101–510 after October 25, 1994.

(b) *Request for inclusion under this process*. This part also applies to installations that were approved for closure/realignment under either Public Law 100–526 or Public Law 101–510 prior to October 25, 1994 and for which an LRA submitted a request for inclusion under this part to DoD by December 24, 1994. A list of such requests was published in the FEDERAL REGISTER on May 30, 1995 (60 FR 28089).

(1) For installations with Title V applications pending but not approved before October 25, 1994, the LRA shall consider and specifically address any application for use of buildings and property to assist the homeless that were received by HHS prior to October 25, 1994, and were spending with the Secretary of HHS on that date. These pending requests shall be addressed in the LRA's homeless assistance submission.

(2) For installations with Title V applications approved before October 25, 1994 where there is an approved Title V application, but property has not been assigned or otherwise disposed of by the Military Department, the LRA must ensure that its homeless assistance submission provides the Title V applicant with:

(i) The property requested;

(ii) Properties, on or off the installation, that are substantially equivalent to those requested;

(iii) Sufficient funding to acquire such substantially equivalent properties;

(iv) Services and activities that meet the needs identified in the application; or,

(v) A combination of the properties, funding, and services and activities described in § 176.10(b)(2)(i)–(iv) of this part.

(c) *Revised Title V process*. All other installations approved for closure or realignment under either Public Law 100–526 or Public Law 101–510 prior to October 25, 1994, for which there was no request for consideration under this part, are covered by the process stipulated under Title V. Buildings or property that were transferred or leased for homeless use under Title V prior to October 25, 1994, may not be reconsidered under this part.

### § 176.15 Waivers and extensions of deadlines.

(a) After consultation with the LRA and HUD, and upon a finding that it is in the interest of the communities affected by the closure/realignment of the installation, DoD, through the Director of the Office of Economic Adjustment, may extend or postpone any deadline contained in this part.

(b) Upon completion of a determination and finding of good cause, and except for deadlines and actions required on the part of DoD, HUD may waive any provision of §§ 176.20 through 176.45 of this part in any particular case, subject only to statutory limitations.

### § 176.20 Overview of the process.

(a) *Recognition of the LRA*. As soon as practicable after the list of installations recommended for closure or realignment is approved, DoD, through OEA, will recognize an LRA for the installation. Upon recognition, OEA shall publish the name, address, and point of contact for the LRA in the FEDERAL REGISTER and in a newspaper of general circulation in the communities in the vicinity of the installation.

(b) *Responsibilities of the Military Department*. The Military Department shall make installation properties available to other DoD components and Federal agencies in accordance with the procedures set out at 32 CFR part 174. The Military Department will keep the LRA informed of other Federal interest in the property during this process. Upon completion of this process the Military Department will notify HUD and either the LRA or the Chief Executive Officer of the State, as appropriate, and publish a list of surplus property on the installation that will be available for reuse in the FEDERAL REGISTER and a newspaper of general circulation in the communities in the vicinity of the installation.

(c) *Responsibilities of the LRA.* The LRA should begin to conduct outreach efforts with respect to the installation as soon as is practicable after the date of approval of closure/realignment of the installation. The local reuse planning process must begin no later than the date of the Military Department's FEDERAL REGISTER publication of available property described at § 176.20(b). For those installations that began the process described in this part prior to August 17, 1995, HUD will, on a case-by-case basis, determine whether the statutory requirements have been fulfilled and whether any additional requirements listed in this part should be required. Upon the FEDERAL REGISTER publication described in § 176.20(b), the LRA shall:

(1) Publish, within 30 days, in a newspaper of general circulation in the communities in the vicinity of the installation, the time period during which the LRA will receive notices of interest from State and local governments, representatives of the homeless, and other interested parties. This publication shall include the name, address, telephone number and the point of contact for the LRA who can provide information on the prescribed form and contents of the notices of interest. The LRA shall notify DoD of the deadline specified for receipt of notices of interest. LRAs are strongly encouraged to make this publication as soon as possible within the permissible 30 day period in order to expedite the closure process.

(i) In addition, the LRA has the option to conduct an informal solicitation of notices of interest from public and non-profit entities interested in obtaining property via a public benefit transfer other than a homeless assistance conveyance under either 40 U.S.C. 471 *et. seq.* or 49 U.S.C. 47151–47153. As part of such a solicitation, the LRA may wish to request that interested entities submit a description of the proposed use to the LRA and the sponsoring Federal agency.

(ii) For all installations selected for closure or realignment prior to 1995 that elected to proceed under Public Law 103–421, the LRA shall accept notices of interest for not less than 30 days.

(iii) For installations selected for closure or realignment in 1995 or thereafter, notices of interest shall be accepted for a minimum of 90 days and not more than 180 days after the LRA's publication under § 176.20(c)(1).

(2) Prescribe the form and contents of notices of interest.

(i) The LRA may not release to the public any information regarding the capacity of the representative of the homeless to carry out its program, a description of the organization, or its financial plan for implementing the program, without the consent of the representative of the homeless concerned, unless such release is authorized under Federal law and under the law of the State and communities in which the installation concerned is located. The identity of the representative of the homeless may be disclosed.

(ii) The notices of interest from representatives of the homeless must include:

(A) A description of the homeless assistance program proposed, including the purposes to which the property or facility will be put, which may include uses such as supportive services, job and skills training, employment programs, shelters, transitional housing or housing with no established limitation on the amount of time of residence, food and clothing banks, treatment facilities, or any other activity which clearly meets an identified need of the homeless and fills a gap in the continuum of care;

(B) A description of the need for the program;

(C) A description of the extent to which the program is or will be coordinated with other homeless assistance programs in the communities in the vicinity of the installation;

(D) Information about the physical requirements necessary to carry out the program including a description of the buildings and property at the installation that are necessary to carry out the program;

(E) A description of the financial plan, the organization, and the organizational capacity of the representative of the homeless to carry out the program; and,

(F) An assessment of the time required to start carrying out the program.

(iii) The notices of interest from entities other than representatives of the homeless should specify the name of the entity and specific interest in property or facilities along with a description of the planned use.

(3) In addition to the notice required under § 176.20(c)(1), undertake outreach efforts to representatives of the homeless by contacting local government officials and other persons or entities that may be interested in assisting the homeless within the vicinity of the installation.

(i) The LRA may invite persons and organizations identified on the HUD list of representatives of the homeless and any other representatives of the homeless with which the LRA is familiar, operating in the vicinity of the installation, to the workshop described in § 176.20(c)(3)(ii).

(ii) The LRA, in coordination with the Military Department and HUD, shall conduct at least one workshop where representatives of the homeless have an opportunity to:

(A) Learn about the closure/realignment and disposal process;

(B) Tour the buildings and properties available either on or off the installation;

(C) Learn about the LRA's process and schedule for receiving notices of interest as guided by § 176.20(c)(2); and,

(D) Learn about any known land use constraints affecting the available property and buildings.

(iii) The LRA should meet with representatives of the homeless that express interest in discussing possible uses for these properties to alleviate gaps in the continuum of care.

(4) Consider various properties in response to the notices of interest. The LRA may consider property that is located off the installation.

(5) Develop an application, including the redevelopment plan and homeless assistance submission, explaining how the LRA proposes to address the needs of the homeless. This application shall consider the notices of interest received from State and local governments, representatives of the homeless, and other interested parties. This shall include, but not be limited to, entities eligible for public benefit transfers under either 40 U.S.C. 471 *et. seq.*, or 49 U.S.C. 47151–47153; representatives of the homeless; commercial, industrial, and residential development interests; and other interests. From the deadline date for receipt of notices of interest described at § 176.20(c)(1), the LRA shall have 270 days to complete and submit the LRA application to the appropriate Military Department and HUD. The application requirements are described at § 176.30.

(6) Make the draft application available to the public for review and comment periodically during the process of developing the application. The LRA must conduct at least one public hearing on the application prior to its submission to HUD and the appropriate Military Department. A summary of the public comments received during the process of developing the application shall be included in the application when it is submitted.

(d) *Public benefit transfer screening.* The LRA should, while conducting its outreach efforts, work with the Federal agencies that sponsor public benefit transfers under either 40 U.S.C. 471 *et. seq.* or 49 U.S.C. 47151–47153. Those agencies can provide a list of parties in the vicinity of the installation that might be interested in and eligible for public benefit transfers. The LRA should make a reasonable effort to inform such parties of the availability of the property and incorporate their interests within the planning process. Actual recipients of property are to be determined by sponsoring Federal agency. The Military Departments shall notify sponsoring Federal agencies about property that is available based on the community redevelopment plan and keep the LRA apprised of any expressions of interest. Such expressions of interest are not required to be incorporated into the redevelopment plan, but must be considered.

[62 FR 35346, July 1, 1997, as amended at 71 FR 9927, Feb. 28, 2006]

### § 176.25 HUD's negotiations and consultations with the LRA.

HUD may negotiate and consult with the LRA before and during the course of preparation of the LRA's application

and during HUD's review thereof with a view toward avoiding any preliminary determination that the application does not meet any requirement of this part. LRAs are encouraged to contact HUD for a list of persons and organizations that are representatives of the homeless operating in the vicinity of the installation.

**§ 176.30 LRA application.**

(a) *Redevelopment plan*. A copy of the redevelopment plan shall be part of the application.

(b) *Homeless assistance submission*. This component of the application shall include the following:

(1) Information about homelessness in the communities in the vicinity of the installation.

(i) A list of all the political jurisdictions which comprise the LRA.

(ii) A description of the unmet need in the continuum of care system within each political jurisdiction, which should include information about any gaps that exist in the continuum of care for particular homeless subpopulations. The source for this information shall depend upon the size and nature of the political jurisdictions(s) that comprise the LRA. LRAs representing:

(A) Political jurisdictions that are required to submit a Consolidated Plan shall include a copy of their Homeless and Special Needs Population Table (Table 1), Priority Homeless Needs Assessment Table (Table 2), and narrative description thereof from that Consolidated Plan, including the inventory of facilities and services that assist the homeless in the jurisdiction.

(B) Political jurisdictions that are part of an urban county that is required to submit a Consolidated Plan shall include a copy of their Homeless and Special Needs Population Table (Table 1), Priority Homeless Needs Assessment Table (Table 2), and narrative description thereof from that Consolidated Plan, including the inventory of facilities and services that assist the homeless in the jurisdiction. In addition, the LRA shall explain what portion of the homeless population and subpopulations described in the Consolidated Plan are attributable to the political jurisdiction it represents.

(C) A political jurisdiction not described by § 176.30(b)(1)(ii)(A) or § 176.30(b)(1)(ii)(B) shall submit a narrative description of what it perceives to be the homeless population within the jurisdiction and a brief inventory of the facilities and services that assist homeless persons and families within the jurisdiction. LRAs that represent these jurisdictions are not required to conduct surveys of the homeless population.

(2) Notices of interest proposing assistance to homeless persons and/or families.

(i) A description of the proposed activities to be carried out on or off the installation and a discussion of how these activities meet a portion or all of the needs of the homeless by addressing the gaps in the continuum of care. The activities need not be limited to expressions of interest in property, but may also include discussions of how economic redevelopment may benefit the homeless;

(ii) A copy of each notice of interest from representatives of the homeless for use of buildings and property and a description of the manner in which the LRA's application addresses the need expressed in each notice of interest. If the LRA determines that a particular notice of interest should not be awarded property, an explanation of why the LRA determined not to support that notice of interest, the reasons for which may include the impact of the program contained in the notice of interest on the community as described in § 176.30(b)(2)(iii); and,

(iii) A description of the impact that the implemented redevelopment plan will have on the community. This shall include information on how the LRA's redevelopment plan might impact the character of existing neighborhoods adjacent to the properties proposed to be used to assist the homeless and should discuss alternative plans. Impact on schools, social services, transportation, infrastructure, and concentration of minorities and/or low income persons shall also be discussed.

(3) Legally binding agreements for buildings, property, funding, and/or services.

(i) A copy of the legally binding agreements that the LRA proposes to

enter into with the representative(s) of the homeless selected by the LRA to implement homeless programs that fill gaps in the existing continuum of care. The legally binding agreements shall provide for a process for negotiating alternative arrangements in the event that an environmental analysis conducted under §176.45(b) indicates that any property identified for transfer in the agreement is not suitable for the intended purpose. Where the balance determined in accordance with §176.30(b)(4) provides for the use of installation property as a homeless assistance facility, legally binding agreements must provide for the reversion or transfer, either to the LRA or to another entity or entities, of the buildings and property in the event they cease to be used for the homeless. In cases where the balance proposed by the LRA does not include the use of buildings or property on the installation, the legally binding agreements need not be tied to the use of specific real property and need not include a reverter clause. Legally binding agreements shall be accompanied by a legal opinion of the chief legal advisor of the LRA or political jurisdiction or jurisdictions which will be executing the legally binding agreements that the legally binding agreements, when executed, will constitute legal, valid, binding, and enforceable obligations on the parties thereto;

(ii) A description of how buildings, property, funding, and/or services either on or off the installation will be used to fill some of the gaps in the current continuum of care system and an explanation of the suitability of the buildings and property for that use; and,

(iii) Information on the availability of general services such as transportation, police, and fire protection, and a discussion of infrastructure such as water, sewer, and electricity in the vicinity of the proposed homeless activity at the installation.

(4) An assessment of the balance with economic and other development needs.

(i) An assessment of the manner in which the application balances the expressed needs of the homeless and the needs of the communities comprising the LRA for economic redevelopment and other development; and

(ii) An explanation of how the LRA's application is consistent with the appropriate Consolidated Plan(s) or any other existing housing, social service, community, economic, or other development plans adopted by the jurisdictions in the vicinity of the installation.

(5) A description of the outreach undertaken by the LRA. The LRA shall explain how the outreach requirements described at §176.20(c)(1) and §176.20(c)(3) have been fulfilled. This explanation shall include a list of the representatives of the homeless the LRA contacted during the outreach process.

(c) *Public comments*. The LRA application shall include the materials described at §176.20(c)(6). These materials shall be prefaced with an overview of the citizen participation process observed in preparing the application.

### §176.35 HUD's review of the application.

(a) *Timing*. HUD shall complete a review of each application no later than 60 days after its receipt of a completed application.

(b) *Standards of review*. The purpose of the review is to determine whether the application is complete and, with respect to the expressed interest and requests of representatives of the homeless, whether the application:

(1) *Need*. Takes into consideration the size and nature of the homeless population in the communities in the vicinity of the installation, the availability of existing services in such communities to meet the needs of the homeless in such communities, and the suitability of the buildings and property covered by the application for use and needs of the homeless in such communities. HUD will take into consideration the size and nature of the installation in reviewing the needs of the homeless population in the communities in the vicinity of the installation.

(2) Impact of notices of interest. Takes into consideration any economic impact of the homeless assistance under the plan on the communities in the vicinity of the installation, including:

(i) Whether the plan is feasible in light of demands that would be placed on available social services, police and fire protection, and infrastructure in the community; and,

(ii) Whether the selected notices of interest are consistent with the Consolidated Plan(s) of any other existing housing, social service, community economic, or other development plans adopted by the political jurisdictions in the vicinity of the installation.

(3) Legally binding agreements. Specifies the manner in which the buildings, property, funding, and/or services on or off the installation will be made available for homeless assistance purposes. HUD will review each legally binding agreement to verify that:

(i) They include all the documents legally required to complete the transactions necessary to realize the homeless use(s) described in the application;

(ii) They include all appropriate terms and conditions;

(iii) They address the full range of contingencies including those described at §176.30(b)(3)(i);

(iv) They stipulate that the buildings, property, funding, and/or services will be made available to the representatives of the homeless in a timely fashion; and,

(v) They are accompanied by a legal opinion of the chief legal advisor of the LRA or political jurisdiction or jurisdictions which will be executing the legally binding agreements that the legally binding agreements will, when executed, constitute legal, valid, binding, and enforceable obligations on the parties thereto.

(4) *Balance*. Balances in an appropriate manner a portion or all of the needs of the communities in the vicinity or the installation for economic redevelopment and other development with the needs of the homeless in such communities.

(5) *Outreach*. Was developed in consultation with representatives of the homeless and the homeless assistance planning boards, if any, in the communities in the vicinity of the installation and whether the outreach requirements described at §176.20(c)(1) and §176.20(c)(3) have been fulfilled by the LRA.

(c) *Notice of determination*. (1) HUD shall, no later than the 60th day after its receipt of the application, unless such deadline is extended pursuant to §176.15(a), send written notification both to DoD and the LRA of its preliminary determination that the application meets or fails to meet the requirements of §176.35(b). If the application fails to meet the requirements, HUD will send the LRA:

(i) A summary of the deficiencies in the application;

(ii) An explanation of the determination; and,

(iii) A statement of how the LRA must address the determinations.

(2) In the event that no application is submitted and no extension is requested as of the deadline specified in §176.20(c)(5), and the State does not accept within 30 days a DoD written request to become recognized as the LRA, the absence of such application will trigger an adverse determination by HUD effective on the date of the lapsed deadline. Under these conditions, HUD will follow the process described at §176.40.

(d) *Opportunity to cure*. (1) The LRA shall have 90 days from its receipt of the notice of preliminary determination under §176.35(c)(1) within which to submit to HUD and DoD a revised application which addresses the determinations listed in the notice. Failure to submit a revised application shall result in a final determination, effective 90 days from the LRA's receipt of the preliminary determination, that the redevelopment plan fails to meet the requirements of §176.35(b).

(2) HUD shall, within 30 days of its receipt of the LRA's resubmission send written notification of its final determination of whether the application meets the requirements of §176.35(b) to both DOD and the LRA.

### §176.40 Adverse determinations.

(a) *Review and consultation*. If the resubmission fails to meet the requirements of §176.35(b) or if no resubmission is received, HUD will review the original application, including the notices of interest submitted by representatives of the homeless. In addition, in such instances or when no

original application has been submitted, HUD:

(1) Shall consult with the representatives of the homeless, if any, for purposes of evaluation the continuing interest of such representatives in the use of buildings or property at the installation to assist the homeless;

(2) May consult with the applicable Military Department regarding the suitability of the buildings and property at the installation for use to assist the homeless; and,

(3) May consult with representatives of the homeless and other parties as necessary.

(b) *Notice of decision.* (1) Within 90 days of receipt of an LRA's revised application which HUD determines does not meet the requirements of §176.35(b), HUD shall, based upon its reviews and consultations under §176.40(a):

(i) Notify DoD and the LRA of the buildings and property at the installation that HUD determines are suitable for use to assist the homeless, and;

(ii) Notify DoD and the LRA of the extent to which the revised redevelopment plan meets the criteria set forth in §176.35(b).

(2) In the event that an LRA does not submit a revised redevelopment plan under §176.35(d), HUD shall, based upon its reviews and consultations under §176.40(a), notify DoD and the LRA of the buildings and property at the installation that HUD determines are suitable for use to assist the homeless, either

(i) Within 190 days after HUD sends its notice of preliminary adverse determination under §176.35(c)(1), if an LRA has not submitted a revised redevelopment plan; or

(ii) Within 390 days after the Military Department's FEDERAL REGISTER publication of available property under §176.20(b), if no redevelopment plan has been received and no extension has been approved.

### §176.45 Disposal of buildings and property.

(a) *Puglic benefit transfer screening.* Not later than the LRA's submission of its redevelopment plan to DoD and HUD, the Military Development will conduct an official public benefit transfer screening in accordance with the Federal Property Management Regulations (41 CFR 101–47.303–2) based upon the uses identified in the redevelopment plan. Federal sponsoring agencies shall notify eligible applicants that any request for property must be consistent with the uses identified in the redevelopment plan. At the request of the LRA, the Military Department may conduct the official State and local public benefit screening at any time after the publication of available property described at §176.20(b).

(b) *Environmental analysis.* Prior to disposal of any real property, the Military Department shall, consistent with NEPA and section 2905 of the Defense Base Closure and Realignment Act of 1990, as amended (10 U.S.C. 2687 note), complete an environmental impact analysis of all reasonable disposal alternatives. The Military Department shall consult with the LRA throughout the environmental impact analysis process to ensure both that the LRA is provided the most current environmental information available concerning the installation, and that the Military Department receives the most current information available concerning the LRA's redevelopment plans for the installation.

(c) *Disposal.* Upon receipt of a notice of approval of an application from HUD under §176.35(c)(1) or §176.35(d)(2), DoD shall dispose of buildings and property in accordance with the record of decision or other decision document prepared under §176.45(b). Disposal of buildings and property to be used as homeless assistance facilities shall be to either the LRA or directly to the representative(s) of the homeless and shall be without consideration. Upon receipt of a notice from HUD under §176.40(b), DoD will dispose of the buildings and property at the installation in consultation with HUD and the LRA.

(d) *LRA's responsibility.* The LRA shall be responsible for the implementation of and compliance with legally binding agreements under the application.

(e) *Reversions to the LRA.* If a building or property reverts to the LRA under a legally binding agreement under the

application, the LRA shall take appropriate actions to secure, to the maximum extent practicable, the utilization of the building or property by other homeless representatives to assist the homeless. An LRA may not be required to utilize the building or property to assist the homeless.

# PART 179—MUNITIONS RESPONSE SITE PRIORITIZATION PROTOCOL (MRSPP)

Sec.
179.1 Purpose.
179.2 Applicability and scope.
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APPENDIX A TO PART 179—TABLES OF THE MUNITIONS RESPONSE SITE PRIORITIZATION PROTOCOL (MRSPP).

AUTHORITY: 10 U.S.C. 2710 *et seq.*

SOURCE: 70 FR 58028, Oct. 5, 2005, unless otherwise noted.

## § 179.1 Purpose.

The Department of Defense (the Department) is adopting this Munitions Response Site Prioritization Protocol (MRSPP) (hereinafter referred to as the ''rule'') under the authority of 10 U.S.C. 2710(b). Provisions of 10 U.S.C. 2710(b) require that the Department assign to each defense site in the inventory required by 10 U.S.C. 2710(a) a relative priority for response activities based on the overall conditions at each location and taking into consideration various factors related to safety and environmental hazards.

## § 179.2 Applicability and scope.

(a) This part applies to the Office of the Secretary of Defense, the Military Departments, the Defense Agencies and the Department Field Activities, and any other Department organizational entity or instrumentality established to perform a government function (hereafter referred to collectively as the ''Components'').

(b) The rule in this part shall be applied at all locations:

(1) That are, or were, owned by, leased to, or otherwise possessed or used by the Department, and

(2) That are known to, or suspected of, containing unexploded ordnance (UXO), discarded military munitions (DMM), or munitions constituents (MC), and

(3) That are included in the inventory established pursuant to 10 U.S.C. 2710(a).

(c) The rule in this part shall not be applied at the locations not included in the inventory required under 10 U.S.C. 2710(a). The locations not included in the inventory are:

(1) Locations that are not, or were not, owned by, leased to, or otherwise possessed or used by the Department,

(2) Locations neither known to contain, or suspected of containing, UXO, DMM, or MC,

(3) Locations outside the United States,

(4) Locations where the presence of military munitions results from combat operations,

(5) Currently operating military munitions storage and manufacturing facilities,

(6) Locations that are used for, or were permitted for, the treatment or disposal of military munitions, and

(7) Operational ranges.

## § 179.3 Definitions.

This part includes definitions for many terms that clarify its scope and applicability. Many of the terms relevant to this part are already defined, either in 10 U.S.C. 101, 10 U.S.C. 2710(e), or the Code of Federal Regulations. Where this is the case, the statutory and regulatory definitions are repeated here strictly for ease of reference. Citations to the U.S. Code or the Code of Federal Regulations are provided with the definition, as applicable. Unless used elsewhere in the U.S. Code or the Code of Federal Regulations, these terms are defined only for purposes of this part.

*Barrier* means a natural obstacle or obstacles (*e.g.*, difficult terrain, dense vegetation, deep or fast-moving water), a man-made obstacle or obstacles (*e.g.*, fencing), and combinations of natural and man-made obstacles.

*Chemical agent (CA)* means a chemical compound (to include experimental compounds) that, through its chemical properties produces lethal or other

damaging effects on human beings, is intended for use in military operations to kill, seriously injure, or incapacitate persons through its physiological effects. Excluded are research, development, testing and evaluation (RDTE) solutions; riot control agents; chemical defoliants and herbicides; smoke and other obscuration materials; flame and incendiary materials; and industrial chemicals. (This definition is based on the definition of ''chemical agent and munition'' in 50 U.S.C. 1521(j)(1).)

*Chemical Agent (CA) Hazard* is a condition where danger exists because CA is present in a concentration high enough to present potential unacceptable effects (*e.g.*, death, injury, damage) to people, operational capability, or the environment.

*Chemical Warfare Materiel (CWM)* means generally configured as a munition containing a chemical compound that is intended to kill, seriously injure, or incapacitate a person through its physiological effects. CWM includes V- and G-series nerve agents or H-series (mustard) and L-series (lewisite) blister agents in other-than-munition configurations; and certain industrial chemicals (*e.g.*, hydrogen cyanide (AC), cyanogen chloride (CK), or carbonyl dichloride (called phosgene or CG)) configured as a military munition. Due to their hazards, prevalence, and military-unique application, chemical agent identification sets (CAIS) are also considered CWM. CWM does not include riot control devices; chemical defoliants and herbicides; industrial chemicals (*e.g.*, AC, CK, or CG) not configured as a munition; smoke and other obscuration-producing items; flame and incendiary-producing items; or soil, water, debris, or other media contaminated with low concentrations of chemical agents where no CA hazards exist. For the purposes of this Protocol, CWM encompasses four subcategories of specific materials:

(1) *CWM, explosively configured* are all munitions that contain a CA fill and any explosive component. Examples are M55 rockets with CA, the M23 VX mine, and the M360 105-mm GB artillery cartridge.

(2) *CWM, nonexplosively configured* are all munitions that contain a CA fill, but that do not contain any explosive components. Examples are any chemical munition that does not contain explosive components and VX or mustard agent spray canisters.

(3) *CWM, bulk container* are all non-munitions-configured containers of CA (e.g., a ton container) and CAIS K941, toxic gas set M–1 and K942, toxic gas set M–2/E11.

(4) *CAIS* are military training aids containing small quantities of various CA and other chemicals. All forms of CAIS are scored the same in this rule, except CAIS K941, toxic gas set M–1; and CAIS K942, toxic gas set M–2/E11, which are considered forms of CWM, bulk container, due to the relatively large quantities of agent contained in those types of sets.

*Components* means the Office of the Secretary of Defense, the Military Departments, the Defense Agencies, the Department Field Activities, and any other Department organizational entity or instrumentality established to perform a government function.

*Defense site* means locations that are or were owned by, leased to, or otherwise possessed or used by the Department. The term does not include any operational range, operating storage or manufacturing facility, or facility that is used for or was permitted for the treatment or disposal of military munitions. (10 U.S.C. 2710(e)(1))

*Discarded military munitions (DMM)* means military munitions that have been abandoned without proper disposal or removed from storage in a military magazine or other storage area for the purpose of disposal. The term does not include UXO, military munitions that are being held for future use or planned disposal, or military munitions that have been properly disposed of consistent with applicable environmental laws and regulations. (10 U.S.C. 2710(e)(2))

*Explosive hazard* means a condition where danger exists because explosives are present that may react (*e.g.*, detonate, deflagrate) in a mishap with potential unacceptable effects (*e.g.*, death, injury, damage) to people, property, operational capability, or the environment.

*Military munitions* means all ammunition products and components produced for or used by the armed forces

for national defense and security, including ammunition products or components under the control of the Department of Defense, the Coast Guard, the Department of Energy, and the National Guard. The term includes confined gaseous, liquid, and solid propellants; explosives, pyrotechnics, chemical and riot control agents, smokes, and incendiaries, including bulk explosives and chemical warfare agents; chemical munitions, rockets, guided and ballistic missiles, bombs, warheads, mortar rounds, artillery ammunition, small arms ammunition, grenades, mines, torpedoes, depth charges, cluster munitions and dispensers, and demolition charges; and devices and components of any item thereof. The term does not include wholly inert items, improvised explosive devices, and nuclear weapons, nuclear devices, and nuclear components, other than nonnuclear components of nuclear devices that are managed under the nuclear weapons program of the Department of Energy after all required sanitization operations under the Atomic Energy Act of 1954 (42 U.S.C. 2011 *et seq.*) have been completed. (10 U.S.C. 101(e)(4))

*Military range* means designated land and water areas set aside, managed, and used to research, develop, test, and evaluate military munitions, other ordnance, or weapon systems, or to train military personnel in their use and handling. Ranges include firing lines and positions, maneuver areas, firing lanes, test pads, detonation pads, impact areas, and buffer zones with restricted access and exclusionary areas. (40 CFR 266.201)

*Munitions and explosives of concern* distinguishes specific categories of military munitions that may pose unique explosives safety risks, such as UXO, as defined in 10 U.S.C. 101(e)(5); discarded military munitions, as defined in 10 U.S.C. 2710(e)(2); or munitions constituents (*e.g.*, TNT, RDX), as defined in 10 U.S.C. 2710(e)(3), present in high enough concentrations to pose an explosive hazard.

*Munitions constituents* means any materials originating from UXO, discarded military munitions, or other military munitions, including explosive and nonexplosive materials, and emission, degradation, or breakdown elements of such ordnance or munitions. (10 U.S.C. 2710(e)(3))

*Munitions response* means response actions, including investigation, removal actions, and remedial actions, to address the explosives safety, human health, or environmental risks presented by UXO, discarded military munitions (DMM), or munitions constituents (MC), or to support a determination that no removal or remedial action is required.

*Munitions response area (MRA)* means any area on a defense site that is known or suspected to contain UXO, DMM, or MC. Examples are former ranges and munitions burial areas. An MRA comprises one or more munitions response sites.

*Munitions response site (MRS)* means a discrete location within an MRA that is known to require a munitions response.

*Operational range* means a range that is under the jurisdiction, custody, or control of the Secretary of Defense and that is used for range activities, or although not currently being used for range activities, that is still considered by the Secretary to be a range and has not been put to a new use that is incompatible with range activities. (10 U.S.C. 101(e)(3))

*Range* means a designated land or water area that is set aside, managed, and used for range activities of the Department of Defense. The term includes firing lines and positions, maneuver areas, firing lanes, test pads, detonation pads, impact areas, electronic scoring sites, buffer zones with restricted access, and exclusionary areas. The term also includes airspace areas designated for military use in accordance with regulations and procedures prescribed by the Administrator of the Federal Aviation Administration. (10 U.S.C. 101(e)(1)(A) and (B))

*Range activities* means research, development, testing, and evaluation of military munitions, other ordnance, and weapons systems; and the training of members of the armed forces in the use and handling of military munitions, other ordnance, and weapons systems. (10 U.S.C. 101(3)(2))

*Unexploded ordnance (UXO)* means military munitions that:

(1) Have been primed, fuzed, armed, or otherwise prepared for action;

(2) Have been fired, dropped, launched, projected, or placed in such a manner as to constitute a hazard to operations, installations, personnel, or material; and

(3) Remain unexploded, whether by malfunction, design, or any other cause. (10 U.S.C. 101(e)(5))

*United States* means, in a geographic sense, the states, territories, and possessions and associated navigable waters, contiguous zones, and ocean waters of which the natural resources are under the exclusive management authority of the United States. (10 U.S.C. 2710(e)(10))

**§ 179.4 Policy.**

(a) In assigning a relative priority for response activities, the Department generally considers those MRSs posing the greatest hazard as being the highest priority for action. The priority assigned should be based on the overall conditions at each MRS, taking into consideration various factors relating to safety and environmental hazard potential.

(b) In addition to the priority assigned to an MRS, other considerations (*e.g.*, availability of specific equipment, intended reuse, stakeholder interest) can affect the sequence in which munitions response actions at a specific MRS are funded.

(c) It is Department policy to ensure that U.S. EPA, other federal agencies (as appropriate or required), state regulatory agencies, tribal governments, local restoration advisory boards or technical review committees, and local stakeholders are offered opportunities to participate in the application of the rule in this part and making sequencing recommendations.

**§ 179.5 Responsibilities.**

Each Component shall:

(a) Apply the rule in this part to each MRS under its administrative control when sufficient data are available to populate all the data elements within any or all of the three hazard evaluation modules that comprise the rule. Upon further delineation and characterization of an MRA into more than one MRS, Components shall reapply the rule to all MRSs within the MRA. In such cases where data are not sufficient to populate one or two of the hazard evaluation modules (*e.g.*, there are no constituent sampling data for the Health Hazard Evaluation [HHE] module), Components will assign a priority based on the hazard evaluation modules evaluated and reapply the rule once sufficient data are available to apply the remaining hazard evaluation modules.

(b) Ensure that the total acreage of each MRA is evaluated using this rule (i.e., ensure the all MRSs within the MRA are evaluated).

(c) Ensure that EPA, other federal agencies (as appropriate or required), state regulatory agencies, tribal governments, local restoration advisory boards or technical review committees, local community stakeholders, and the current landowner (if the land is outside Department control) are offered opportunities as early as possible and throughout the process to participate in the application of the rule and making sequencing recommendations.

(1) To ensure EPA, other federal agency, state regulatory agencies, tribal governments, and local government officials are aware of the opportunity to participate in the application of the rule, the Component organization responsible for implementing a munitions response at the MRS shall notify the heads of these organizations (or their designated point of contact), as appropriate, seeking their involvement prior to beginning prioritization. Records of the notification will be placed in the Administrative Record and Information Repository for the MRS.

(2) Prior to beginning prioritization, the Component organization responsible for implementing a munitions response at the MRS shall publish an announcement in local community publications requesting information pertinent to prioritization or sequencing decisions to ensure the local community is aware of the opportunity to participate in the application of the rule.

(d) Establish a quality assurance panel of Component personnel to review, initially, all MRS prioritization

decisions. Once the Department determines that its Components are applying the rule in a consistent manner and the rule's application leads to decisions that are representative of site conditions, the Department may establish a sampling-based approach for its Components to use for such reviews. This panel reviewing the priority assigned to an MRS shall not include any participant involved in applying the rule to that MRS. If the panel recommends a change that results in a different priority, the Component shall report, in the inventory data submitted to the Office of the Deputy Under Secretary of Defense (Installations & Environment) (ODUSD[I&E]), the rationale for this change. The Component shall also provide this rationale to the appropriate regulatory agencies and involved stakeholders for comment before finalizing the change.

(e) Following the panel review, submit the results of applying the rule along with the other inventory data that 10 U.S.C. 2710(c) requires be made publicly available, to the ODUSD(I&E). The ODUSD(I&E) shall publish this information in the report on environmental restoration activities for that fiscal year. If sequencing decisions result in action at an MRS with a lower MRS priority ahead of an MRS with a higher MRS priority, the Component shall provide specific justification to the ODUSD(I&E).

(f) Document in a Management Action Plan (MAP) or its equivalent all aspects of the munitions responses required at all MRSs for which that MAP is applicable. Department guidance requires that MAP be developed and maintained at an installation (or Formerly Used Defense Site [FUDS] property) level and address each site at that installation or FUDS. For the FUDS program, a statewide MAP may also be developed.

(g) Develop sequencing decisions at installations and FUDS with input from appropriate regulators and stakeholders (*e.g.*, community members of an installation's restoration advisory board or technical review committee), and document this development in the MAP. Final sequencing may be impacted by Component program management considerations. If the sequencing of any MRS is changed from the sequencing reflected in the current MAP, the Component shall provide information to the appropriate regulators and stakeholders documenting the reasons for the sequencing change, and shall request their review and comment on that decision.

(h) Ensure that information provided by regulators and stakeholders that may influence the priority assigned to an MRS or sequencing decision concerning an MRS is included in the Administrative Record and the Information Repository.

(i) Review each MRS priority at least annually and update the priority as necessary to reflect new information. Reapplication of the rule is required under any of the following circumstances:

(1) Upon completion of a response action that changes site conditions in a manner that could affect the evaluation under this rule.

(2) To update or validate a previous evaluation at an MRS when new information is available.

(3) To update or validate the priority assigned where that priority has been previously assigned based on evaluation of only one or two of the three hazard evaluation modules.

(4) Upon further delineation and characterization of an MRA into MRSs.

(5) To categorize any MRS previously classified as ''evaluation pending.''

### § 179.6 Procedures.

The rule in this part comprises the following three hazard evaluation modules.

(a) Explosive Hazard Evaluation (EHE) module.

(1) The EHE module provides a single, consistent, Department-wide approach for the evaluation of explosive hazards. This module is used when there is a known or suspected presence of an explosive hazard. The EHE module is composed of three factors, each of which has two to four data elements that are intended to assess the specific conditions at an MRS. These factors are:

(i) *Explosive hazard*, which has the data elements *Munitions Type* and

*Source of Hazard* and constitutes 40 percent of the EHE module score. (See appendix A to this part, tables 1 and 2.)

(ii) *Accessibility*, which has the data elements *Location of Munitions, Ease of Access*, and *Status of Property* and constitutes 40 percent of the EHE module score. (See appendix A, tables 3, 4, and 5.)

(iii) Receptors, which has the data elements *Population Density*, *Population Near Hazard*, *Types of Activities/Structures*, and *Ecological and/or Cultural Resources* and constitutes 20 percent of the EHE module score. (See appendix A, tables 6, 7, 8, and 9.)

(2) Based on MRS-specific information, each data element is assigned a numeric score, and the sum of these score is the EHE module score. The EHE module score results in an MRS being placed into one of the following ratings. (See appendix A, table 10.)

(i) *EHE Rating A (Highest)* is assigned to MRSs with an EHE module score from 92 to 100.

(ii) *EHE Rating B* is assigned to MRSs with an EHE module score from 82 to 91.

(iii) *EHE Rating C* is assigned to MRSs with an EHE module score from 71 to 81.

(iv) *EHE Rating D* is assigned to MRSs with an EHE module score from 60 to 70.

(v) *EHE Rating E* is assigned to MRSs with an EHE module score from 48 to 59.

(vi) *EHE Rating F* is assigned to MRSs with an EHE module score from 38 to 47.

(vii) *EHE Rating G (Lowest)* is assigned to MRSs with an EHE module score less than 38.

(3) There are also three other possible outcomes for the EHE module:

(i) *Evaluation pending*. This category is used when there are known or suspected UXO or DMM, but sufficient information is not available to populate the nine data elements of the EHE module.

(ii) *No longer required*. This category is reserved for MRSs that no longer require an assigned priority because the Department has conducted a response, all objectives set out in the decision document for the MRS have been achieved, and no further action, except for long-term management and recurring reviews, is required.

(iii) *No known or suspected explosive hazard*. This category is reserved for MRSs that do not require evaluation under the EHE module.

(4) The EHE module rating shall be considered with the CHE and HHE module ratings to determine the MRS priority.

(5) MRSs lacking information for determining an EHE module rating shall be programmed for additional study and evaluated as soon as sufficient data are available. Until an EHE module rating is assessed, MRSs shall be rated as ''evaluation pending'' for the EHE module.

(b) Chemical Warfare Materiel Hazard Evaluation (CHE) module. (1) The CHE module provides an evaluation of the chemical hazards associated with the physiological effects of CWM. The CHE module is used only when CWM are known or suspected of being present at an MRS. Like the EHE module, the CHE module has three factors, each of which has two to four data elements that are intended to assess the conditions at an MRS.

(i) *CWM hazard*, which has the data elements *CWM Configuration* and *Sources of CWM* and constitutes 40 percent of the CHE score. (See appendix A to this part, tables 11 and 12.)

(ii) *Accessibility*, which focuses on the potential for receptors to encounter the CWM known or suspected to be present on an MRS. This factor consists of three data elements, *Location of CWM*, *Ease of Access*, and *Status of Property*, and constitutes 40 percent of the CHE score. (See appendix A, tables 13, 14, and 15.)

(iii) *Receptor*, which focuses on the human and ecological populations that may be impacted by the presence of CWM. It has the data elements *Population Density*, *Population Near Hazard*, *Types of Activities/Structures*, and *Ecological and/or Cultural Resources* and constitutes 20 percent of the CHE score. (See appendix A, tables 16, 17, 18, and 19.)

(2) Similar to the EHE module, each data element is assigned a numeric score, and the sum of these scores (*i.e.*, the CHE module score) is used to determine the CHE rating. The CHE module

score results in an MRS being placed into one of the following ratings. (See appendix A, table 20.)

(i) *CHE Rating A (Highest)* is assigned to MRSs with a CHE score from 92 to 100.

(ii) *CHE Rating B* is assigned to MRSs with a CHE score from 82 to 91.

(iii) *CHE Rating C* is assigned to MRSs with a CHE score from 71 to 81.

(iv) *CHE Rating D* is assigned to MRSs with a CHE score from 60 to 70.

(v) *CHE Rating E* is assigned to MRSs with a CHE score from 48 to 59.

(vi) *CHE Rating F* is assigned to MRSs with a CHE score from 38 to 47.

(vii) *CHE Rating G (Lowest)* is assigned to MRSs with a CHE score less than 38.

(3) There are also three other potential outcomes for the CHE module:

(i) *Evaluation pending*. This category is used when there are known or suspected CWM, but sufficient information is not available to populate the nine data elements of the CHE module.

(ii) *No longer required*. This category is reserved for MRSs that no longer require an assigned priority because the Department has conducted a response, all objectives set out in the decision document for the MRS have been achieved, and no further action, except for long-term management and recurring reviews, is required.

(iii) *No known or suspected CWM hazard*. This category is reserved for MRSs that do not require evaluation under the CHE module.

(4) The CHE rating shall be considered with the EHE module and HHE module ratings to determine the MRS priority.

(5) MRSs lacking information for assessing a CHE module rating shall be programmed for additional study and evaluated as soon as sufficient data are available. Until a CHE module rating is assigned, the MRS shall be rated as ''evaluation pending'' for the CHE module.

(c) Health Hazard Evaluation (HHE) module.

(1) The HHE provides a consistent Department-wide approach for evaluating the relative risk to human health and the environment posed by MC. The HHE builds on the RRSE framework that is used in the Installation Restoration Program (IRP) and has been modified to address the unique requirements of MRSs. The HHE module shall be used for evaluating the potential hazards posed by MC and other chemical contaminants. The HHE module is intended to evaluate MC at sites. Any incidental nonmunitions-related contaminants may be addressed incidental to a munitions response under the MMRP.

(2) The module has three factors:

(i) Contamination Hazard Factor (CHF), which indicates MC, and any nonmunitions-related incidental contaminants present; this factor contributes a level of High (H), Middle (M), or Low (L) based on Significant, Moderate, or Minimal contaminants present, respectively. (See appendix A to this part, table 21.)

(ii) Receptor Factor (RF), which indicates the receptors; this factor contributes a level of H, M, or L based on Identified, Potential, or Limited receptors, respectively. (See appendix A, table 21.)

(iii) Migration Pathway Factor (MPF), which indicates environmental migration pathways, and contributes a level of H, M, or L based on Evident, Potential or Confined pathways, respectively. (See appendix A, table 21.)

(3) The H, M, and L levels for the CHF, RF, and MPF are combined in a matrix to obtain composite three-letter combination levels that integrate considerations of all three factors. (See appendix A, table 22.)

(4) The three-letter combination levels are organized by frequency, and the resulting frequencies result in seven HHE ratings. (See appendix A, table 23.)

(i) HHE Rating A (Highest) is assigned to MRSs with an HHE combination level of high for all three factors.

(ii) HHE Rating B is assigned to MRSs with a combination level of high for CHF and RF and medium for MPF (HHM).

(iii) HHE Rating C is assigned to MRSs with a combination level of high for the CHF and RF and low for MPF (HHL), or high for CHF and medium for the RF and MPF (HMM).

(iv) HHE Rating D is assigned to MRSs with a combination level of high for the CHF, medium for the RF, and

low for the MPF (HML), or medium for all three factors (MMM).

(v) HHE Rating E is assigned to MRSs with a combination level of high for the CHF and low for the RF and MPF (HLL), or medium for the CHF and RF and low for the MPF (MML).

(vi) HHE Rating F is assigned to MRSs with a combination level of medium for the CHF and low for the RF and MPF (MLL).

(vii) HHE Rating G (Lowest) is assigned to MRSs with a combination level of low for all three factors (LLL).

(5) The HHE three-letter combinations are replaced by the seven HHE ratings. (See appendix A, table 24.)

(6) There are also three other potential outcomes for the HHE module:

(i) *Evaluation pending*. This category is used when there are known or suspected MC, and any incidental nonmunitions-related contaminants present, but sufficient information is not available to determine the HHE module rating.

(ii) *No longer required*. This category is reserved for MRSs that no longer require an assigned MRS priority because the Department has conducted a response, all objectives set out in the decision document for the MRS have been achieved, and no further action, except for long-term management and recurring reviews, is required.

(iii) *No known or suspected munitions constituent hazard*. This rating is reserved for MRSs that do not require evaluation under the HHE module.

(7) The HHE module rating shall be considered with the EHE and CHE module ratings to determine the MRS priority.

(8) MRSs lacking information sufficient for assessing an HHE module rating shall be programmed for additional study and evaluated as soon as sufficient data are available. Until an HHR module rating is assigned, the MRS shall be classified as ''evaluation pending'' for the HHE module.

(d) *Determining the MRS priority*. (1) An MRS priority is determined based on integrating the ratings from the EHE, CHE, and HHE modules. Until all three hazard evaluation modules have been evaluated, the MRS priority shall be based on the results of the modules completed.

(2) Each MRS is assigned to one of eight MRS priorities based on the ratings of the three hazard evaluation modules, where Priority 1 indicates the highest potential hazard and Priority 8 the lowest potential hazard. Under the rule in this part, only MRSs with CWM can be assigned to Priority 1 and no MRS with CWM can be assigned to Priority 8. (See appendix A to this part, table 25.)

(3) An ''evaluation pending'' rating is used to indicate that an MRS requires further evaluation. This designation is only used when none of the three modules has a numerical rating (*i.e.*, 1 through 8) and at least one module is rated ''evaluation pending.'' The Department shall develop program metrics focused on reducing the number of MRSs with a status of ''evaluating pending'' for any of the three modules. (See appendix A, table 25.)

(4) A ''no longer required'' rating is used to indicate that an MRS no longer requires prioritization. The MRS will receive this rating when none of the three modules has a numerical (*i.e.*, 1 through 8) or an ''evaluation pending'' designation, and at least one of the modules is rated ''no longer required.''

(5) A rating of ''no known or suspected hazard'' is used to indicate that an MRS has no known or expected hazard. This designation is used only when the hazard evaluation modules are rated as ''no known or suspected explosive hazard,'' ''no known or suspected CWM hazard,'' and ''no known or suspected MC hazard.'' (See appendix A, table 25.)

### § 179.7 Sequencing.

(a) *Sequencing considerations*. The sequencing of MRSs for action shall be based primarily on the MRS priority determined through applying the rule in this part. Generally, an MRS that presents a greater relative risk to human health, safety, or the environment will be addressed before an MRS that presents a lesser relative risk. Other factors, however, may warrant consideration when determining the sequencing for specific MRSs. In evaluating other factors in sequencing decisions, the Department will consider a broad range of issues. These other, or risk-plus factors, do not influence or

change the MRS priority, but may influence the sequencing for action. Examples of factors that the Department may consider are:

(1) Concerns expressed by regulators or stakeholders.

(2) Cultural and social factors.

(3) Economic factors, including economic considerations pertaining to environmental justice issues, economies of scale, evaluation of total life cycle costs, and estimated valuations of long-term liabilities.

(4) Findings of health, safety, or ecological risk assessments or evaluations based on MRS-specific data.

(5) Reasonably anticipated future land use, especially when planning response actions, conducting evaluations of response alternatives, or establishing specific response action objectives.

(6) A community's reuse requirements at Base Realignment and Closure (BRAC) installations.

(7) Specialized considerations of tribal trust lands (held in trust by the United States for the benefit of any tribe or individual). The United States holds the legal title to the land and the tribe holds the beneficial interest.

(8) Implementation and execution considerations (*e.g.*, funding availability; the availability of the necessary equipment and people to implement a particular action; examination of alternatives to responses that entail significant capital investments, a lengthy period of operation, or costly maintenance; alternatives to removal or treatment of contamination when existing technology cannot achieve established standards [*e.g.*, maximum contaminant levels]).

(9) Mission-driven requirements.

(10) The availability of appropriate technology (*e.g.*, technology to detect, discriminate, recover, and destroy UXO).

(11) Implementing standing commitments, including those in formal agreements with regulatory agencies, requirements for continuation of remedial action operations until response objectives are met, other long-term management activities, and program administration.

(12) Established program goals and initiatives.

(13) Short-term and long-term ecological effects and environmental impacts in general, including injuries to natural resources.

(b) *Procedures and documentation for sequencing decisions.* (1) Each installation or FUDS is required to develop and maintain a Management Action Plan (MAP) or its equivalent. Sequencing decisions, which will be documented in the MAP at military installations and FUDS, shall be developed with input from appropriate regulators and stakeholders (*e.g.*, community members of an installation's restoration advisory board or technical review committee). If the sequencing of an MRS is changed from the sequencing reflected in the current MAP, information documenting the reasons for the sequencing change will be provided for inclusion in the MAP. Notice of the change in the sequencing shall be provided to those regulators and stakeholders that provided input to the sequencing process.

(2) In addition to the information on prioritization, the Components shall ensure that information provided by regulators and stakeholders that may influence the sequencing of an MRS is included in the Administrative Record and the Information Repository.

(3) Components shall report the results of sequencing to ODUSD(I&E) (or successor organizations). ODUSD(I&E) shall compile the sequencing results reported by each Component and publish the sequencing in the report on environmental restoration activities for that fiscal year. If sequencing decisions result in action at an MRS with a lower MRS priority ahead of an MRS with a higher priority, specific justification shall be provided to the ODUSD(I&E).

## APPENDIX A TO PART 179—TABLES OF THE MUNITIONS RESPONSE SITE PRIORITIZATION PROTOCOL

The tables in this Appendix are solely for use in implementing 32 CFR part 179.

Table 1
Classifications Within the EHE Module *Munitions Type* Data Element

| Classification | Description | Score |
|---|---|---|
| **Sensitive** | • All UXO that are considered likely to function upon any interaction with exposed persons (e.g., submunitions, 40mm high-explosive [HE] grenades, white phosphorus [WP] munitions, high-explosive antitank [HEAT] munitions, and practice munitions with sensitive fuzes, but excluding all other practice munitions).<br>• All hand grenades containing energetic filler.<br>• Bulk primary explosives, or mixtures of these with environmental media, such that the mixture poses an explosive hazard. | 30 |
| **High explosive (used or damaged)** | • All UXO containing a high-explosive filler (e.g., RDX, Composition B), that are not considered "sensitive."<br>• All DMM containing a high-explosive filler that have:<br>- Been damaged by burning or detonation<br>- Deteriorated to the point of instability. | 25 |
| **Pyrotechnic (used or damaged)** | • All UXO containing pyrotechnic fillers other than white phosphorous (e.g., flares, signals, simulators, smoke grenades).<br>• All DMM containing pyrotechnic fillers other than white phosphorous (e.g., flares, signals, simulators, smoke grenades) that have:<br>- Been damaged by burning or detonation<br>- Deteriorated to the point of instability. | 20 |
| **High explosive (unused)** | • All DMM containing a high explosive filler that:<br>- Have not been damaged by burning or detonation<br>- Are not deteriorated to the point of instability. | 15 |
| **Propellant** | • All UXO containing mostly single-, double-, or triple-based propellant, or composite propellants (e.g., rocket motor).<br>• All DMM containing mostly single-, double-, or triple-based propellant, or composite propellants (e.g., rocket motor) that are:<br>- Damaged by burning or detonation<br>- Deteriorated to the point of instability. | 15 |
| **Bulk secondary high explosives, pyrotechnics, or propellant** | • All DMM containing mostly single-, double-, or triple-based propellant, or composite propellants (e.g., rocket motor), that are deteriorated.<br>• Bulk secondary high explosives, pyrotechnic compositions, or propellant (not contained in a munition), or mixtures of these with environmental media such that the mixture poses an explosive hazard. | 10 |

Table 1
Classifications Within the EHE Module *Munitions Type* Data Element

| Classification | Description | Score |
|---|---|---|
| **Pyrotechnic (not used or damaged)** | • All DMM containing a pyrotechnic fillers (i.e., red phosphorous), other than white phosphorous filler, that:<br>- Have not been damaged by burning or detonation<br>- Are not deteriorated to the point of instability. | 10 |
| **Practice** | • All UXO that are practice munitions that are not associated with a sensitive fuze.<br>• All DMM that are practice munitions that are not associated with a sensitive fuze and that have not:<br>- Been damaged by burning or detonation<br>- Deteriorated to the point of instability. | 5 |
| **Riot control** | • All UXO or DMM containing a riot control agent filler (e.g., tear gas). | 3 |
| **Small arms** | • All used munitions or DMM that are categorized as small arms ammunition. [Physical evidence or historical evidence that no other types of munitions (e.g., grenades, subcaliber training rockets, demolition charges) were used or are present on the MRS is required for selection of this category.] | 2 |
| **Evidence of no munitions** | • Following investigation of the MRS, there is physical evidence that there are no UXO or DMM present, or there is historical evidence indicating that no UXO or DMM are present. | 0 |

**Notes:**

- *Former* (as in "former military range") means the MRS is a location that was (1) closed by a formal decision made by the Component with administrative control over the location, or (2) put to a use incompatible with the presence of UXO, DMM, or MC.
- *Historical evidence* means the investigation: (1) found written documents or records, (2) documented interviews of persons with knowledge of site conditions, or (3) found and verified other forms of information.
- *Physical evidence* means: (1) recorded observations from on-site investigations, such as finding intact UXO or DMM, or munitions debris (e.g., fragments, penetrators, projectiles, shell casings, links, fins); (2) the results of field or laboratory sampling and analysis procedures; or (3) the results of geophysical investigations.
- *Practice munitions* means munitions that contain an inert filler (e.g., wax, sand, concrete), a spotting charge (i.e., a small charge of red phosphorus, photoflash powder, or black powder used to indicate the point of impact), and a fuze.
- The term *small arms ammunition* means ammunition, without projectiles that contain explosives (other than tracers), that is .50 caliber or smaller, or for shotguns.

Table 2
Classifications Within the EHE Module *Source of Hazard* Data Element

| Classification | Description | Score |
|---|---|---|
| **Former range** | • The MRS is a former military range where munitions (including practice munitions with sensitive fuzes) have been used. Such areas include impact or target areas, associated buffer and safety zones, firing points, and live-fire maneuver areas. | 10 |
| **Former munitions treatment (i.e., OB/OD) unit** | • The MRS is a location where UXO or DMM (e.g., munitions, bulk explosives, bulk pyrotechnic, or bulk propellants) were burned or detonated for the purpose of treatment prior to disposal. | 8 |
| **Former practice munitions range** | • The MRS is a former military range on which only practice munitions without sensitive fuzes were used. | 6 |
| **Former maneuver area** | • The MRS is a former maneuver area where no munitions other than flares, simulators, smokes, and blanks were used. There must be evidence that no other munitions were used at the location to place an MRS into this category. | 5 |
| **Former burial pit or other disposal area** | • The MRS is a location where DMM were buried or disposed of (e.g., disposed of into a water body) without prior thermal treatment. | 5 |
| **Former industrial operating facilities** | • The MRS is a location that is a former munitions maintenance, manufacturing, or demilitarization facility. | 4 |
| **Former firing points** | • The MRS is a firing point, where the firing point is delineated as an MRS separate from the rest of a former military range. | 4 |
| **Former missile or air defense artillery emplacements** | • The MRS is a former missile defense or air defense artillery (ADA) emplacement not associated with a military range. | 2 |
| **Former storage or transfer points** | • The MRS is a location where munitions were stored or handled for transfer between different modes of transportation (e.g., rail to truck, truck to weapon system). | 2 |
| **Former small arms range** | • The MRS is a former military range where only small arms ammunition was used. [There must be evidence that no other types of munitions (e.g., grenades) were used or are present to place an MRS into this category.] | 1 |
| **Evidence of no munitions** | • Following investigation of the MRS, there is physical evidence that no UXO or DMM are present, or there is historical evidence indicating that no UXO or DMM are present. | 0 |

**Notes:**

- *Former* (as in "former military range") means the MRS is a location that was (1) closed by a formal decision made by the Component with administrative control over the location, or (2) put to a use incompatible with the presence of UXO, DMM, or MC.
- *Historical evidence* means the investigation: (1) found written documents or records, (2) documented interviews of persons with knowledge of site conditions, or (3) found and verified other forms of information.
- *Physical evidence* means: (1) recorded observations from on-site investigations, such as finding intact UXO or DMM, or munitions debris (e.g., fragments, penetrators, projectiles, shell casings, links, fins); (2) the results of field or laboratory sampling and analysis procedures; or (3) the results of geophysical investigations.
- *Practice munitions* means munitions that contain an inert filler (e.g., wax, sand, concrete), a spotting charge (i.e., a small charge of red phosphorus, photoflash powder, or black powder used to indicate the point of impact), and a fuze.
- The term *small arms ammunition* means ammunition, without projectiles that contain explosives (other than tracers), that is .50 caliber or below, or for shotguns.

Table 3
Classifications Within the EHE Module *Information on the Location of Munitions* Data Element

| Classification | Description | Score |
|---|---|---|
| **Confirmed surface** | • Physical evidence indicates that there are UXO or DMM on the surface of the MRS.<br>• Historical evidence (e.g., a confirmed incident report or accident report) indicates there are UXO or DMM on the surface of the MRS. | 25 |
| **Confirmed subsurface, active** | • Physical evidence indicates the presence of UXO or DMM in the subsurface of the MRS, and the geological conditions at the MRS are likely to cause UXO or DMM to be exposed, in the future, by naturally occurring phenomena (e.g., drought, flooding, erosion, frost, heat heave, tidal action), or intrusive activities (e.g., plowing, construction, dredging) at the MRS are likely to expose UXO or DMM.<br>• Historical evidence indicates that UXO or DMM are located in the subsurface of the MRS and the geological conditions at the MRS are likely to cause UXO or DMM to be exposed, in the future, by naturally occurring phenomena (e.g., drought, flooding, erosion, frost, heat heave, tidal action), or intrusive activities (e.g., plowing, construction, dredging) at the MRS are likely to expose UXO or DMM. | 20 |
| **Confirmed subsurface, stable** | • Physical evidence indicates the presence of UXO or DMM in the subsurface of the MRS and the geological conditions at the MRS are not likely to cause UXO or DMM to be exposed, in the future, by naturally occurring phenomena, or intrusive activities at the MRS are not likely to cause UXO or DMM to be exposed.<br>• Historical evidence indicates that UXO or DMM are located in the subsurface of the MRS and the geological conditions at the MRS are not likely to cause UXO or DMM to be exposed, in the future, by naturally occurring phenomena, or intrusive activities at the MRS are not likely to cause UXO or DMM to be exposed. | 15 |
| **Suspected (physical evidence)** | • There is physical evidence (e.g., munitions debris, such as fragments, penetrators, projectiles, shell casings, links, fins), other than the documented presence of UXO or DMM, indicating that UXO or DMM may be present at the MRS. | 10 |
| **Suspected (historical evidence)** | • There is historical evidence indicating that UXO or DMM may be present at the MRS. | 5 |
| **Subsurface, physical constraint** | • There is physical or historical evidence indicating that UXO or DMM may be present in the subsurface, but there is a physical constraint (e.g., pavement, water depth over 120 feet) preventing direct access to the UXO or DMM. | 2 |

Table 3
Classifications Within the EHE Module *Information on the Location of Munitions* Data Element

| Classification | Description | Score |
|---|---|---|
| **Small arms (regardless of location)** | • The presence of small arms ammunition is confirmed or suspected, regardless of other factors such as geological stability. [There must be evidence that no other types of munitions (e.g., grenades) were used or are present at the MRS to place an MRS into this category.] | 1 |
| **Evidence of no munitions** | • Following investigation of the MRS, there is physical evidence that there are no UXO or DMM present, or there is historical evidence indicating that no UXO or DMM are present. | 0 |

**Notes:**

- *Historical evidence* means the investigation: (1) found written documents or records, (2) documented interviews of persons with knowledge of site conditions, or (3) found and verified other forms of information.
- *Physical evidence* means: (1) recorded observations from on-site investigations, such as finding intact UXO or DMM, or munitions debris (e.g., fragments, penetrators, projectiles, shell casings, links, fins); (2) the results of field or laboratory sampling and analysis procedures; or (3) the results of geophysical investigations.
- *In the subsurface* means the munition (i.e., a DMM or UXO) is (1) entirely beneath the ground surface, or (2) fully submerged in a water body.
- *On the surface* means the munition (i.e., a DMM or UXO) is (1) entirely or partially exposed above the ground surface (i.e., above the soil layer), or (2) entirely or partially exposed above the surface of a water body (e.g., as a result of tidal activity).
- The term *small arms ammunition* means ammunition, without projectiles that contain explosives (other than tracers), that is .50 caliber or smaller, or for shotguns.

Table 4
Classifications Within the EHE Module *Ease of Access* Data Element

| Classification | Description | Score |
|---|---|---|
| **No barrier** | • There is no barrier preventing access to any part of the MRS (i.e., all parts of the MRS are accessible). | 10 |
| **Barrier to MRS access is incomplete** | • There is a barrier preventing access to parts of the MRS, but not the entire MRS. | 8 |
| **Barrier to MRS access is complete, but not monitored** | • There is a barrier preventing access to all parts of the MRS, but there is no surveillance (e.g., by a guard) to ensure that the barrier is effectively preventing access to all parts of the MRS. | 5 |
| **Barrier to MRS access is complete and monitored** | • There is a barrier preventing access to all parts of the MRS, and there is active, continual surveillance (e.g., by a guard, video monitoring) to ensure that the barrier is effectively preventing access to all parts of the MRS. | 0 |

**Notes:**

- *Barrier* means a natural obstacle or obstacles (e.g., difficult terrain, dense vegetation, deep or fast-moving water), a man-made obstacle or obstacles (e.g., fencing), or a combination of natural and man-made obstacles.

Table 5
Classifications Within the EHE *Status of Property* Data Element

| Classification | Description | Score |
|---|---|---|
| **Non-DoD control** | • The MRS is at a location that is no longer owned by, leased to, or otherwise possessed or used by the Department. Examples are privately owned land or water bodies; land or water bodies owned or controlled by state, tribal, or local governments; and land or water bodies managed by other federal agencies. | 5 |
| **Scheduled for transfer from DoD control** | • The MRS is on land or is a water body that is owned, leased, or otherwise possessed by the Department, and the Department plans to transfer that land or water body to the control of another entity (e.g., a state, tribal, or local government; a private party; another federal agency) within 3 years from the date the rule is applied. | 3 |
| **DoD control** | • The MRS is on land or is a water body that is owned, leased, or otherwise possessed by the Department. With respect to property that is leased or otherwise possessed, the Department must control access to the MRS 24 hours per day, every day of the calendar year. | 0 |

| Table 6<br>Classifications Within the EHE Module *Population Density* Data Element | | |
|---|---|---|
| Classification | Definition | Score |
| **> 500 persons per square mile** | • There are more than 500 persons per square mile in the county in which the MRS is located, based on U.S. Census Bureau data. | 5 |
| **100 to 500 persons per square mile** | • There are 100 to 500 persons per square mile in the county in which the MRS is located, based on U.S. Census Bureau data. | 3 |
| **< 100 persons per square mile** | • There are fewer than 100 persons per square mile in the county in which the MRS is located, based on U.S. Census Bureau data. | 1 |
| **Notes:**<br>• If an MRS is in more than one county, the Component will use the largest population value among those counties. If the MRS is within or borders a city or town, the population density for that city or town, instead of the county population density, is used. | | |

| Table 7<br>Classifications Within the EHE Module *Population Near Hazard* Data Element | | |
|---|---|---|
| Classification | Description | Score |
| **26 or more structures** | • There are 26 or more inhabited structures located up to 2 miles from the boundary of the MRS, within the boundary of the MRS, or both. | 5 |
| **16 to 25** | • There are 16 to 25 inhabited structures located up to 2 miles from the boundary of the MRS, within the boundary of the MRS, or both. | 4 |
| **11 to 15** | • There are 11 to 15 inhabited structures located up to 2 miles from the boundary of the MRS, within the boundary of the MRS, or both. | 3 |
| **6 to 10** | • There are 6 to 10 inhabited structures located up to 2 miles from the boundary of the MRS, within the boundary of the MRS, or both. | 2 |
| **1 to 5** | • There are 1 to 5 inhabited structures located up to 2 miles from the boundary of the MRS, within the boundary of the MRS, or both. | 1 |
| **0** | • There are no inhabited structures located up to 2 miles from the boundary of the MRS, within the boundary of the MRS, or both. | 0 |
| **Notes:**<br>• The term *inhabited structures* means permanent or temporary structures, other than military munitions-related structures, that are routinely occupied by one or more persons for any portion of a day. | | |

Table 8
Classifications Within the EHE Module *Types of Activities/Structures* Data Element

| Classification | Description | Score |
|---|---|---|
| **Residential, educational, commercial, or subsistence** | • Activities are conducted, or inhabited structures are located up to two miles from the MRS's boundary or within the MRS's boundary, that are associated with any of the following purposes: residential, educational, child care, critical assets (e.g., hospitals, fire and rescue, police stations, dams), hotels, commercial, shopping centers, playgrounds, community gathering areas, religious sites, or sites used for subsistence hunting, fishing, and gathering. | 5 |
| **Parks and recreational areas** | • Activities are conducted, or inhabited structures are located up to two miles from the MRS's boundary or within the MRS's boundary, that are associated with parks, nature preserves, or other recreational uses. | 4 |
| **Agricultural, forestry** | • Activities are conducted, or inhabited structures are located up to two miles from the MRS's boundary or within the MRS's boundary, that are associated with agriculture or forestry. | 3 |
| **Industrial or warehousing** | • Activities are conducted, or inhabited structures are located up to two miles from the MRS's boundary or within the MRS's boundary, that are associated with industrial activities or warehousing. | 2 |
| **No known or recurring activities** | • There are no known or recurring activities occurring up to two miles from the MRS's boundary or within the MRS's boundary. | 1 |

**Notes:**

- The term *inhabited structures* means permanent or temporary structures, other than Department-related structures, that are routinely occupied by one or more persons for any portion of a day.

Table 9
Classifications Within the EHE Module *Ecological and/or Cultural Resources* Data Element

| Classification | Description | Score |
|---|---|---|
| **Ecological and cultural resources present** | • There are both ecological and cultural resources present on the MRS. | 5 |
| **Ecological resources present** | • There are ecological resources present on the MRS. | 3 |
| **Cultural resources present** | • There are cultural resources present on the MRS. | 3 |
| **No ecological or cultural resources present** | • There are no ecological resources or cultural resources present on the MRS. | 0 |

**Notes:**

- *Ecological resources* means that (1) a threatened or endangered species (designated under the Endangered Species Act [ESA]) is present on the MRS; or (2) the MRS is designated under the ESA as critical habitat for a threatened or endangered species; or (3) there are identified sensitive ecosystems such as wetlands or breeding grounds present on the MRS.
- *Cultural resources* means there are recognized cultural, traditional, spiritual, religious, or historical features (e.g., structures, artifacts, symbolism) on the MRS. Requirements for determining if a particular feature is a cultural resource are found in *the National Historic Preservation Act, Native American Graves Protection and Repatriation Act, Archeological Resources Protection Act, Executive Order 13007*, and *the American Indian Religious Freedom Act*. As examples: American Indians or Alaska Natives deem an MRS to be of religious significance; there are areas used by American Indians or Alaska Natives for subsistence activities (e.g., hunting, fishing).

Table 10
Determining the EHE Rating from the EHE Module Score

| Overall EHE Module Score | EHE Rating |
|---|---|
| The MRS has an overall EHE module score from 92 to 100. | EHE Rating A |
| The MRS has an overall EHE module score from 82 to 91. | EHE Rating B |
| The MRS has an overall EHE module score from 71 to 81. | EHE Rating C |
| The MRS has an overall EHE module score from 60 to 70. | EHE Rating D |
| The MRS has an overall EHE module score from 48 to 59. | EHE Rating E |
| The MRS has an overall EHE module score from 38 to 47. | EHE Rating F |
| The MRS has an overall EHE module score less than 38. | EHE Rating G |
| Alternative Module Ratings | Evaluation Pending |
| | No Longer Required |
| | No Known or Suspected Explosive Hazard |

Table 11
Classifications Within the CHE Module *CWM Configuration* Data Element

| Classification | Description | Score |
|---|---|---|
| **CWM, explosive configuration, either UXO or damaged DMM** | The CWM known or suspected of being present at the MRS is:<br>• Explosively configured CWM that are UXO (i.e., CWM/UXO).<br>• Explosively configured CWM that are DMM (i.e., CWM/DMM) that have been damaged. | 30 |
| **CWM mixed with UXO** | • The CWM known or suspected of being present at the MRS are explosively configured CWM/DMM that have not been damaged, or nonexplosively configured CWM/DMM, or CWM not configured as a munition, that are commingled with conventional munitions that are UXO. | 25 |
| **CWM, explosive configuration that are DMM (undamaged)** | • The CWM known or suspected of being present at the MRS are explosively configured CWM/DMM that have not been damaged. | 20 |
| **CWM, not explosively configured or CWM, bulk container** | The CWM known or suspected of being present at the MRS is:<br>• Nonexplosively configured CWM/DMM.<br>• Bulk CWM/DMM (e.g., ton container). | 15 |
| **CAIS K941 and CAIS K942** | • The CWM/DMM known or suspected of being present at the MRS is CAIS K941-toxic gas set M-1 or CAIS K942-toxic gas set M-2/E11. | 12 |
| **CAIS (chemical agent identification sets)** | • Only CAIS, other than CAIS K941 and K942, are known or suspected of being present at the MRS. | 10 |
| **Evidence of no CWM** | • Following investigation, the physical evidence indicates that CWM are not present at the MRS, or the historical evidence indicates that CWM are not present at the MRS. | 0 |

**Notes:**

- The term *CWM/UXO* means CWM that are UXO.
- The notation *CWM/DMM* means CWM that are DMM, to include CAIS K941, toxic gas set M-1; and K942, toxic gas set M-2/E11.
- The term CAIS/DMM means CAIS, other than CAIS K941 and K942.
- *Historical evidence* means the investigation: (1) found written documents or records, (2) documented interviews of persons with knowledge of site conditions, or (3) found and verified other forms of information.
- *Physical evidence* means: (1) recorded observations from on-site investigations, such as finding intact UXO or DMM, or munitions debris (e.g., fragments, penetrators, projectiles, shell casings, links, fins); (2) the results of field or laboratory sampling and analysis procedures; or (3) the results of geophysical investigations.

Table 12
Classifications Within the CHE Module *Sources of CWM* Data Element

| Classification | Description | Score |
|---|---|---|
| **Live-fire involving CWM** | • The MRS is a former military range that supported live-fire of explosively configured CWM and the CWM/UXO are known or suspected of being present on the surface or in the subsurface.<br>• The MRS is a former military range that supported live-fire with conventional munitions, and CWM/DMM are on the surface or in the subsurface commingled with conventional munitions that are UXO. | 10 |
| **Damaged CWM/DMM surface or subsurface** | • There are damaged CWM/DMM on the surface or in the subsurface at the MRS. | 10 |
| **Undamaged CWM/DMM surface** | • There are undamaged CWM/DMM on the surface at the MRS. | 10 |
| **CAIS/DMM surface** | • There are CAIS/DMM on the surface. | 10 |
| **Undamaged CWM/DMM, subsurface** | • There are undamaged CWM/DMM in the subsurface at the MRS. | 5 |
| **CAIS/DMM subsurface** | • There are CAIS/DMM in the subsurface at the MRS. | 5 |
| **Former CA or CWM Production Facilities** | • The MRS is a facility that formerly engaged in production of CA or CWM, and CWM/DMM is suspected of being present on the surface or in the subsurface. | 3 |
| **Former Research, Development, Testing, and Evaluation (RDT&E) facility using CWM** | • The MRS is at a facility that formerly was involved in non-live-fire RDT&E activities (including static testing) involving CWM, and there are CWM/DMM suspected of being present on the surface or in the subsurface. | 3 |
| **Former Training Facility using CWM or CAIS** | • The MRS is a location that formerly was involved in training activities involving CWM and/or CAIS (e.g., training in recognition of CWA, decontamination training) and CWM/DMM or CAIS/DMM are suspected of being present on the surface or in the subsurface. | 2 |
| **Former Storage or Transfer points of CWM** | • The MRS is a former storage facility or transfer point (e.g., intermodal transfer) for CWM. | 1 |
| **Evidence of no CWM** | • Following investigation, the physical evidence indicates that CWM are not present at the MRS, or the historical evidence indicates that CWM are not present at the MRS. | 0 |

**Notes:**

- The term *CWM /UXO* means CWM that are UXO.
- The notation *CWM/DMM* means CWM that are DMM, to include CAIS K941, toxic gas set M-1; and K942, toxic gas set M-2/E11.
- The term CAIS/DMM means CAIS, other than CAIS K941 and K942.
- *Historical evidence* means the investigation: (1) found written documents or records, (2) documented interviews of persons with knowledge of site conditions, or (3) found and verified other forms of information.
- *Physical evidence* means: (1) recorded observations from on-site investigations, such as finding intact UXO or DMM, or munitions debris (e.g., fragments, penetrators, projectiles, shell casings, links, fins); (2) the results of field or laboratory sampling and analysis procedures; or (3) the results of geophysical investigations.
- *In the subsurface* means the CWM (i.e., a DMM or UXO) is (1) entirely beneath the ground surface, or (2) fully submerged in a water body.
- *On the surface* means the CWM (i.e., a DMM or UXO) is (1) entirely or partially exposed above the ground surface (i.e., above the soil layer), or (2) entirely or partially exposed above the surface of a water body (e.g., as a result of tidal activity).

Table 13
Classifications Within the CHE Module *Information on the Location of CWM* Data Element

| Classification | Description | Score |
|---|---|---|
| **Confirmed surface** | • Physical evidence indicates that there are CWM on the surface of the MRS.<br>• Historical evidence (e.g., a confirmed incident report or accident report) indicates there are CWM on the surface of the MRS. | 25 |
| **Confirmed subsurface, active** | • Physical evidence indicates the presence of CWM in the subsurface of the MRS and the geological conditions at the MRS are likely to cause CWM to be exposed, in the future, by naturally occurring phenomena (e.g., drought, flooding, erosion, frost, heat heave, tidal action), or intrusive activities (e.g., plowing, construction, dredging) at the MRS are likely to expose CWM.<br>• Historical evidence indicates that CWM are located in the subsurface of the MRS and the geological conditions at the MRS are likely to cause CWM to be exposed, in the future, by naturally occurring phenomena (e.g., drought, flooding, erosion, frost, heat heave, tidal action), or intrusive activities (e.g., plowing, construction, dredging) at the MRS are likely to expose CWM. | 20 |
| **Confirmed subsurface, stable** | • Physical evidence indicates the presence of CWM in the subsurface of the MRS and the geological conditions at the MRS are not likely to cause CWM to be exposed, in the future, by naturally occurring phenomena, or intrusive activities at the MRS are not likely to cause CWM to be exposed.<br>• Historical evidence indicates that CWM are located in the subsurface of the MRS and the geological conditions at the MRS are not likely to cause CWM to be exposed, in the future, by naturally occurring phenomena, or intrusive activities at the MRS are not likely to cause CWM to be exposed. | 15 |
| **Suspected (physical evidence)** | • There is physical evidence, other than the documented presence of CWM, indicating that CWM may be present at the MRS. | 10 |
| **Suspected (historical evidence)** | • There is historical evidence indicating that CWM may be present at the MRS. | 5 |
| **Subsurface, physical constraint** | • There is physical or historical evidence indicating that CWM may be present in the subsurface, but there is a physical constraint (e.g., pavement, water depth over 120 feet) preventing direct access to the CWM. | 2 |

Table 13
Classifications Within the CHE Module *Information on the Location of CWM* Data Element

| Classification | Description | Score |
|---|---|---|
| **Evidence of no CWM** | • Following investigation of the MRS, there is physical evidence that there is no CWM present or there is historical evidence indicating that no CWM are present. | 0 |

**Notes:**

- *Historical evidence* means the investigation: (1) found written documents or records, (2) documented interviews of persons with knowledge of site conditions, or (3) found and verified other forms of information.
- *Physical evidence* means: (1) recorded observations from on-site investigations, such as finding intact UXO or DMM, or munitions debris (e.g., fragments, penetrators, projectiles, shell casings, links, fins); (2) the results of field or laboratory sampling and analysis procedures; or (3) the results of geophysical investigations.
- *In the subsurface* means the CWM (i.e., a DMM or UXO) is (1) entirely beneath the ground surface, or (2) fully submerged in a water body.
- *On the surface* means the CWM (i.e., a DMM or UXO) is (1) entirely or partially exposed above the ground surface (i.e., above the soil layer), or (2) entirely or partially exposed above the surface of a water body (e.g., as a result of tidal activity).

Table 14
Classifications Within the CHE Module *Ease of Access* Data Element

| Classification | Description | Score |
|---|---|---|
| **No barrier** | • There is no barrier preventing access to any part of the MRS (i.e., all parts of the MRS are accessible). | 10 |
| **Barrier to MRS access is incomplete** | • There is a barrier preventing access to parts of the MRS, but not the entire MRS. | 8 |
| **Barrier to MRS access is complete, but not monitored** | • There is a barrier preventing access to all parts of the MRS, but there is no surveillance (e.g., by a guard) to ensure that the barrier is effectively preventing access to all parts of the MRS. | 5 |
| **Barrier to MRS access is complete and monitored** | • There is a barrier preventing access to all parts of the MRS, and there is active continual surveillance (e.g., by a guard, video monitoring) to ensure that the barrier is effectively preventing access to all parts of the MRS. | 0 |

**Notes:**

- *Barrier* means a natural obstacle or obstacles (e.g., difficult terrain, dense vegetation, deep or fast moving water), a man-made obstacle or obstacles (e.g., fencing), or a combination of natural and man-made obstacles.

| Table 15<br>Classifications Within the CHE Module *Status of Property* Data Element | | |
|---|---|---|
| Classification | Description | Score |
| **Non-DoD control** | • The MRS is at a location that is no longer owned by, leased to, or otherwise possessed or used by the Department. Examples are privately owned land or water bodies; land or water bodies owned or controlled by state, tribal, or local governments; and land or water bodies managed by other federal agencies. | 5 |
| **Scheduled for transfer from DoD control** | • The MRS is on land or is a water body that is owned, leased, or otherwise possessed by the Department, and the Department plans to transfer that land or water body to control of another entity (e.g., a state, tribal, or local government; a private party; another federal agency) within 3 years from the date the rule is applied. | 3 |
| **DoD control** | • The MRS is on land or is a water body that is owned, leased, or otherwise possessed by the Department. With respect to property that is leased or otherwise possessed, the Department controls access to the property 24 hours per day, every day of the calendar year. | 0 |

| Table 16<br>Classifications Within the CHE Module *Population Density* Data Element | | |
|---|---|---|
| Classification | Definition | Score |
| **> 500 persons per square mile** | • There are more than 500 persons per square mile in the county in which the MRS is located, based on U.S. Census Bureau data. | 5 |
| **100 to 500 persons per square mile** | • There are 100 to 500 persons per square mile in the county in which the MRS is located, based on U.S. Census Bureau data. | 3 |
| **< 100 persons per square mile** | • There are fewer than 100 persons per square mile in the county in which the MRS is located, based on U.S. Census Bureau data. | 1 |
| **Notes:**<br>• If an MRS is in more than one county, the Component will use the largest population value among those counties. If the MRS is within or borders a city or town, the population density for that city or town, instead of the county population density, is used. | | |

Table 17
Classifications Within the CHE Module *Population Near Hazard* Data Element

| Classification | Description | Score |
|---|---|---|
| **26 or more structures** | • There are 26 or more inhabited structures located up to 2 miles from the boundary of the MRS, within the boundary of the MRS, or both. | 5 |
| **16 to 25** | • There are 16 to 25 inhabited structures located up to 2 miles from the boundary of the MRS, within the boundary of the MRS, or both. | 4 |
| **11 to 15** | • There are 11 to 15 inhabited structures located up to 2 miles from the boundary of the MRS, within the boundary of the MRS, or both. | 3 |
| **6 to 10** | • There are 6 to 10 inhabited structures located up to 2 miles from the boundary of the MRS, within the boundary of the MRS, or both. | 2 |
| **1 to 5** | • There are 1 to 5 inhabited structures located up to 2 miles from the boundary of the MRS, within the boundary of the MRS, or both. | 1 |
| **0** | • There are no inhabited structures located up to 2 miles from the boundary of the MRS, within the boundary of the MRS, or both. | 0 |

**Notes:**

- The term *inhabited structures* means permanent or temporary structures, other than military munitions-related structures, that are routinely occupied by one or more persons for any portion of a day.

Table 18
Classifications Within the CHE Module *Types of Activities/Structures* Data Element

| Classification | Description | Score |
|---|---|---|
| **Residential, educational, commercial, or subsistence** | • Activities are conducted, or inhabited structures are located up to two miles from the MRS's boundary or within the MRS's boundary, that are associated with any of the following purposes: residential, educational, child care, critical assets (e.g., hospitals, fire and rescue, police stations, dams), hotels, commercial, shopping centers, playgrounds, community gathering areas, religious sites, or sites used for subsistence hunting, fishing, and gathering. | 5 |
| **Parks and recreational areas** | • Activities are conducted, or inhabited structures are located up to two miles from the MRS's boundary or within the MRS's boundary, that are associated with parks, nature preserves, or other recreational uses. | 4 |
| **Agricultural, forestry** | • Activities are conducted, or inhabited structures are located up to two miles from the MRS's boundary or within the MRS's boundary, that are associated with agriculture or forestry. | 3 |
| **Industrial or warehousing** | • Activities are conducted, or inhabited structures are located up to two miles from the MRS's boundary, or within the MRS's boundary, that are associated with industrial activities or warehousing. | 2 |
| **No known or recurring activities** | • There are no known or recurring activities occurring up to two miles from the MRS's boundary or within the MRS's boundary. | 1 |

**Notes:**

- The term *inhabited structures* means permanent or temporary structures, other than Department-related structures, that are routinely occupied by one or more persons for any portion of a day.

Table 19
Classifications Within the CHE Module *Ecological and/or Cultural Resources* Data Element

| Classification | Description | Score |
|---|---|---|
| **Ecological and cultural resources present** | • There are both ecological and cultural resources present on the MRS. | 5 |
| **Ecological resources present** | • There are ecological resources present on the MRS. | 3 |
| **Cultural resources present** | • There are cultural resources present on the MRS. | 3 |
| **No ecological or cultural resources present** | • There are no ecological resources or cultural resources present on the MRS. | 0 |

**Notes:**

- *Ecological resources* means that: (1) a threatened or endangered species (designated under the Endangered Species Act [ESA]) is present on the MRS; or (2) the MRS is designated under the ESA as critical habitat for a threatened or endangered species; or (3) there are identified sensitive ecosystems such as wetlands or breeding grounds present on the MRS.
- *Cultural resources* means there are recognized cultural, spiritual, traditional, religious, or historical features (e.g., structures, artifacts, symbolism) on the MRS. Requirements for determining if a particular feature is a cultural resource are found in *the National Historic Preservation Act, Native American Graves Protection and Repatriation Act, Archeological Resources Protection Act, Executive Order 13007*, and *the American Indian Religious Freedom Act*. As examples: American Indians or Alaska Natives deem an MRS to be of spiritual significance; there are areas that are used by American Indians or Alaska Natives for subsistence activities (e.g., hunting, fishing).

Table 20
Determining the CHE Rating from the CHE Module Score

| Overall CHE Module Score | CHE Rating |
|---|---|
| The MRS has an overall CHE module score from 92 to 100. | CHE Rating A |
| The MRS has an overall CHE module score from 82 to 91. | CHE Rating B |
| The MRS has an overall CHE module score from 71 to 81. | CHE Rating C |
| The MRS has an overall CHE module score from 60 to 70. | CHE Rating D |
| The MRS has an overall CHE module score from 48 to 59. | CHE Rating E |
| The MRS has an overall CHE module score from 38 to 47. | CHE Rating F |
| The MRS has an overall CHE module score less than 38. | CHE Rating G |
| Alternative Module Ratings | Evaluation Pending |
| | No Longer Required |
| | No Known or Suspected CWM Hazard |

| Table 21<br>HHE Factor Levels | | | | | |
|---|---|---|---|---|---|
| Contaminant Hazard Factor | | Receptor Factor | | Migration Pathway Factor | |
| Significant | High (H) | Identified | High (H) | Evident | High (H) |
| Moderate | Middle (M) | Potential | Middle (M) | Potential | Middle (M) |
| Minimal | Low (L) | Limited | Low (L) | Confined | Low (L) |

| Table 22<br>HHE Three-letter Combination Levels | | | | |
|---|---|---|---|---|
| Contaminant Hazard Factor | Receptor Factor | Migration Pathway | | |
| | | Evident | Potential | Confined |
| Significant | Identified | HHH | HHM | HHL |
| | Potential | HHM | HMM | HML |
| | Limited | HHL | HML | HLL |
| Moderate | Identified | HHM | HMM | HML |
| | Potential | HMM | MMM | MML |
| | Limited | HML | MML | MLL |
| Minimal | Identified | HHL | HML | HLL |
| | Potential | HML | MML | MLL |
| | Limited | HLL | MLL | LLL |

| Table 23<br>HHE Module Ratings | |
|---|---|
| Combination | Rating |
| HHH | A |
| HHM | B |
| HHL | C |
| HMM | |
| HML | D |
| MMM | |
| HLL | E |
| MML | |
| MLL | F |
| LLL | G |
| Alternative Module Ratings | Evaluation Pending |
| | No Longer Required |
| | No Known or Suspected MC Hazard |

Table 24
HHE Module Rating

| Contaminant Hazard Factor | Receptor Factor | Migration Pathway | | |
|---|---|---|---|---|
| | | Evident | Potential | Confined |
| Significant | Identified | A | B | C |
| | Potential | B | C | D |
| | Limited | C | D | E |
| Moderate | Identified | B | C | D |
| | Potential | C | D | E |
| | Limited | D | E | F |
| Minimal | Identified | C | D | E |
| | Potential | D | E | F |
| | Limited | E | F | G |

Table 25
MRS Priority Based on Highest Hazard Evaluation Module Rating

| EHE Module Rating | Priority | CHE Module Rating | Priority | HHE Module Rating | Priority |
|---|---|---|---|---|---|
| | | Hazard Evaluation A (Highest) | 1 | | |
| Hazard Evaluation A (Highest) | 2 | Hazard Evaluation B | 2 | Hazard Evaluation A (Highest) | 2 |
| Hazard Evaluation B | 3 | Hazard Evaluation C | 3 | Hazard Evaluation B | 3 |
| Hazard Evaluation C | 4 | Hazard Evaluation D | 4 | Hazard Evaluation C | 4 |
| Hazard Evaluation D | 5 | Hazard Evaluation E | 5 | Hazard Evaluation D | 5 |
| Hazard Evaluation E | 6 | Hazard Evaluation F | 6 | Hazard Evaluation E | 6 |
| Hazard Evaluation F | 7 | Hazard Evaluation G (Lowest) | 7 | Hazard Evaluation F | 7 |
| Hazard Evaluation G (Lowest) | 8 | | | Hazard Evaluation G (Lowest) Low | 8 |
| Evaluation Pending | | Evaluation Pending | | Evaluation Pending | |
| No Longer Required | | No Longer Required | | No Longer Required | |
| No Known or Suspected Explosive Hazard | | No Known or Suspected CWM Hazard | | No Known or Suspected MC Hazard | |

# SUBCHAPTER I—CIVIL DEFENSE

## PART 185—DEFENSE SUPPORT OF CIVIL AUTHORITIES (DSCA)

Sec.
185.1 Purpose.
185.2 Applicability and scope.
185.3 Definitions.
185.4 Policy.
185.5 Responsibilities.

AUTHORITY: Legal authority includes, 10 U.S.C. sections 113, 331–335, 371–382, 2553, 2554, 2555, and 2564; 31 U.S.C. 1535–1536 (Economy Act); 42 U.S.C. section 5121 et seq. (Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended (Stafford Act)); and Public Law 94–524, as amended (Presidential Protection Assistance Act of 1976).

SOURCE: 76 FR 2248, Jan. 13, 2011, unless otherwise noted.

### § 185.1 Purpose.

This part:

(a) Establishes policy and assigns responsibilities for DSCA, also referred to as civil support.

(b) Supplements the regulations (in DoD Directive 5525.5)[1] required by section 375 of title 10, United States Code (U.S.C.), regarding military support for civilian law enforcement.

(c) Sets forth policy guidance for the execution and oversight of DSCA when requested by civil authorities or by qualifying entities and approved by the appropriate DoD official, or as directed by the President, within the United States, including the District of Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and any territory or possession of the United States or any political subdivision thereof.

(d) Authorizes immediate response authority for providing DSCA, when requested.

(e) Authorizes emergency authority for the use of military force, under dire situations, as described in § 185.4(i) of this part.

[1] Available for downloading at *http://www.dtic.mil/whs/directives/corres/pdf/552505p.pdf*

### § 185.2 Applicability and scope.

This part:

(a) 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'').

(b) Applies to the Army National Guard and the Air National Guard (hereafter referred to collectively as the ''National Guard'') personnel when under Federal command and control. Also applies to National Guard personnel when the Secretary of Defense determines that it is appropriate to employ National Guard personnel in title 32, U.S.C., status to fulfill a request for DSCA, the Secretary of Defense requests the concurrence of the Governors of the affected States, and those Governors concur in the employment of National Guard personnel in such a status.

(c) Applies to all DSCA (except the specific forms of DSCA listed in paragraph (d) of this section), including but not limited to:

(1) Mutual or automatic aid, also known as reciprocal fire protection agreements (see chapter 15A of title 42 U.S.C.).

(2) DoD fire and emergency services programs (see DoD Instruction 6055.06)[2].

(3) Support of special events in accordance with applicable laws and DoD policy (see DoD Directive 2000.15)[3].

(4) United States Army Corps of Engineers (USACE) activities as the DoD Coordinating and Primary Agency for

[2] Available by downloading at *http://www.dtic.mil/whs/directives/corres/pdf/605506p.pdf*.

[3] Available by downloading at *http://www.dtic.mil/whs/directives/corres/pdf/200015p.pdf*.

Emergency Support Function #3, Public Works and Engineering, of the National Response Framework.

(5) Defense support to civilian law enforcement agencies (see DoDD 3025.12[4] and DoD Directive 5525.5).

(d) Does not apply to the following:

(1) Support in response to foreign disasters provided in accordance with DoD Directive 5100.46[5].

(2) Joint investigations conducted by the Inspector General of the Department of Defense, the Defense Criminal Investigative Service, and the military criminal investigative organizations with civil law enforcement agencies on matters within their respective jurisdictions using their own forces and equipment.

(3) Detail of DoD personnel to duty outside the Department of Defense in accordance with DoD Instruction 1000.17[6].

(4) Counternarcotics operations conducted under the authority of section 1004 of Public Law 101–510 (1991).

(5) Support provided by the USACE when accomplishing missions and responsibilities under the authority of section 701n of title 33, U.S.C. and Executive Order 12656.

(6) Assistance provided by DoD intelligence and counterintelligence components in accordance with DoD Directive 5240.01[7], Executive Orders 12333 and 13388, DoD 5240.1–R[8], and other applicable laws and regulations.

(7) Military community relations programs and activities administered by the Assistant Secretary of Defense for Public Affairs (see DoD Directive 5410.18[9] and DoD Instruction 5410.19[10]).

(8) Sensitive support in accordance with DoD Directive S–5210.36[11].

(9) Activities performed by the Civil Air Patrol in support of civil authorities or qualifying entities when approved by the Air Force as auxiliary missions in accordance with section 9442 of title 10, U.S.C. and DoD 3025.1–M[12] except as restricted by § 185.4(j) of this part.

(10) Innovative readiness training (formerly called ''civil-military cooperative action programs'') (*see* DoD Directive 1100.20)[13].

**§ 185.3 Definitions.**

*Civil Authorities*. See Joint Publication 1–02[14].

*Civil Disturbances*. See Joint Publication 1–02.

*Defense Domestic Crisis Manager*. The lead DoD official responsible for DoD's domestic crisis management response, ensuring the information needs and other requirements of the Secretary of Defense are met, and developing, coordinating, and overseeing the implementation of DoD policy for crisis management to ensure DoD capability to develop and execute options to prevent, mitigate, or respond to a potential or actual domestic crisis. The Assistant Secretary of Defense for Homeland Defense and Americas' Security Affairs (ASD(HD&ASA)) serves as the Defense Domestic Crisis Manager.

*Defense Support of Civil Authorities (DSCA)*. Support provided by U.S. Federal military forces, DoD civilians, DoD contract personnel, DoD Component assets, and National Guard forces

[4] Available by downloading at *http://www.dtic.mil/whs/directives/corres/pdf/302512p.pdf*.

[5] Available by downloading at *http://www.dtic.mil/whs/directives/corres/pdf/510046p.pdf*.

[6] Available by downloading at *http://www.dtic.mil/whs/directives/corres/pdf/100017p.pdf*.

[7] Available by downloading at *http://www.dtic.mil/whs/directives/corres/pdf/524001p.pdf*.

[8] Available by downloading at *http://www.dtic.mil/whs/directives/corres/pdf/524001r.pdf*.

[9] Available by downloading at *http://www.dtic.mil/whs/directives/corres/pdf/541018p.pdf*.

[10] Available by downloading at *http://www.dtic.mil/whs/directives/corres/pdf/541019p.pdf*.

[11] Document is classified and copies maybe requested by contacting USD(I), *USDI.pubs@osd.mil*

[12] Available by downloading at *http://www.dtic.mil/whs/directives/corres/pdf/302501m.pdf*.

[13] Available by downloading at *http://www.dtic.mil/whs/directives/corres/pdf/110020p.pdf*.

[14] Available by downloading at *http://www.dtic.mil/doctrine/new_pubs/jp1_02.pdf*.

(when the Secretary of Defense, in coordination with the Governors of the affected States, elects and requests to use those forces in title 32, U.S.C., status) in response to requests for assistance from civil authorities for domestic emergencies, law enforcement support, and other domestic activities, or from qualifying entities for special events. Also known as civil support.

*Direct Liaison*. An authority for Federal military forces to consult with, coordinate with, and respond to State authorities (including National Guard units and personnel operating in Title 32 status or in State Active Duty status) or Federal civilian authorities in the tactical-level execution of assigned tasks, pursuant to an order by the Secretary of Defense or the President to provide support to those authorities.

*Emergency Authority*. A Federal military commander's authority, in extraordinary emergency circumstances where prior authorization by the President is impossible and duly constituted local authorities are unable to control the situation, to engage temporarily in activities that are necessary to quell large-scale, unexpected civil disturbances because (1) such activities are necessary to prevent significant loss of life or wanton destruction of property and are necessary to restore governmental function and public order or (2) duly constituted Federal, State, or local authorities are unable or decline to provide adequate protection for Federal property or Federal governmental functions.

*Federal Military Forces*. Army, Navy, Marine Corps and Air Force personnel (including Reserve Component personnel) on Federal active duty and National Guard personnel when under Federal command and control.

*Immediate Response Authority*. A Federal military commander's, DoD Component Head's, and/or responsible DoD civilian official's authority temporarily to employ resources under their control, subject to any supplemental direction provided by higher headquarters, and provide those resources to save lives, prevent human suffering, or mitigate great property damage in response to a request for assistance from a civil authority, under imminently serious conditions when time does not permit approval from a higher authority within the United States. Immediate response authority does not permit actions that would subject civilians to the use of military power that is regulatory, prescriptive, proscriptive, or compulsory. State immediate response is addressed in §185.4(h) of this part.

*Qualifying Entity*. A non-Governmental organization to which the Department of Defense may provide assistance for special events by virtue of statute, regulation, policy, or other approval by the Secretary of Defense or his or her authorized designee.

*Responsible DoD Civilian*. For purposes of DSCA, the Head of a DoD Component or other DoD civilian official who has authority over DoD assets that may be used for a DSCA response.

*Special Event*. An international or domestic event, contest, activity, or meeting, which by its very nature, or by specific statutory or regulatory authority, may warrant security, safety, and/or other logistical support or assistance from the Department of Defense.

*Total Force*. See DoD Directive 1200.17[15].

## §185.4 Policy.

It is DoD policy that:

(a) This part shall be implemented consistent with national security objectives and military readiness.

(b) Unless expressly stated otherwise, the provisions of this part should not be construed to rescind any existing authorities of the Heads of DoD Components, commanders, and/or responsible DoD civilians to provide DSCA in accordance with existing laws, DoD issuances, and Secretary of Defense-approved orders.

(c) DSCA is initiated by a request for DoD assistance from civil authorities or qualifying entities or is authorized by the President or Secretary of Defense.

(d) All requests for DSCA shall be written, and shall include a commitment to reimburse the Department of

[15] Available by downloading at *http://www.dtic.mil/whs/directives/corres/pdf/120017p.pdf*.

Defense in accordance with the Stafford Act, Economy Act, or other authorities except requests for support for immediate response, and mutual or automatic aid, in accordance with § 185.4(g) and (m) of this part. Unless approval authority is otherwise delegated by the Secretary of Defense, all DSCA requests shall be submitted to the office of the Executive Secretary of the Department of Defense. For assistance provided according to § 185.4(g) of this part, civil authorities shall be informed that oral requests for assistance in an emergency must be followed by a written request that includes an offer to reimburse the Department of Defense at the earliest available opportunity. States also must reimburse the United States Treasury in accordance with section 9701 of title 31, U.S.C. Support may be provided on a non-reimbursable basis only if required by law or if both authorized by law and approved by the appropriate DoD official.

(e) All requests from civil authorities and qualifying entities for assistance shall be evaluated for:

(1) Legality (compliance with laws).

(2) Lethality (potential use of lethal force by or against DoD Forces).

(3) Risk (safety of DoD Forces).

(4) Cost (including the source of funding and the effect on the DoD budget).

(5) Appropriateness (whether providing the requested support is in the interest of the Department).

(6) Readiness (impact on the Department of Defense's ability to perform its primary mission).

(f) DSCA plans shall be compatible with the National Response Framework; the National Incident Management System; all contingency plans for operations in the locations listed in § 185.1(c) of this part; and any other national plans (approved by the President or Secretary of Defense) or DoD issuances governing DSCA operations. DSCA planning will consider command and control options that will emphasize unity of effort, and authorize direct liaison if authorized by the Secretary of Defense.

(g) Federal military commanders, Heads of DoD Components, and/or responsible DoD civilian officials (hereafter referred to collectively as ''DoD officials'') have immediate response authority as described in this part. In response to a request for assistance from a civil authority, under imminently serious conditions and if time does not permit approval from higher authority, DoD officials may provide an immediate response by temporarily employing the resources under their control, subject to any supplemental direction provided by higher headquarters, to save lives, prevent human suffering, or mitigate great property damage within the United States. Immediate response authority does not permit actions that would subject civilians to the use of military power that is regulatory, prescriptive, proscriptive, or compulsory.

(1) The DoD official directing a response under immediate response authority shall immediately notify the National Joint Operations and Intelligence Center (NJOIC), through the chain of command, of the details of the response. The NJOIC will inform appropriate DoD Components to including the geographic Combatant Command.

(2) An immediate response shall end when the necessity giving rise to the response is no longer present (e.g., when there are sufficient resources available from State, local, and other Federal agencies to respond adequately and that agency or department has initiated response activities) or when the initiating DoD official or a higher authority directs an end to the response. The DoD official directing a response under immediate response authority shall reassess whether there remains a necessity for the Department of Defense to respond under this authority as soon as practicable but, if immediate response activities have not yet ended, not later than 72 hours after the request of assistance was received.

(3) Support provided under immediate response authority should be provided on a cost-reimbursable basis, where appropriate or legally required, but will not be delayed or denied based on the inability or unwillingness of the requester to make a commitment to reimburse the Department of Defense.

(h) The authority of State officials is recognized to direct a State immediate response using National Guard personnel under State command and control (including personnel in a title 32, U.S.C. (hereafter referred to as ''Title

32'') status) in accordance with State law, but National Guard personnel will not be placed in or extended in Title 32 status to conduct State immediate response activities.

(i) Federal military commanders are provided emergency authority under this part. Federal military forces shall not be used to quell civil disturbances unless specifically authorized by the President in accordance with applicable law (e.g., chapter 15 of title 10, U.S.C.) or permitted under emergency authority, as described below (See DoD Directive 3025.12[16] and DoD Directive 5525.5[17].) In these circumstances, those Federal military commanders have the authority, in extraordinary emergency circumstances where prior authorization by the President is impossible and duly constituted local authorities are unable to control the situation, to engage temporarily in activities that are necessary to quell large-scale, unexpected civil disturbances because:

(1) Such activities are necessary to prevent significant loss of life or wanton destruction of property and are necessary to restore governmental function and public order, or,

(2) When duly constituted Federal, State, or local authorities are unable or decline to provide adequate protection for Federal property or Federal governmental functions. Federal action, including the use of Federal military forces, is authorized when necessary to protect the Federal property or functions.

(j) Except for immediate response and emergency authority as described in § 185.4(g) and § 185.4(i) of this part, only the Secretary of Defense may approve requests from civil authorities or qualifying entities for Federal military support for:

(1) Defense assistance in responding to civil disturbances (requires Presidential authorization) in accordance with DoD Directive 3025.12.

(2) Defense response to CBRNE events (*see* DoD Instruction 2000.18)[18].

(3) Defense assistance to civilian law enforcement organizations, except as authorized in DoD Directive 5525.5.

(4) Assistance in responding with assets with potential for lethality. This support includes loans of arms; vessels or aircraft; or ammunition. It also includes assistance under section 382 of title 10, U.S.C., and section 831 of title 18, U.S.C.; all support to counterterrorism operations; and all support to civilian law enforcement authorities in situations where a confrontation between civilian law enforcement and civilian individuals or groups is reasonably anticipated.

(k) Federal military forces employed for DSCA activities shall remain under Federal military command and control at all times.

(l) Special event support to a qualifying entity shall be treated as DSCA.

(m) All requests for DSCA mutual and automatic aid via the DoD Fire & Emergency Services programs shall be in accordance with DoD Instruction 6055.06.

(n) DSCA is a total force mission (*see* DoD Directive 1200.17).

(o) No DoD unmanned aircraft systems (UAS) will be used for DSCA operations, including support to Federal, State, local, and tribal government organizations, unless expressly approved by the Secretary of Defense. Use of armed UAS for DSCA operations is not authorized. (See DoD Directive 5240.01, Executive Orders 12333 and 13388, and DoD 5240.1–R.)

(p) Direct liaison between DoD Components and the States should occur only when time does not permit compliance with § 185.5(m)(1) of this part. In each such instance, the Chief, National Guard Bureau, will be informed of the direct liaison.

**§ 185.5 Responsibilities.**

(a) The Under Secretary of Defense for Policy (USD(P)) shall:

[16] Available by downloading at *http://www.dtic.mil/whs/directives/corres/pdf/302512p.pdf*.

[17] Available by downloading at *http://www.dtic.mil/whs/directives/corres/pdf/552505p.pdf*.

[18] Available by downloading at *http://www.dtic.mil/whs/directives/corres/pdf/200018p.pdf*.

(1) Coordinate DSCA policy with other Federal departments and agencies, State agencies, and the DoD Components, as appropriate.

(2) Establish DoD policy governing DSCA.

(b) The Assistant Secretary of Defense for Homeland Defense and Americas' Security Affairs (ASD(HD&ASA)), under the authority, direction, and control of the USD(P) shall:

(1) Serve as the principal civilian advisor to the Secretary of Defense and the USD(P) for DSCA.

(2) Serve as the Defense Domestic Crisis Manager.

(3) As delegated by the Secretary of Defense in accordance with DoD Directive 5111.13[19], serve as approval authority for requests for assistance from civil authorities or qualifying entities sent to the Secretary of Defense, except for those items retained in § 185.4(j) and (o) of this part, or delegated to other officials. This authority may not be delegated further than the Principal Deputy Assistant Secretary of Defense for Homeland Defense and Americas' Security Affairs. When carrying out this authority, the ASD(HD&ASA) shall:

(i) Coordinate requests with the Chairman of the Joint Chiefs of Staff, the Commanders of the Combatant Commands with DSCA responsibilities in the matter, and Military Department Secretaries and other DoD officials as appropriate.

(ii) Immediately notify the Secretary of Defense of the use of this authority.

(4) Develop, coordinate, and oversee the implementation of DoD policy for DSCA plans and activities, including:

(i) Requests for assistance during domestic crises, emergencies, or civil disturbances.

(ii) Domestic consequence management.

(iii) Coordination or consultation, as appropriate, with the Department of Homeland Security and other Federal agencies on the development and validation of DSCA requirements.

(iv) DoD support for national special security events.

(v) DoD support for national and international sporting events, in accordance with section 2564 of title 10, U.S.C.

(vi) Direct the fullest appropriate dissemination of information relating to all aspects of DSCA, using all approved media and in accordance with DoD Directive 8320.02[20].

(5) Exercise staff cognizance over DoD Directive 5525.5.

(c) The Assistant Secretary of Defense for Special Operations and Low Intensity Conflict and Interdependent Capabilities, under the authority, direction, and control of the USD(P), shall support planning by the Defense Domestic Crisis Manager during DSCA operations, as required.

(d) The Under Secretary of Defense (Comptroller)/Chief Financial Officer shall:

(1) Establish policies and procedures to ensure timely reimbursement to the Department of Defense for reimbursable DSCA activities.

(2) Assist in management of statutory resources for DSCA in support of appropriate international and domestic sporting events.

(e) The Under Secretary of Defense for Personnel and Readiness (USD(P&R)) shall identify, monitor, and oversee the development of integrated DSCA training capabilities and the integration of these training capabilities into exercises and training to build, sustain, and assess DSCA readiness in accordance with DoD Directive 1322.18[21].

(f) The Assistant Secretary of Defense for Health Affairs (ASD(HA)), under the authority, direction, and control of the USD(P&R), as the principal advisor to the Secretary of Defense for all DoD health policy shall:

(1) Provide guidance and support for all domestic crisis situations or emergencies that require health or medical-related DSCA to ASD(HD&ASA).

(2) Exercise authority in accordance with section 300hh–11 of title 42, U.S.C., and according to DoD Directive

[19] Available by downloading at *http://www.dtic.mil/whs/directives/corres/pdf/511113p.pdf*.

[20] Available by downloading at *http://www.dtic.mil/whs/directives/corres/pdf/832002p.pdf*.

[21] Available by downloading at *http://www.dtic.mil/whs/directives/corres/pdf/132218p.pdf*.

6010.22[22], for participation in the National Disaster Medical System.

(g) The Assistant Secretary of Defense for Reserve Affairs, under the authority, direction, and control of USD(P&R), shall provide recommendations, guidance, and support on the use of the Reserve Components to perform DSCA missions to ASD(HD&ASA).

(h) The Under Secretary of Defense for Acquisition, Technology, and Logistics (USD(AT&L)) shall establish policies and procedures, in coordination with ASD(HD&ASA), to implement DSCA requirements for DoD Fire and Emergency Services programs and mutual or automatic aid that may be part of that program.

(i) The Heads of the DoD Components shall:

(1) Direct that any DSCA-related DoD issuances, concept plans, interagency agreements, and memorandums of understanding or agreement with external agencies are in full compliance with this part.

(2) Direct Component compliance with financial management guidance related to support provided for DSCA operations, including guidance related to tracking costs and seeking reimbursement.

(3) When approved by the Secretary of Defense, plan, program, and budget for DSCA capabilities in accordance with law, policy, and assigned missions.

(j) The Secretaries of the Military Departments in addition to the responsibilities in §185.5(i) of this part, shall:

(1) Establish the necessary policies and procedures to ensure the appropriate personnel are trained to execute DSCA plans as directed by the Secretary of Defense.

(2) Direct that requests for reimbursement of actual DSCA expenditures (performance of work or services, payments to contractors, or delivery from inventory) begin within 30 calendar days after the month in which performance occurred. Final billing invoices shall be submitted to supported departments and agencies within 90 calendar days of the termination of the supported event.

(k) The Chairman of the Joint Chiefs of Staff in addition to the responsibilities in §185.5(i) of this part, shall:

(1) Advise the Secretary of Defense on the effects of requests for DSCA on national security and military readiness.

(2) Identify available resources for support in response to DSCA requests and release related orders when approved by the Secretary of Defense.

(3) Incorporate DSCA into joint training and exercise programs in consultation with the USD(P&R), the Chief, National Guard Bureau (NGB), and appropriate officials from the Department of Homeland Security and other appropriate Federal departments and agencies.

(4) Advocate for needed DSCA capabilities.

(l) The Commanders of Combatant Commands with DSCA responsibilities, in addition to the responsibilities in §185.5(i) of this part and in accordance with the Unified Command Plan shall:

(1) In coordination with the Chairman of the Joint Chiefs of Staff, plan and execute DSCA operations in their areas of responsibility in accordance with this part, the Unified Command Plan and the Global Force Management Implementation Guidance.

(2) In coordination with the Chairman of the Joint Chiefs of Staff, incorporate DSCA into joint training and exercise programs in consultation with the Department of Homeland Security, other appropriate Federal departments and agencies, and the NGB.

(3) Advocate for needed DSCA capabilities and requirements through the Joint Requirements Oversight Council, subject to §185.5(i) of this part, and the planning, programming, budgeting, and execution process.

(4) Work closely with subordinate commands to ensure that they are appropriately reimbursed for DSCA in accordance with §185.5(j) of this part.

(5) Exercise Training Readiness Oversight (TRO) over assigned Reserve Component forces when not on active

[22] Available by downloading at *http://www.dtic.mil/whs/directives/corres/pdf/601022p.pdf*.

duty or when on active duty for training in accordance with DoD Instruction 1215.06[23].

(m) The Chief, NGB, under the authority, direction, and control of the Secretary of Defense, normally through the Secretary of the Army and the Secretary of the Air Force, shall:

(1) Serve as the channel of communications for all matters pertaining to the National Guard between DoD Components and the States in accordance with DoD Directive 5105.77[24].

(2) Annually assess the readiness of the National Guard of the States to conduct DSCA activities and report on this assessment to the Secretaries of the Army and the Air Force; the USD(P&R), ASD(HD&ASA), and ASD(RA); and, through the Chairman of the Joint Chiefs of Staff, to the Secretary of Defense and appropriate Combatant Commanders.

(3) Report National Guard support of civil authorities or qualifying entities when using Federal resources, equipment, and/or funding to the NJOIC.

(4) Serve as an advisor to the Combatant Commanders on National Guard matters pertaining to the combatant command missions, and support planning and coordination for DSCA activities as requested by the Chairman of the Joint Chiefs of Staff or the Combatant Commanders.

(5) Ensure that National Guard appropriations are appropriately reimbursed for DSCA activities.

(6) Advocate for needed DSCA capabilities.

(7) Develop and promulgate, in accordance with DoD Directive 5105.77 and in coordination with the Secretaries of the Army and Air Force and the ASD(HD&ASA), guidance regarding this part as it relates to National Guard matters.

# SUBCHAPTERS J–K [RESERVED]

[23] Available by downloading at *http://www.dtic.mil/whs/directives/corres/pdf/121506p.pdf*.

[24] Available by downloading at *http://www.dtic.mil/whs/directives/corres/pdf/510577p.pdf*.

# SUBCHAPTER L—ENVIRONMENT

## PART 187—ENVIRONMENTAL EFFECTS ABROAD OF MAJOR DEPARTMENT OF DEFENSE ACTIONS

Sec.
187.1 Purpose.
187.2 Applicability.
187.3 Definitions.
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ENCLOSURE 1 TO PART 187—REQUIREMENTS FOR ENVIRONMENTAL CONSIDERATIONS—GLOBAL COMMONS

ENCLOSURE 2 TO PART 187—REQUIREMENTS FOR ENVIRONMENTAL CONSIDERATIONS—FOREIGN NATIONS AND PROTECTED GLOBAL RESOURCES

AUTHORITY: Title 10 U.S.C. 131.

SOURCE: 44 FR 21786, Apr. 14, 1979, unless otherwise noted. Redesignated at 56 FR 64481, Dec. 10, 1991.

### § 187.1 Purpose.

Executive Order 12114 provides the exclusive and complete requirement for taking account of considerations with respect to actions that do significant harm to the environment of places *outside* the United States. This part provides policy and procedures to enable Department of Defense (DoD) officials to be informed and take account of environmental considerations when authorizing or approving certain major Federal actions that do significant harm to the environment of places outside the United States. Its sole objective is to establish internal procedures to achieve this purpose, and nothing in it shall be construed to create a cause of action. Guidance for taking account of considerations with respect to the environment of places *within* the United States is set out in 32 CFR part 188 (under rev.) That guidance is grounded on legal and policy requirements different from those applicable to this part.

[44 FR 21786, Apr. 14, 1979. Redesignated and amended at 56 FR 64481, Dec. 10, 1991]

### § 187.2 Applicability.

The provisions of this part apply to the Office of the Secretary of Defense, the Military Departments, the Organization of the Joint Chiefs of Staff, the Unified and Specified Commands, and the Defense Agencies (hereafter referred to as ''DoD components'').

### § 187.3 Definitions.

(a) *Environment* means the natural and physical environment, and it excludes social, economic, and other environments. Social and economic effects do not give rise to any requirements under this part.

(b) *Federal Action* means an action that is implemented or funded directly by the United States Government. It does not include actions in which the United States participates in an advisory, information-gathering, representational, or diplomatic capacity but does not implement or fund the action; actions taken by a foreign government or in a foreign country in which the United States is a beneficiary of the action, but does not implement or fund the action; or actions in which foreign governments use funds derived indirectly from United States funding.

(c) *Foreign Nation* means any geographic area (land, water, and airspace) that is under the jurisdiction of one or more foreign governments; any area under military occupation by the United States alone or jointly with any other foreign government; and any area that is the responsibility of an international organization of governments. ''Foreign nation'' includes contiguous zones and fisheries zones of foreign nations. ''Foreign government'' in this context includes governments regardless of whether recognized by the United States, political factions, and organizations that exercise governmental power outside the United States.

(d) *Global Commons* are geographical areas that are outside the jurisdiction of any nation, and include the oceans outside territorial limits and Antarctica. Global commons do not include contiguous zones and fisheries zones of foreign nations.

(e) *Major Action* means an action of considerable importance involving substantial expenditures of time, money,

and resources, that affects the environment on a large geographic scale or has substantial environmental effects on a more limited geographical area, and that is substantially different or a significant departure from other actions, previously analyzed with respect to environmental considerations and approved, with which the action under consideration may be associated. Deployment of ships, aircraft, or other mobile military equipment is not a major action for purposes of this part.

(f) *United States* means all States, territories, and possessions of the United States; and all waters and airspace subject to the territorial jurisdiction of the United States. The territories and possessions of the United States include the Virgin Islands, American Samoa, Wake Island, Midway Island, Guam, Palmyra Island, Johnston Atoll, Navassa Island, and Kingman Reef.

### § 187.4 Policy.

(a) Executive Order 12114 is based on the authority vested in the President by the Constitution and the laws of the United States. The objective of the Order is to further foreign policy and national security interests while at the same time taking into consideration important environmental concerns.

(b) The Department of Defense acts with care in the global commons because the stewardship of these areas is shared by all the nations of the world. The Department of Defense will take account of environmental considerations when it acts in the global commons in accordance with procedures set out in Enclosure 1 and its attachment.

(c) The Department of Defense also acts with care within the jurisdiction of a foreign nation. Treaty obligations and the sovereignty of other nations must be respected, and restraint must be exercised in applying United States laws within foreign nations unless Congress has expressly provided otherwise. The Department of Defense will take account of environmental considerations in accordance with Enclosure 2 and its attachments when it acts in a foreign nation.

(d) Foreign policy considerations require coordination with the Department of State on communications with foreign governments concerning environmental agreements and other formal arrangements with foreign governments concerning environmental matters under this part.

Informal working-level communications and arrangements are not included in this coordination requirement. Consultation with the Department of State also is required in connection with the utilization of additional exemptions from this part as specified in paragraph C.3.b. of Enclosure 2. Coordination and consultation with the Department of State will be through the Assistant Secretary of Defense (International Security Affairs).

(e) Executive Order 12114, implemented by this part prescribes the exclusive and complete procedural measures and other actions to be taken by the Department of Defense to further the purpose of the National Environmental Policy Act with respect to the environment outside the United States.

### § 187.5 Responsibilities.

(a) The *Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics)* shall:

(1) Serve as the responsible Department of Defense official for policy matters under Executive Order 12114 and this part;

(2) Modify or supplement any of the enclosures to this part in a manner consistent with the policies set forth in this part;

(3) Maintain liaison with the Council on Environmental Quality with respect to environmental documents;

(4) Participate in determining whether a recommendation should be made to the President that a natural or ecological resource of global importance be designated for protection; and

(5) Consult with the Assistant Secretary of Defense (International Security Affairs) on significant or sensitive actions or decisions affecting relations with another nation.

(b) The *Assistant Secretary of Defense (International Security Affairs)* shall:

(1) Maintain liaison and conduct consultations with the Department of State as required under this part; and

(2) Serve as the responsible official, in consultation with the Assistant Secretary of Defense (Manpower, Reserve

Affairs, and Logistics), for monitoring the continuing cooperation and the exchange of information with other nations concerning the environment.

(c) The *General Counsel, DoD*, shall provide advice and assistance concerning the requirements of Executive Order 12114 and this part.

(d) The *Secretaries of the Military Departments, Directors of the Defense Agencies*, and *Commanders of the Unified and Specified Commands*, for operations under their jurisdiction, shall:

(1) Prepare and consider environmental documents when required by this directive for proposed actions within their respective DoD component (this reporting requirement has been assigned Report Control Symbol DD-M(AR) 1327 (§ 187.6));

(2) Insure that regulations and other major policy issuances are reviewed for consistency with Executive Order 12114 and this part;

(3) Designate a single point-of-contact for matters pertaining to this part; and

(4) Consult with the Assistant Secretary of Defense (International Security Affairs) on significant or sensitive actions or decisions affecting relations with another nation.

[44 FR 21786, Apr. 14, 1979. Redesignated and amended at 56 FR 64481, Dec. 10, 1991]

### § 187.6 Information requirements.

The documents to be prepared under § 187.5(d) and Enclosures 1 and 2, ''Requirements for Environmental Considerations—Global Commons,'' and ''Requirements for Environmental Considerations—Foreign Nations and Protected Global Resources,'' respectively, are assigned Report Control Symbol DD-M(AR) 1327.

[44 FR 21786, Apr. 14, 1979. Redesignated and amended at 56 FR 64481, Dec. 10, 1991]

## ENCLOSURE 1—REQUIREMENTS FOR ENVIRONMENTAL CONSIDERATIONS—GLOBAL COMMONS

A. *General*. This enclosure implements the requirements of Executive Order 12114 with respect to major Department of Defense actions that do significant harm to the environment of the global commons. The focus is not the place of the action, but the location of the environment with respect to which there is significant harm. The actions prescribed by this enclosure are the exclusive and complete requirement for taking account of environmental considerations with respect to Department of Defense activities that affect the global commons.

B. *Actions included*. The requirements of this enclosure apply only to major Federal actions that do significant harm to the environment of the global commons.

C. *Environmental Document Requirements*—1. *General*. When an action is determined to be a major Federal action that significantly harms the environment of the global commons, an environmental impact statement, as described below, will be prepared to enable the responsible decision-making official to be informed of pertinent environmental considerations. The statement may be a specific statement for the particular action, a generic statement covering the entire class of similar actions, or a program statement.

2. *Limitations on Actions*. Until the requirements of this enclosure have been met with respect to actions involving the global commons, no action concerning the proposal may be taken that does significant harm to the environment or limits the choice of reasonable alternatives.

3. *Emergencies*. Where emergency circumstances make it necessary to take an action that does significant harm to the environment without meeting the requirements of this enclosure, the DoD component concerned shall consult with the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics). This includes actions that must be taken to promote the national defense or security and that cannot be delayed, and actions necessary for the protection of life or property.

4. *Combining Documents*. Environmental documents may be combined with other agency documents to reduce duplication. If an environmental impact statement for a particular action already exists, regardless of what Federal agency prepared it, no new statement is required by this part.

5. *Collective Statements*. Consideration should be given to the use of generic and program statements. Generic statements may include actions with relevant similarities such as common timing, environmental effects, alternatives, methods of implementation, or subject matter.

6. *Tiering*. Consideration should be given to tiering of environmental impact statements to eliminate repetitive discussions of the same issue and to focus the issues. Tiering refers to the coverage of general matters in broader environmental impact statements, with succeeding narrower statements or environmental analyses that incorporate by reference the general discussion and concentrate only on the issues specific to the statement subsequently prepared.

7. *Lead Agency*. When one or more other Federal agencies are involved with the Department of Defense in an action or program, a lead agency may be designated to supervise the preparation of the environmental impact statement. In appropriate cases, more than one agency may act as joint lead agencies. The following factors should be considered in making the lead agency designation:

a. The magnitude of agency involvement;

b. Which agency or agencies have project approval and disapproval authority;

c. The expert capabilities concerning the environmental effects of the action;

d. The duration of agency involvement; and

e. The sequence of agency involvement.

8. *Categorical Exclusions*. The Department of Defense may provide categorical exclusions for actions that normally do not, individually or cumulatively, do significant harm to the environment. If an action is covered by a categorical exclusion no environmental assessment or environmental impact statement is required. Categorical exclusions will be established by the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics) and will be identified in Attachment 1 to this enclosure, to be entitled, ''Categorical Exclusions—Global commons. ''DoD components identifying recurring actions that have been determined, after analysis, not to do significant harm to the environment should submit recommendations for cateorical exclusions and accompanying justification to the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics).

9. *Environmental Assessments*. The purpose of an environmental assessment is to assist DoD components in determining whether an environmental impact statement is required for a particular action. The assessment should be brief and concise but should include sufficient information on which a determination can be made whether the proposed action is major and Federal, and whether it significantly harms the environment of the global commons. As a minimum, the assessment should include consideration of the need for the proposed action and the environmental effect of the proposed action. The environmental assessment will be made available to the public in the United States upon request, but there is no requirement that it be distributed for public comment.

D. *Environmental Impact Statements*. 1. *General*. Environmental impact statements will be concise and no longer than necessary to permit an informed consideration of the environmental effects of the proposed action on the global commons and the reasonable alternatives. If an action requiring an environmental impact statement also has effects on the environment of a foreign nation or on a resource designated as one of global importance, the statement need not consider or be prepared with respect to these effects. The procedures for considering these effects are set out in Enclosure 2, of this part.

2. *Draft Statement*. Environmental impact statements will be prepared in two stages and may be supplemented. The first, or draft statement, should be sufficiently complete to permit meaningful analysis and comment. The draft statement will be made available to the public, in the United States, for comment. The Department of State, the council on environmental Quality, and other interested Federal agencies will be informed of the availability of the draft statement and will be afforded an opportunity to comment. Contacts with foreign governments are discussed in §187.4(d) and subsection D.11. of this enclosure.

3. *Final statement*. Final statements will consider, either individually or collectively, substantive comments received on the draft statement. The final statement will be made available to the public in the United States.

4. *Supplemental statement*. Supplements to the draft or final statement should be used when substantial changes to the proposed action are made relative to the environment of the global commons or when significant new information or circumstances, relevant to environmental concerns, bears on the proposed action or its environmental effects on the global commons. Supplemental statements will be circulated for comment as in subsection 2. of this enclosure unless alternative procedures are approved by the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics).

5. *Statement content*. The statement will include: A section on consideration of the purpose of and need for the proposed action; a section on the environmental consequences of the proposed action and reasonable alternatives; a section that provides a succinct description of the environment of the global commons affected by the proposed action and reasonable alternatives; and a section that analyzes, in comparative form, the environmental effects on the global commons of the proposed action and reasonable alternatives.

6. *Incomplete Information*. The statement should indicate when relevant information is missing due to unavailability or scientific uncertainty.

7. *Hearings*. Public hearings are not required. consideration should be given in appropriate cases to holding or sponsoring public hearings. Factors in this consideration include: Foreign relations sensitivities; whether the hearings would be an infringement or create the appearance of infringement on the sovereign responsibilities of another government; requirements of domestic and foreign governmental confidentiality; requirements of national security; whether meaningful information could be obtained through hearings; time considerations; and

requirements for commercial confidentiality. There is no requirement that all factors listed in this section be considered when one or more factors indicate that public hearings would not produce a substantial net benefit to those responsible for authorizing or approving the proposed action.

8. *Decision*. Relevant environmental documents developed in accordance with this enclosure will accompany the proposal for action through the review process to enable officials responsible for authorizing or approving the proposed action to be informed and to take account of environmental considerations. One means of making an appropriate record with respect to this requirement is for the decision-maker to sign and date a copy of the environmental impact statement indicating that it has been considered in the decision-making process. Other means of making an appropriate record are also acceptable.

9. *Timing*. No decision on the proposed action may be made until the later of 90 days after the draft statement has been made available and notice thereof published in the FEDERAL REGISTER, or 30 days after the final statement has been made available and notice thereof published in the FEDERAL REGISTER. The 90-day period and the 30-day period may run concurrently. Not less than 45 days may be allowed for public comment. The Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics) may, upon a showing of probable important adverse effect on national security or foreign policy, reduce the 30-day, 45-day, and 90-day periods.

10. *Classified Information*. Environmental assessments and impact statements that address classified proposals will be safeguarded and classified information will be restricted from public dissemination in accordance with Department of Defense procedures (32 CFR part 159) established for such information under Executive Order 12065. The requirements of that Executive Order take precedence over any requirement of disclosure in this part. Only unclassified portions of environmental documents may be disseminated to the public.

11. *Foreign Governments*. Consideration will be given to whether any foreign government should be informed of the availability of environmental documents. Communications with foreign governments concerning environmental agreements and other formal arrangements with foreign governments concerning environmental matters under this part will be coordinated with the Department of State. Informal, working-level communications and arrangements are not included in this coordination requirement. Coordination with the Department of State will be through the Assistant Secretary of Defense (International Security Affairs).

[44 FR 21786, Apr. 14, 1979. Redesignated and amended at 56 FR 64481, Dec. 10, 1991]

## ENCLOSURE 2—REQUIREMENTS FOR ENVIRONMENTAL CONSIDERATIONS—FOREIGN NATIONS AND PROTECTED GLOBAL RESOURCES

A. *General*. This enclosure implements the requirements of Executive Order 12114 to provide for procedural and other actions to be taken to enable officials to be informed of pertinent environmental considerations when authorizing or approving certain major Department of Defense actions that do significant harm to the environment of a foreign nation or to a protected global resource.

B. *Actions included*. 1. The requirements of this enclosure apply only to the following actions:

a. Major Federal actions that significantly harm the environment of a foreign nation that is not involved in the action. The involvement of the foreign nation may be directly by participation with the United States in the action, or it may be in conjunction with another participating nation. The focus of this category is on the geographical location of the environmental harm and not on the location of the action.

b. Major Federal actions that are determined to do significant harm to the environment of a foreign nation because they provide to that nation: (1) A product, or involve a physical project that produces a principal product, emission, or effluent, that is prohibited or strictly regulated by Federal law in the United States because its toxic effects on the environment create a serious public health risk; or (2) a physical project that is prohibited or strictly regulated in the United States by Federal law to protect the environment against radioactive substances. Included in the category of ''prohibited or strictly regulated'' are the following: asbestos, vinyl chloride, acrylonitrile, isocyanates, polychlorinated biphenyls, mercury, beryllium, arsenic, cadmium, and benzene.

c. Major Federal actions outside the United States that significantly harm natural or ecological resources of global importance designated for protection by the President or, in the case of such a resource protected by international agreement binding on the United States, designated for protection by the Secretary of State. Such determinations by the President or the Secretary of State to be listed in Attachment 1 to this enclosure, entitled, ''Protected Global Resources''.

2. The actions prescribed by this enclosure are the exclusive and complete requirement

for taking account of environmental considerations with respect to Federal actions that do significant harm to the environment of foreign nations and protected global resources as described in subsection B.1., of this enclosure. No action is required under this enclosure with respect to Federal actions that affect only the environment of a participating or otherwise involved foreign nation and that do not involve providing products or physical projects producing principal products, emissions, or effluents that are prohibited or strictly regulated by Federal law in the United States, or resources of global importance that have been designated for protection.

C. *Environmental Document Requirements.*

1. *General.* a. There are two types of environmental documents officials shall use in taking account of environmental considerations for actions covered by this enclosure:

(1) Environmental studies—bilateral or multilateral environmental studies, relevant or related to the proposed action, by the United States and one or more foreign nations or by an international body or organization in which the United States is a member or participant; and

(2) Environmental reviews—concise reviews of the environmental issues involved that are prepared unilaterally by the United States.

b. This section identifies the procedures for the preparation of environmental studies or reviews when required by this enclosure and the exceptions from the requirement to prepare environmental studies or reviews. If an environmental document already exists for a particular action, regardless of what Federal agency prepared it, no new document is required by this enclosure.

2. *Lead Agency.* When one or more other Federal agencies are involved with the Department of Defense in an action or program, a lead agency may be designated to supervise the preparation of environmental documentation. In appropriate cases, more than one agency may act as joint lead agencies. The following factors should be considered in making the lead agency designation:

a. The magnitude of agency involvement;

b. Which agency or agencies have project approval and disapproval authority;

c. The expert capabilities concerning the environmental effects of the action;

d. The duration of agency involvement; and

e. The sequence of agency involvement.

3. *Exemptions.* There are general exemptions from the requirements of this enclosure provided by Executive Order 12114, and the Secretary of Defense has the authority to approve additional exemptions.

a. *General Exemptions.* The following actions are exempt from the procedural and other requirements of this enclosure under general exemptions established for all agencies by Executive Order 12114:

(1) Actions that the DoD component concerned determines do not do significant harm to the environment outside the United States or to a designated resource of global importance.

(2) Actions taken by the President. These include: Signing bills into law; signing treaties and other international agreements; the promulgation of Executive Orders; Presidential proclamations; and the issuance of Presidental decisions, instructions, and memoranda. This includes actions taken within the Department of Defense to prepare or assist in preparing recommendations, advice, or information for the President in connection with one of these actions by the President. It does not include actions taken within the Department of Defense to implement or carry out these instruments and issuances after they are promulgated by the President.

(3) Actions taken by or pursuant to the direction of the President or a cabinet officer in the course of armed conflict. The term ''armed conflict'' refers to: hostilities for which Congress has declared war or enacted a specific authorization for the use of armed forces; hostilities or situations for which a report is prescribed by section 4(a)(1) of the War Powers Resolution, 50 U.S.C.A. 1543(a)(1) (Supp. 1978); and other actions by the armed forces that involve defensive use or introduction of weapons in situations where hostilities occur or are expected. This exemption applies as long as the armed conflict continues.

(4) Actions taken by or pursuant to the direction of the President or a cabinet officer when the national security or national interest is involved. The determination that the national security or national interest is involved in actions by the Department of Defense must be made in writing by the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics).

(5) The activities of the intelligence components utilized by the Secretary of Defense under Executive Order 12036, 43 FR 3674 (1978). These components include the Defense Intelligence Agency, the National Security Agency, the offices for the collection of specialized intelligence through reconnaissance programs, the Army Office of the Assistant Chief of Staff for Intelligence, the Office of Naval Intelligence, and the Air Force Office of the Assistant Chief of Staff for Intelligence.

(6) The decisions and actions of the Office of the Assistant Secretary of Defense (International Security Affairs), the Defense Security Assistance Agency, and the other responsible offices within DoD components with respect to arms transfers to foreign nations. The term ''arms transfers'' includes the grant, loan, lease, exchange, or sale of

defense articles or defense services to foreign governments or international organizations, and the extension or guarantee of credit in connection with these transactions.

(7) Votes and other actions in international conferences and organizations. This includes all decisions and actions of the United States with respect to representation of its interests at international organizations, and at multilateral conferences, negotiations, and meetings.

(8) Disaster and emergency relief actions.

(9) Actions involving export licenses, export permits, or export approvals, other than those relating to nuclear activities. This includes: Advice provided by DoD components to the Department of State with respect to the issuance of munitions export licenses under section 38 of the Arms Export Control Act, 22 U.S.C. 2778 (1976); advice provided by DoD components to the Department of Commerce with respect to the granting of export licenses under the Export Administration Act of 1969, 50 U.S.C. App. 2401–2413 (1970 & Supp. V 1975); and direct exports by the Department of Defense of defense articles and services to foreign governments and international organizations that are exempt from munitions export licenses under section 38 of the Arms Export Control Act, 22 U.S.C. 2778 (1976). The term ''export approvals'' does not mean or include direct loans to finance exports.

(10) Actions relating to nuclear activities and nuclear material, except actions providing to a foreign nation a nuclear production or utilization facility, as defined in the Atomic Energy Act of 1954, as amended, or a nuclear waste management facility.

b. *Additional Exemptions*. The Department of Defense is authorized under Executive Order 12114 to establish additional exemptions that apply only to the Department's operations. There are two types of additional exemptions: Case-by-case and class.

(1) *Case-by-Case Exemptions*. Exemptions other than those specified above may be required because emergencies, national security considerations, exceptional foreign policy requirements, or other special circumstances preclude or are inconsistent with the preparation of environmental documentation and the taking of other actions prescribed by this enclosure. The following procedures apply for approving these exemptions:

(a) *Emergencies*. This category includes actions that must be taken to promote the national defense or security and that cannot be delayed, and actions necessary for the protection of life or property. The heads of the DoD components are authorized to approve emergency exemptions on a case-by-case basis. The Department of Defense is required to consult as soon as feasible with the Department of State and the Council on Environmental Quality with respect to emergency exemptions. The requirement to consult as soon as feasible is not a requirement of prior consultation. A report of the emergency action will be made by the DoD component head to the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics), who, with the Assistant Secretary of Defense (International Security Affairs), shall undertake the necessary consultations.

(b) *Other Circumstances*. National security considerations, exceptional foreign policy requirements, and other special circumstances not identified in paragraph C.3.a. of this enclosure, may preclude or be inconsistent with the preparation of environmental documentation. In these circumstances, the head of the DoD component concerned is authorized to exempt a particular action from the environmental documentation requirements of this enclosure after obtaining the prior approval of the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics), who, with the Assistant Secretary of Defense (International Security Affairs), shall consult, before approving the exemption, with the Department of State and the Council on Environmental Quality. The requirement for prior consultation is not a requirement for prior approval.

(2) *Class Exemptions*. Circumstances may exist where a class exemption for a group of related actions is more appropriate than a specific exemption. Class exemptions may be established by the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics), who, with the Assistant Secretary of Defense (International Security Affairs), shall consult, before approving the exemption, with the Department of State and the Council on Environmental Quality. The requirement for prior consultation is not a requirement for prior approval. Requests for class exemptions will be submitted by the head of the DoD component concerned to the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics) after coordination with other interested DoD components. Notice of the establishment of a class exemption will be issued as Attachment 2 to this enclosure to be entitled, ''Class Exemptions—Foreign Nations and Protected Global Resources.''

4. *Categorical Exclusions*. The Department of Defense is authorized by Executive Order 12114 to provide for categorical exclusions. A categorical exclusion is a category of actions that normally do not, individually or cumulatively, do significant harm to the environment. If an action is covered by a categorical exclusion, no environmental document is required. Categorical exclusions will be established by the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics), and will be identified in Attachment 3 to this enclosure to be entitled, ''Categorical Exclusions—Foreign Nations and Protected Global

Resources.'' DoD components identifying recurring actions that have been determined, after analysis, not to do significant harm to the environment should submit requests for categorical exclusions and accompanying justification to the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics).

D. *Environmental studies*. 1. *General*. Environmental studies are one of two alternative types of documents to be used for actions described by section B. of this enclosure.

a. An environmental study is an analysis of the likely environmental consequences of the action that is to be considered by DoD components in the decision-making process. It includes a review of the affected environment, significant actions taken to avoid environmental harm or otherwise to better the environment, and significant environmental considerations and actions by the other participating nations, bodies, or organizations.

b. An environmental study is a cooperative action and not a unilateral action undertaken by the United States. It may be bilateral or multilateral, and it is prepared by the United States in conjunction with one or more foreign nations, or by an international body or organization in which the United States is a member or participant. The environmental study, because it is prepared as a cooperative undertaking, may be best suited for use with respect to actions that provide strictly regulated or prohibited products or projects to a foreign nation (B.l.b.) and actions that affect a protected global resource (B.l.c.).

2. *Department of State Coordination*. Communications with foreign governments concerning environmental studies and other formal arrangements with foreign governments concerning environmental matters under this directive will be coordinated with the Department of State. Informal, working-level communications and arrangements are not included in this coordination requirement. Coordination with the Department of State will be through the Assistant Secretary of Defense (International Security Affairs).

3. *Whether to Prepare an Environmental Study*. The judgment whether the action is one that would do significant harm to one of the environments covered by this enclosure normally will be made in consultation with concerned foreign governments or organizations. If a negative decision is made, the file will be documented with a record of that decision and the decision-makers who participated. If a decision is made to prepare a study then, except as provided by this enclosure, no action concerning the proposal may be taken that would do significant harm to the environment until the study has been completed and the results considered.

4. *Content of the Study*. The document is a study of the environmental aspects of the proposed action to be considered in the decision-making process. The precise content of each study must be flexible because of such considerations as the sensitivity of obtaining information from foreign governments, the availability of useful and understandable information, and other factors identified under ''Limitations,'' (subsection D.6., of this enclosure). The study should, however, include consideration of the following:

a. A general review of the affected environment;

b. The predicted effect of the action on the environment;

c. Significant known actions taken by governmental entities with respect to the proposed action to protect or improve the environment; and

d. If no actions are being taken to protect or enhance the environment, whether the decision not to do so was made by the affected foreign government or international organization.

5. *Distribution of the Study*. Except as provided under ''Limitations,'' (subsection D.6., of this enclosure), and except where classified information is involved, environmental studies will be made available to the Department of State, the Council on Environmental Quality, other interested Federal agencies, and, on request, to the public in the United States. Interested foreign governments also may be informed of the studies, subject to the ''Limitations'' (subsection D.6., of this enclosure) and controls on classified information, and furnished copies of the documents. No distribution is required prior to the preparation of the final version of the study or prior to taking the action that caused the study to be prepared.

6. *Limitations*. The requirements with respect to the preparation, content, and distribution of environmental studies in the international context must remain flexible. The specific procedures must be determined on a case-by-case basis and may be modified where necessary to:

a. Enable the component to act promptly. Considerations such as national security and foreign government involvement may require prompt action that must take precedence in the environmental review process;

b. Avoid adverse impacts on relations between the United States and foreign governments and international organizations;

c. Avoid infringement or the appearance of infringement on the sovereign responsibilities of another government. The collection of information and the preparation and distribution of environmental documentation for actions in which another nation is involved, or with respect to the environment and resources of another nation, unless done with proper regard to the sovereign authority of that nation, may be viewed by that nation as an interference in its internal affairs

and its responsibility to evaluate requirements with respect to the environment;

d. Ensure consideration of:

(1) Requirements of governmental confidentiality. This refers to the need to protect sensitive foreign affairs information and information received from another government with the understanding that it will be protected from disclosure regardless of its classification;

(2) National security requirements. This refers to the protection of classified information and other national security interests;

(3) Availability of meaningful information. Information on the environment of foreign nations may be unavailable, incomplete, or not susceptible to meaningful evaluation, particularly where the affected foreign nation is not a participant in the analysis. This may reduce or change substantially the normal content of the environmental study;

(4) The extent of the participation of the DoD component concerned and its ability to affect the decision made. The utility of the environmental analysis and the need for an in-depth review diminishes as DoD's role and control over the decision lessens; and

(5) International commercial, commercial confidentiality, competitive, and export promotion factors. This refers to the requirement to protect domestic and foreign trade secrets and confidential business information from disclosure. Export promotion factors includes the concept of not unnecessarily hindering United States exports.

7. *Classified Information*. Classified information will be safeguarded from disclosure in accordance with the Department of Defense procedures (32 CFR 159) established for such information under Executive Order 12065. The requirements of that Executive Order take precedence over any requirement of disclosure in this directive.

E. *Environmental Reviews*. 1. *General*. Environmental reviews are the second of the two alternative types of documents to be used for actions covered by section B. of this enclosure.

a. An environmental review is a survey of the important environmental issues involved. It includes identification of these issues, and a review of what if any consideration has been or can be given to the environmental aspects by the United States and by any foreign government involved in taking the action.

b. An environmental review is prepared by the DoD component concerned either unilaterally or in conjunction with another Federal agency. While an environmental review may be used for any of the actions identified by section B., it may be uniquely suitable, because it is prepared unilaterally by the United States, to actions that affect the environment of a nation not involved in the undertaking (B.l.a.).

2. *Department of State Coordination*. Communications with foreign governments concerning environmental agreements and other formal arrangements with foreign governments concerning environmental matters under this enclosure will be coordinated with the Department of State. Informal working-level communications and arrangements are not included in this coordination requirement. Coordination with the Department of State will be through the Assistant Secretary of Defense (International Security Affairs).

3. *Whether to Prepare an Environmental Review*. Sufficient information will be gathered, to the extent it is reasonably available, to permit an informed judgment as to whether the proposed action would do significant harm to the environments covered by this enclosure. If a negative decision is made, a record will be made of that decision and its basis. If a decision is made to prepare a review, then, except as provided by this enclosure, no action concerning the proposal may be taken that would do significant environmental harm until the review has been completed.

4. *Content of the Review*. An environmental review is a survey of the important environmental issues associated with the proposed action that is to be considered by the DoD component concerned in the decision-making process. It does not include all possible environmental issues and it does not include the detailed evaluation required in an environmental impact statement under Enclosure 1 of this part. There is no foreign government or international organization participation in its preparation, and the content therefore may be circumscribed because of the availability of information and because of foreign relations sensitivities. Other factors affecting the content are identified under ''Limitations,'' (subsection E.6., of this enclosure). To the extent reasonably practical the review should include consideration of the following:

a. A statement of the action to be taken including its timetable, physical features, general operating plan, and other similar broad-guage descriptive factors;

b. Identification of the important environmental issues involved;

c. The aspects of the actions taken or to be taken by the DoD component that ameliorate or minimize the impact on the environment; and

d. The actions known to have been taken or to be planned by the government of any participating and affected foreign nations that will affect environmental considerations.

5. *Distribution*. Except as provided under ''Limitations,'' (subsection E.6., of this enclosure), and except where classified information is involved, environmental reviews will be made available to the Department of

State, the Council on Environmental Quality, other interested Federal agencies, and, on request, to the public in the United States. Interested foreign governments also may be informed of the reviews and, subject to the ''Limitations'' (subsection E.6., of this enclosure) and controls on classified information, will be furnished copies of the documents on request. This provision for document distribution is not a requirement that distribution be made prior to taking the action that is the subject of the review.

6. *Limitations*. The requirements with respect to the preparation, content, and distribution of environmental reviews in the international context must remain flexible. The specific procedures must be determined on a case-by-case basis and may be modified where necessary to:

a. Enable the component to act promptly. Considerations such as national security and foreign government involvement may require prompt action that must take precedence in the environmental review process;

b. Avoid adverse impacts on relations between the United States and foreign governments and international organizations;

c. Avoid infringement or the appearance of infringement on the sovereign responsibilities of another government. The collection of information and the preparation and distribution of environmental documentation for actions in which another nation is involved or with respect to the environment and resources of another nation, unless done with proper regard to the sovereign authority of that nation, may be viewed by that nation as an interference in its internal affairs and its prerogative to evaluate requirements with respect to the environment; and

d. Ensure consideration of:

(1) Requirements of governmental confidentiality. This refers to the need to protect sensitive foreign affairs information and information received from another government with the understanding that it will be protected from disclosure regardless of its classification;

(2) National security requirements. This refers to the protection of classified information;

(3) Availability of meaningful information. Information on the environment of foreign nations may be unavailable, incomplete, or not susceptable to meaningful evaluation, and this may reduce or change substantially the normal content of the environmental review;

(4) The extent of the participation of the DoD component concerned and its ability to affect the decision made. The utility of the environmental analysis and the need for an in-depth review diminishes as the role of the Department of Defense and control over the decision lessens; and

(5) International commercial, commercial confidentiality, competitive, and export promotion factors. This refers to the requirements to protect domestic and foreign trade secrets and confidential business information from disclosure. Export promotion factors includes the concept of not unnecessarily hindering United States exports.

7. *Classified Information*. Classified information will be safeguarded from disclosure in accordance with the DoD procedures (32 CFR 159) established for such information under Executive Order 12065. The requirements of that Executive Order take precedence over any requirement of disclosure in this part.

## PART 188–190 [RESERVED]