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# CODE OF FEDERAL REGULATIONS

# Title 32
## National Defense

Parts 700 to 799

Revised as of July 1, 2016

Containing a codification of documents
of general applicability and future effect

As of July 1, 2016

Published by the Office of the Federal Register
National Archives and Records Administration
as a Special Edition of the Federal Register

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*Cite this Code:* CFR

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Each volume of the Code is revised at least once each calendar year and issued on a quarterly basis approximately as follows:

Title 1 through Title 16.....as of January 1
Title 17 through Title 27.....as of April 1
Title 28 through Title 41.....as of July 1
Title 42 through Title 50.....as of October 1

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An index to the text of ''Title 3—The President'' is carried within that volume.

The Federal Register Index is issued monthly in cumulative form. This index is based on a consolidation of the ''Contents'' entries in the daily Federal Register.

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OLIVER A. POTTS,
*Director*,
*Office of the Federal Register*.
*July 1, 2016*.

# THIS TITLE

Title 32—NATIONAL DEFENSE is composed of six volumes. The parts in these volumes are arranged in the following order: Parts 1–190, parts 191–399, parts 400–629, parts 630–699, parts 700–799, and part 800 to end. The contents of these volumes represent all current regulations codified under this title of the CFR as of July 1, 2016.

The current regulations issued by the Department of Defense appear in the volumes containing parts 1–189 and parts 190–399; those issued by the Department of the Army appear in the volumes containing parts 400–629 and parts 630–699; those issued by the Department of the Navy appear in the volume containing parts 700–799, and those issued by the Department of the Air Force, Defense Logistics Agency, Selective Service System, National Counterintelligence Center, Central Intelligence Agency, Information Security Oversight Office, National Security Council, Office of Science and Technology Policy, Office for Micronesian Status Negotiations, and Office of the Vice President of the United States appear in the volume containing part 800 to end.

For this volume, Cheryl E. Sirofchuck was Chief Editor. The Code of Federal Regulations publication program is under the direction of John Hyrum Martinez, assisted by Stephen J. Frattini.

# Title 32—National Defense

(This book contains parts 700 to 799)

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*Part*

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# Subtitle A—Department of Defense (Continued)

# CHAPTER VI—DEPARTMENT OF THE NAVY

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AUTHORITY: 10 U.S.C. 6011.

SOURCE: 64 FR 56062, Oct. 15, 1999, unless otherwise noted.

## Subpart A—Navy Regulations

### § 700.101 Origin and history of United States Navy Regulations.

(a) United States Navy Regulations began with the enactment by the Continental Congress of the ''Rules for the Regulation of the Navy of the United Colonies'' on November 28, 1775. The first issuance by the United States Government which covered this subject matter was ''An Act for the Government of the Navy of the United States,'' enacted on March 2, 1799. This was followed the next year by ''An Act for the Better Government of the Navy of the United States.''

(b) In the years preceding the Civil War, twelve successor publications were promulgated under a number of titles by the President, the Navy Department and the Secretary of the Navy. A decision by the Attorney General that the last of the pre-Civil War issuances was invalid led to the inclusion in the 1862 naval appropriations bill of a provision that ''the orders, regulations, and instructions heretofore issued by the Secretary of the Navy be, and they are hereby, recognized as the regulations of the Navy Department, subject, however, to such alterations as the Secretary of the Navy may adopt, with the approbation of the President of the United States.''

(c) Thirteen editions of Navy Regulations were published in accordance with this authority (later codified as Section 1547, Revised Statutes) between 1865 and 1948. The 1973 edition of Navy Regulations was published under authority of 10 United States Code (U.S.C.) 6011, which provided that ''United States Navy Regulations shall be issued by the Secretary of the Navy with the approval of the President.'' In 1981, this provision was amended to eliminate the requirement for presidential approval.

(d) While leaving this provision unaffected, Congress enacted the Goldwater-Nichols Department of Defense Reorganization Act of 1986 (Pub. L. 99–443), which granted each of the service secretaries the authority to prescribe regulations to carry out his or her statutory functions, powers and duties.

### § 700.102 Statutory authority for issuance of United States Navy Regulations.

Title 10, United States Code, section 6011, provides that United States Navy Regulations shall be issued by the Secretary of the Navy. Regulations issued under this authority are permanent regulations of general applicability, as opposed to regulations issued by the Secretary under § 700.104.

### § 700.103 Purpose and effect of United States Navy Regulations.

United States Navy Regulation is the principle regulatory document of the Department of the Navy, endowed with the sanction of law, as to duty, responsibility, authority, distinctions and relationships of various commands, officials and individuals. Other directives issued within the Department of the Navy shall not conflict with, alter or amend any provision of Navy Regulations.

### § 700.104 Statutory authority for prescription of other regulations.

The Secretary of the Navy may prescribe regulations to carry out his or her functions, powers and duties under Title 10, United States Code.

### § 700.105 Issuance of directives by other officers and officials.

Responsible officers and officials of the Department of the Navy may issue, or cause to be issued, directives concerning matters over which they exercise command, control or supervision, which do not conflict with, alter or amend these regulations.

### § 700.106 Control of administrative requirements.

(a) Directives will be issued with due regard for the imposition of workload resulting therefrom and benefits or advantages to be gained. Issuance of new directives will be in accordance with the following:

(1) Directives which implement or amplify directives from higher authority will not be issued unless absolutely essential.

(2) Administrative reporting requirements will not be imposed unless the expected value of the information to be gained is significantly greater than the cumulative burden imposed.

(b) Each officer or official issuing a directive or imposing a reporting requirement will periodically, in accordance with instructions to be issued by appropriate authority, review such directive or report with a view toward the following:

(1) Reduction of directives by cancellation or consolidation; or

(2) Reduction of reporting requirements by elimination of the report, reduction in the frequency of the report, or combination with other reports.

(c) When issuance of a directive or a tasking will result in imposition of additional administrative requirements on commands not within the chain of command or the issuing authority, the first common superior of the commands affected by the requirement must concur in the issuance.

### § 700.107 Maintenance of Navy Regulations.

(a) The Chief of Naval Operations is responsible for maintaining Navy Regulations, and for ensuring that Navy Regulations conforms to the current needs of the Department of the Navy. When any person in the Department of the Navy deems it advisable that additions, changes or deletions should be made to Navy Regulations, he or she shall forward a draft of the proposed addition, change or deletion, with a statement of the reasons therefor, to the Chief of Naval Operations via the chain of command. The Chief of Naval Operations shall endeavor to obtain the concurrence of the Commandant of the Marine Corps, the Judge Advocate General and appropriate offices and commands. Unresolved issues concerning such additions, changes or deletions shall be forwarded to the Secretary of the Navy for appropriate action. Any additions, changes or deletions to the U.S. Navy Regulations must be approved by the Secretary of the Navy.

(b) Changes to Navy Regulations will be numbered consecutively and issued as page changes. Advance changes may be used when required; these will be numbered consecutively and incorporated in page changes at frequent intervals.

## Subpart B—The Department of the Navy

### § 700.201 Origin and authority of the Department of the Navy.

(a) The naval affairs of the country began with the war for independence, the American Revolution. On 13 October 1775, Congress passed legislation for ships. This, in effect, created the continental Navy. Two battalions of Marines were authorized on 10 November 1775. Under the Constitution, the First Congress on 7 August 1789 assigned responsibility for the conduct of naval affairs to the War Department. On 30 April 1798, the Congress established a separate Department of the Navy with the Secretary of the Navy as its chief officer. On 11 July 1798, the United States Marine Corps was established as a separate service, and in 1834 was made a part of the Department of the Navy.

(b) The National Security Act of 1947, as amended, is the fundamental law governing the position of the Department of the Navy in the organization for national defense. In 1949, the Act was amended to establish the Department of Defense as an Executive Department, and to establish the Departments of the Army, Navy and Air

Force (formerly established as Executive Departments by the 1947 Act) as military departments within the Department of Defense.

(c) The Goldwater-Nichols Department of Defense Reorganization Act of 1986 further defined the roles of the military departments within the Department of Defense. In addition to establishing the office of Vice Chairman of the Joint Chiefs of Staff, and further emphasizing the operational chain of command, the Act provided detailed statements of the roles of the Secretary of the Navy, the Chief of Naval Operations, the Commandant of the Marine Corps, and their respective principal assistants.

(d) The responsibilities and authority of the Department of the Navy are vested in the Secretary of the Navy, and are subject to reassignment and delegation by the Secretary. The Secretary is bound by the provisions of law, the direction of the President and the Secretary of Defense and, along with all persons in charge of Government agencies, the regulations of certain non-defense agencies addressing their respective areas of functional responsibility.

### § 700.202 Mission of the Department of the Navy.

(a) The Navy, within the Department of the Navy, shall be organized, trained, and equipped primarily for prompt and sustained combat incident to operations at sea. It is responsible for the preparation of naval forces necessary for the effective prosecution of war except as otherwise assigned, and, in accordance with integrated joint mobilization plans, for the expansion of the peacetime components of the Navy to meet the needs of war.

(b) The Navy shall develop aircraft, weapons, tactics, technique, organization and equipment of naval combat and service elements. Matters of joint concern as to these functions shall be coordinated between the Army, the Air Force and the Navy.

(c) The Marine Corps, within the Department of the Navy, shall be organized, trained, and equipped to provide fleet marine forces of combined arms, together with supporting air components, for service with the fleet in the seizure or defense of advanced naval bases and for the conduct of such land operations as may be essential to the prosecution of a naval campaign. In addition, the Marine Corps shall provide detachments and organizations for service on armed vessels of the Navy, shall provide security detachments for the protection of naval property at naval stations and bases, and shall perform such other duties as the President may direct. However, these additional duties may not detract from or interfere with the operations for which the Marine Corps is primarily organized.

(d) The Marine Corps shall develop, in coordination with the Army and the Air Force, those phases of amphibious operations that pertain to the tactics, technique and equipment used by landing forces.

(e) The Marine Corps is responsible, in accordance with integrated joint mobilization plans, for the expansion of peacetime components of the Marine Corps to meet the needs of war.

### § 700.203 Composition.

(a) The Department of the Navy is separately organized under the Secretary of the Navy. It operates under the authority, direction and control of the Secretary of Defense.

(b) The Department of the Navy is composed of the following:

(1) The Office of the Secretary of the Navy;

(2) The Office of the Chief of Naval Operations;

(3) The Headquarters, Marine Corps;

(4) The entire operating forces, including naval aviation, of the Navy and of the Marine Corps, and the reserve components of those operating forces;

(5) All field activities, headquarters, forces, bases, installations, activities and functions under the control or supervision of the Secretary of the Navy; and

(6) The Coast Guard when it is operating as a service in the Navy.

### § 700.204 The principal elements of the Department of the Navy.

(a) The Department of the Navy consists of three elements; the Navy Department, the Operating Forces of the Navy and the Marine Corps, and the Shore Establishment.

(b) The Navy Department refers to the central executive offices of the Department of the Navy located at the seat of Government. The Navy Department is organizationally comprised of the Office of the Secretary of the Navy, the Office of the Chief of Naval Operations, and the Headquarters, Marine Corps. In addition, the Headquarters, Coast Guard, is included when the Coast Guard is operating as a service in the Navy.

(c) The operating forces of the Navy and the Marine Corps comprise the several fleets, seagoing forces, Fleet Marine Forces, other assigned Marine Corps Forces, the Military Sealift Command and other forces and activities that may be assigned thereto by the President or the Secretary of the Navy.

(d) The shore establishment is comprised of shore activities with defined missions approved for establishment by the Secretary of the Navy.

## Subpart C—The Secretary of the Navy

THE SECRETARY OF THE NAVY

### § 700.301 Responsibilities of the Secretary of the Navy.

The Secretary of the Navy is responsible to the Secretary of Defense for:

(a) The functioning and efficiency of the Department of the Navy;

(b) The formulation of policies and programs by the Department of the Navy that are fully consistent with national security objectives and policies established by the President or the Secretary of Defense;

(c) The effective and timely implementation of policy, program and budget decisions and instructions of the President or the Secretary of Defense relating to the functions of the Department of the Navy;

(d) Carrying out the functions of the Department of the Navy so as to fulfill (to the maximum extent practicable) the current and future operational requirement of the unified and specified combatant commands;

(e) Effective cooperation and coordination between the Department of the Navy and the other military departments and agencies of the Department of Defense to provide for more effective, efficient and economical administration and eliminate duplication;

(f) The presentation and justification of the position of the Department of the Navy on the plans, programs and policies of the Department of Defense;

(g) The effective supervision and control of the intelligence activities of the Department of the Navy; and

(h) Such other activities as may be prescribed by law or by the president or Secretary of Defense.

### § 700.302 Responsibilities within the Department of the Navy.

The Secretary is the head of the Department of the Navy. The Secretary is responsible for, and has the authority necessary to conduct, all affairs of the Department of the Navy, including the following functions:

(a) Recruiting;

(b) Organizing;

(c) Supplying;

(d) Equipping (including research and development);

(e) Training;

(f) Servicing;

(g) Mobilizing;

(h) Demobilizing;

(i) Administering (including the morale and welfare of personnel);

(j) Maintaining;

(k) The construction, outfitting and repair of military equipment; and

(l) The construction, maintenance and repair of buildings, and interests in real property necessary to carry out the responsibilities specified in this article.

### § 700.303 Succession.

If the Secretary of the Navy dies, resigns, is removed from office, is absent or is disabled, the person who is highest on the following list, and who is not absent or disabled, shall perform the duties of the Secretary until the President directs another person to perform those duties or until the absence or disability ceases:

(a) The Under Secretary of the Navy;

(b) The Assistant Secretaries of the Navy, in the order prescribed by the Secretary of the Navy and approved by the Secretary of Defense;

(c) The Chief of Naval Operations;

(d) The Commandant of the Marine Corps.

**§ 700.304 Recommendations to Congress.**

After first informing the Secretary of Defense, the Secretary of the Navy may make such recommendations to Congress relating to the Department of Defense as he or she considers appropriate.

**§ 700.305 Assignment of functions.**

The Secretary of the Navy may assign such functions, powers, and duties as he or she considers appropriate to the Under Secretary of the Navy and to the Assistant Secretaries of the Navy. Officers of the Navy and the Marine Corps shall, as directed by the Secretary, report on any matter to the Secretary, the Under Secretary or any Assistant Secretary.

**§ 700.306 Assignment of duty and titles.**

The Secretary of the Navy may:

(a) Assign, detail and prescribe the duties of members of the Navy and Marine Corps and civilian personnel of the Department of the Navy; and

(b) Change the title of any officer or activity of the Department of the Navy not prescribed by law.

**§ 700.307 Powers with respect to the Coast Guard.**

Whenever the Coast Guard operates as a service in the Navy under Section 3 of Title 14, United States Code, the Secretary of the Navy has the same powers and duties with respect to the Coast Guard as the Secretary of Transportation has when the Coast Guard is not so operating.

THE OFFICE OF THE SECRETARY OF THE NAVY

**§ 700.310 Composition.**

The function of the Office of the Secretary of the Navy is to assist the Secretary in carrying out his or her responsibilities. The Office of the Secretary of the Navy is composed of the following:

(a) The Civilian Executive Assistants:

(1) The Under Secretary of the Navy;

(2) The Assistant Secretary of the Navy (Financial Management);

(3) The Assistant Secretary of the Navy (Manpower and Reserve Affairs);

(4) The Assistant Secretary of the Navy (Research, Development and Acquisition);

(5) The Assistant Secretary of the Navy (Installations and Environment); and

(6) The General Counsel of the Department of the Navy.

(b) The Staff Assistants:

(1) The Judge Advocate General of the Navy;

(2) The Naval Inspector General;

(3) The Chief of Naval Research;

(4) The Chief of Information;

(5) The Chief of Legislative Affairs;

(6) The Auditor General of the Navy;

(7) The Director, Office of Program Appraisal; and

(8) Such other officers and officials as may be established by law or as the Secretary of the Navy may establish or designate.

**§ 700.311 Sole responsibilities.**

(a) The Office of the Secretary of the Navy shall have sole responsibility within the Office of the Secretary of the Navy, the Office of the Chief of Naval Operations and the Headquarters, Marine Corps, for the following functions:

(1) Acquisition;

(2) Auditing;

(3) Comptroller (including financial management);

(4) Information management;

(5) Inspector general;

(6) Legislative affairs;

(7) Public affairs;

(8) Research and development, except for military requirements and operational test and evaluation, which are the responsibilities of the Office of the Chief of Naval Operations and the Headquarters Marine Corps.

(b) The following offices within the Office of the Secretary of the Navy are designated to conduct the functions specified in paragraph (a) of this section. No office or other entity may be established or designated within the Office of the Chief of Naval Operations or the Headquarters, Marine Corps, to conduct any of the functions specified in paragraph (a) of this section, except

as noted in paragraph (a)(8) of this section.

(1) The Assistant Secretary of the Navy (Research, Development and Acquisition) is the Acquisition Executive for the Department of the Navy. The Assistant Secretary of the Navy (Research, Development and Acquisition) (ASN(RD&A)) is responsible for research, development and acquisition, except for military requirements and operational test and evaluation, which remain functions of the Office of the Chief of Naval Operations and Headquarters Marine Corps. In addition to Acquisition Executive, ASN(RD&A) is also the Navy Senior Procurement Executive and Senior Department of the Navy Information Resource Management Official. Responsibilities include developing acquisition policy and procedures for all Department of the Navy research, development, production, shipbuilding and production/logistics support programs; and Department of the Navy international technology transfer.

(2) The Auditor General is responsible for the internal auditing function within the Department of the Navy.

(3) The Assistant Secretary of the Navy (Financial Management) is responsible for comptrollership, including financial management, within the Department of the Navy.

(4) The Naval Inspector General is responsible for the inspector general function within the Department of the Navy.

(5) The Chief of Legislative Affairs is responsible for legislative affairs within the Department of the Navy.

(6) The Chief of Information is responsible for public affairs within the Department of the Navy.

(c) The Secretary shall:

(1) Prescribe the relationship of each office or other entity established or designated under paragraph (b) of this section:

(i) To the Chief of Naval Operations and the Office of the Chief of Naval Operations: and

(ii) To the Commandant of the Marine Corps and the Headquarters, Marine Corps; and

(2) Ensure that each such office or entity provides the Chief of Naval Operations and the Commandant of the Marine Corps such staff support as the Chief of Naval Operations and the Commandant of the Marine Corps consider necessary to perform their respective duties and responsibilities.

(d) The vesting in the Office of the Secretary of the Navy of the responsibility for the conduct of a function specified in paragraph (a) of this section does not preclude other elements of the Department of the Navy (including the Office of the Chief of Naval Operations and the Headquarters, Marine Corps) from providing advice or assistance to the Chief of Naval Operations and the Commandant of the Marine Corps, or otherwise participating in that function within the executive part of the Department under the direction of the office assigned responsibility for that function in the Office of the Secretary of the Navy.

### § 700.312 Authority over organizational matters.

Subject to the approval or guidance of the Secretary of the Navy, the Civilian Executive Assistants, the Chief of Naval Operations, the Commandant of the Marine Corps and the Staff Assistants are individually authorized to organize, assign and reassign responsibilities within their respective commands or offices, including the establishment and disestablishment of such component organizations as may be necessary, subject to the following:

(a) The authority to disestablish may not be exercised with respect to any organizational component of the Department established by law.

(b) The Secretary retains the authority to approve the establishment and disestablishment of shore activities.

## THE OFFICE OF THE SECRETARY OF THE NAVY/THE CIVILIAN EXECUTIVE ASSISTANTS

### § 700.320 The Civilian Executive Assistants.

(a) The Civilian Executive Assistants, as identified in § 700.310, are assigned department-wide responsibilities essential to the efficient administration of the Department of the Navy.

(b) Each Civilian Executive Assistants, within his or her assigned area of responsibility, is the principal civilian

advisor and assistant to the Secretary on the administration of the affairs of the Department of the Navy. The Civilian Executive Assistants carry out their duties with the professional assistance of the Office of the Chief of Naval Operations and Headquarters, Marine Corps, as presided over by the Chief of Naval Operations and Commandant of the Marine Corps, respectively.

(c) The Civilian Executive Assistants are authorized and directed to act for the Secretary within their assigned areas of responsibility.

### § 700.321 The Under Secretary of the Navy.

(a) The Under Secretary of the Navy shall perform such duties and exercise such powers as the Secretary of the Navy shall prescribe.

(b) The Under Secretary of the Navy is designated as the deputy and principal assistant to the Secretary of the Navy. The Under Secretary of the Navy acts with full authority of the Secretary in the general management of the Department of the Navy and supervision of offices, organizations and functions as assigned by the Secretary.

### § 700.322 Assistant Secretaries of the Navy; statutory authorization.

There are four Assistant Secretaries of the Navy. The Assistant Secretaries shall perform such duties and exercise such powers as the Secretary of the Navy may prescribe in accordance with law.

### § 700.323 The Assistant Secretary of the Navy (Financial Management).

The Assistant Secretary of the Navy (Financial Management) is the Comptroller of the Navy, and is responsible for all matters related to the financial management of the Department of the Navy, including:

(a) Budgeting;

(b) Accounting;

(c) Disbursing;

(d) Financing;

(e) Internal review;

(f) Progress and statistical reporting; and

(g) Supervision of offices and organizations as assigned by the Secretary of the Navy.

### § 700.324 The Assistant Secretary of the Navy (Manpower and Reserve Affairs).

The Assistant Secretary of the Navy (Manpower and Reserve Affairs) is responsible for:

(a) The overall supervision of manpower and reserve component affairs of the Department of the Navy, including policy and administration of affairs related to military (active and inactive) and civilian personnel; and

(b) Supervision of offices and organizations as assigned by the Secretary, specifically the Naval Council of Personnel Boards and the Board for Correction of Naval Records.

### § 700.325 The Assistant Secretary of the Navy (Installations and Environment).

The Assistant Secretary of the Navy (Installations and Environment) is responsible for:

(a) Policy relating to Navy installations, facilities, environment, safety, shore resources management and quality improvement;

(b) Development, implementation and evaluation of military construction, facilities management and engineering, strategic homeporting, housing, utilities, and base utilization issues;

(c) Environmental policy, safety, occupational health, and Marine Corps and Navy environmental affairs, including environmental protection, restoration, compliance and legislation, natural resource programs, hazardous material/waste minimization, plastics reduction and control, afloat environmental issues, state and federal agency and environmental organization coordination, and the National Environmental Policy Act; and

(d) Advising on fiscal resources related to shore appropriations.

### § 700.326 The Assistant Secretary of the Navy (Research, Development and Acquisition).

The Assistant Secretary of the Navy (Research, Development and Acquisition) is responsible for:

(a) Research, development and acquisition, except for military requirements and operational test and evaluation;

(b) Direct management of acquisition programs;

(c) All aspects of the acquisition process within the Department of the Navy;

(d) All acquisition policy, including technology base and advanced technology development, procurement, competition, contracts and business management, logistics, product integrity, and education and training of the acquisition workforce.

### § 700.327 The General Counsel of the Navy.

(a) The General Counsel is head of the Office of the General Counsel and is responsible for providing legal advice, counsel, and guidance within the Department of the Navy on the following matters:

(1) Business and commercial law, environmental law, civilian personnel law, real and personal property law and patent law;

(2) Procurement of services, including the fiscal, budgetary and accounting aspects, for the Navy and Marine Corps;

(3) Litigation involving the issues enumerated above; and

(4) Other matters as directed by the Secretary of the Navy.

(b) The General Counsel maintains a close working relationship with the Judge Advocate General on all matters of common interest.

## THE OFFICE OF THE SECRETARY OF THE NAVY/THE STAFF ASSISTANTS

### § 700.330 The Staff Assistants.

The Staff Assistants, as identified in § 700.310, assist the Secretary of the Navy, or one or more of the Civilian Executive Assistants, in the administration of the Navy. They supervise all functions and activities internal to their offices and assigned field activities, if any, and are responsible to the Secretary or to one of the Civilian Executive Assistants for the utilization of resources by, and the operating efficiency of, all activities under their supervision or command. Their duties are as provided by law or as assigned by the Secretary.

### § 700.331 The Judge Advocate General.

(a) The Judge Advocate General of the Navy commands the Office of the Judge Advocate General and is the Chief of the Judge Advocate General's Corps. The Judge Advocate General:

(1) Provides or supervises the provision of all legal advice and related services throughout the Department of the Navy, except for the advice and services provided by the General Counsel;

(2) Performs the functions required or authorized by law;

(3) Provides legal and policy advice to the Secretary of the Navy on military justice, administrative law, claims, operational and international law, and litigation involving these issues; and

(4) Acts on other matters as directed by the Secretary.

(b) The Judge Advocate General maintains a close working relationship with the General Counsel on all matters of common interest.

### § 700.332 The Naval Inspector General.

(a) Under the direction of the Secretary of the Navy, the Naval Inspector General:

(1) Inspects, investigates or inquires into any and all matters of importance to the Department of the Navy with particular emphasis on readiness, including, but not limited to effectiveness, efficiency, economy and integrity;

(2) Exercises broad supervision, general guidance and coordination for all Department of the Navy inspection, evaluation and appraisal organizations to minimize duplication of efforts and the number of necessary inspections;

(3) Through analysis of available information, identifies areas of weakness in the Department of the Navy as they relate to matters of integrity and efficiency and provides appropriate recommendations for improvement. To accomplish these functions, the Inspector General shall have unrestricted access, by any means, to any information maintained by any naval activity deemed necessary, unless specifically restricted by the Secretary of the Navy;

(4) Receives allegations of inefficiency, misconduct, impropriety, mismanagement or violations of law, and investigates or refers such matters for investigation, as is appropriate; and

(5) Serves as principal advisor to the Secretary of the Navy, the Chief of Naval Operations and the Commandant of the Marine Corps on all inspection and investigation matters.

(b) In addition, the Naval Inspector General has various functions, including (but not limited to):

(1) Providing of an alternative to the normal chain of command channel for receipt of complaints of personnel;

(2) Serving as the official to whom employees may complain without fear of reprisal;

(3) Cooperating with the Inspector General, Department of Defense;

(4) Providing oversight of intelligence and special activities;

(5) Serving as the Department of the Navy coordinator for fraud, waste and efficiency matters;

(6) Serving as Navy Program Manager and focal point for the Department of the Navy and Navy Hotline programs; and

(7) Designation as the centralized organization within the Department of Defense to monitor and ensure the coordination of criminal, civil, administrative and contractual remedies for all significant cases, including investigation of fraud or corruption related to procurement activities affecting the Department of the Navy.

### § 700.333 The Chief of Naval Research.

(a) The Chief of Naval Research shall command the Office of the Chief of Naval Research, the Office of Naval Research, the Office of Naval Technology and assigned shore activities.

(b) The Office of Naval Research shall perform such duties as the Secretary of the Navy prescribes relating to:

(1) The encouragement, promotion, planning, initiation and coordination of naval research;

(2) The conduct of naval research in augmentation of and in conjunction with the research and development conducted by other agencies and offices of the Department of the Navy; and

(3) The supervision, administration and control of activities within or for the Department of the Navy relating to patents, inventions, trademarks, copyrights and royalty payments, and matters connected therewith.

### § 700.334 The Chief of Information.

(a) The Chief of Information is the direct representative of the Secretary of the Navy in all public affairs and internal relations matters. The Chief of Information is authorized to implement Navy public affairs and internal relations policies and to coordinate those Navy and Marine Corps activities of mutual interest.

(b) The Chief of Naval Operations and the Commandant of the Marine Corps are delegated responsibilities for:

(1) Conduct of their respective services' internal information programs;

(2) Conduct of their respective services' community relations programs; and

(3) Implementing the Secretary of the Navy's public affairs policy and directives.

(c) The Chief of Information will report to the Chief of Naval Operations for support of the responsibilities outlined in paragraph (b) of this section, and will provide such staff support as the Chief of Naval Operations considers necessary to perform those duties and responsibilities.

(d) The Deputy Chief of Information for Marine Corps Matters may report directly to the Secretary regarding public information matters related solely to the Marine Corps. The Deputy Chief will promptly inform the Chief of Information regarding the substance of all independent contacts with the Secretary pertaining to Marine Corps matters. The Deputy Chief of Information for Marine Corps Matters will report to the Commandant of the Marine Corps for support of the responsibilities outlined in paragraph (b) of this section, and will provide such staff support as the Commandant considers necessary to perform those duties and responsibilities.

### § 700.335 The Chief of Legislative Affairs.

The mission of the Chief of Legislative Affairs is to:

(a) Plan, develop and coordinate relationships between representatives of

the Department of the Navy and members of committees of the United States Congress and their staffs which are necessary in the transaction of official Government business (except appropriations matters) affecting the Department of the Navy; and

(b) Furnish staff support, advice and assistance to the Secretary of the Navy, the Chief of Naval Operations, the Commandant of the Marine Corps and all other principal civilian and military officials of the Department of the Navy concerning congressional aspects of the Department of the Navy policies, plans and programs (except appropriations matters).

### § 700.336 The Director, Office of Program Appraisal.

(a) The Director, Office of Program Appraisal, directs, under the immediate supervision of the Secretary of the Navy, the Office of Program Appraisal.

(b) The Office of Program Appraisal will assist the Secretary in assuring that existing and proposed Navy and Marine Corps programs provide the optimum means of achieving the objectives of the Department of the Navy.

### § 700.337 The Auditor General.

(a) The Auditor General of the Navy is responsible for:

(1) Serving as Director of the Naval Audit Service; and

(2) Developing and implementing Navy internal audit policies, programs and procedures within the framework of Government auditing standards.

(b) The Auditor General can provide information and may provide assistance and support to the Chief of Naval Operations and the Commandant of the Marine Corps to enable them to discharge their duties and responsibilities.

## Subpart D—The Chief of Naval Operations

### § 700.401 Precedence.

The Chief of Naval Operations, while so serving, has the grade of admiral. In the performance of duties within the Department of the Navy, the Chief of Naval Operations takes precedence above all other officers of the naval service, except an officer of the naval service who is serving as Chairman or Vice Chairman of the Joint Chiefs of Staff.

### § 700.402 Succession.

When there is a vacancy in the position of Chief of Naval Operations, or during the absence or disability of the Chief of Naval Operations:

(a) The Vice Chief of Naval Operations shall perform the duties of the Chief of Naval Operations until a successor is appointed or the absence or disability ceases.

(b) If there is a vacancy in the position of Vice Chief of Naval Operations or the Vice Chief of Naval Operations is absent or disabled, unless the President directs otherwise, the most senior officer of the Navy in the Office of the Chief of Naval Operations who is not absent or disabled and who is not restricted in the performance of duty shall perform the duties of the Chief of Naval Operations until a successor to the Chief of Naval Operations or the Vice Chief of Naval Operations is appointed or until the absence or disability of the Chief of Naval Operations or Vice Chief of Naval Operations ceases, whichever occurs first.

### § 700.403 Statutory authority and responsibility of the Chief of Naval Operations.

(a) Except as otherwise prescribed by law, and subject to the statutory authority of the Secretary of the Navy to assign functions, powers and duties, the Chief of Naval Operations performs duties under the authority, direction and control of the Secretary of the Navy and is directly responsible to the Secretary.

(b) Subject to the authority, direction and control of the Secretary of the Navy, the Chief of Naval Operations shall:

(1) Preside over the Office of the Chief of Naval Operations;

(2) Transmit the plans and recommendations of the Office of the Chief of Naval Operations to the Secretary and advise the Secretary with regard to such plans and recommendations;

(3) After approval of the plans or recommendations of the Office of the

Chief of Naval Operations by the Secretary, act as the agent of the Secretary in carrying them into effect;

(4) Exercise supervision, consistent with the statutory authority assigned to commanders of unified or specified combatant commands, over such of the members and organizations of the Navy and the Marine Corps as the Secretary determines;

(5) Perform the duties prescribed for a member of the Armed Forces Policy Council and other statutory duties; and

(6) Perform such other military duties, not otherwise assigned by law, as are assigned to the Chief of Naval Operations by the President, the Secretary of Defense or the Secretary of the Navy.

(c) The Chief of Naval Operations shall also perform the statutory duties prescribed for a member of the Joint Chiefs of Staff.

(1) To the extent that such action does not impair the independence of the Chief of Naval Operations in the performance of duties as a member of the Joint Chiefs of Staff, the Chief of Naval Operations shall inform the Secretary of the Navy regarding military advice rendered by members of the Joint Chiefs of Staff on matters affecting the Department of the Navy.

(2) Subject to the authority, direction and control of the Secretary of Defense, the Chief of Naval Operations shall keep the Secretary of the Navy fully informed of significant military operations affecting the duties and responsibilities of the Secretary of the Navy.

### § 700.404 Statutory authority and responsibility of the Office of the Chief of Naval Operations.

(a) The Office of the Chief of Naval Operations shall furnish professional assistance to the Secretary, the Under Secretary and the Assistant Secretaries of the Navy, and to the Chief of Naval Operations. Under the authority, direction and control of the Secretary of the Navy, the Office of the Chief of Naval Operations shall:

(1) Subject to § 700.311(a), prepare for such employment of the Navy, and for such recruiting, organizing, supplying, equipping (including those aspects of research and development assigned by the Secretary of the Navy), training, servicing, mobilizing, demobilizing, administering, and maintaining of the Navy, as will assist in the execution of any power, duty or function of the Secretary or the Chief of Naval Operations;

(2) Investigate and report upon the efficiency of the Navy and its preparation to support military operations by combatant commands;

(3) Prepare detailed instructions for the execution of approved plans and supervise the execution of those plans and instructions;

(4) As directed by the Secretary or the Chief of Naval Operations, coordinate the action of organizations of the Navy; and

(5) Perform such other duties, not otherwise assigned by law, as may be prescribed by the Secretary.

(b) Except as otherwise specifically prescribed by law, the Office of the Chief of Naval Operations shall be organized in such manner, and its members shall perform such duties and have such titles as the Secretary may prescribe.

### § 700.405 Delegated authority and responsibility.

(a) The Chief of Naval Operations is the principal naval advisor and naval executive to the Secretary of the Navy on the conduct of the naval activities of the Department of the Navy.

(b)(1) Internal to the administration of the Department of the Navy, the Chief of Naval Operations, consistent with the statutory authority assigned to commanders of unified or specified combatant commands, under the direction of the Secretary of the Navy, shall command:

(i) The operating forces of the Navy; and

(ii) Such shore activities as may be assigned by the Secretary.

(2) The Chief of Naval Operations shall be responsible to the Secretary of the Navy for the Utilization of resources by, and the operating efficiency of, the Office of the Chief of Naval Operations, the Operating Forces of the Navy and assigned shore activities.

(c) In addition, the Chief of Naval Operations has the following specific responsibilities:

(1) To organize, train, equip, prepare and maintain the readiness of Navy forces, including those for assignment to unified or specified commands, for the performance of military missions as directed by the President, the Secretary of Defense or the Chairman of the Joint Chiefs of Staff;

(2) To determine current and future requirements of the Navy (less Fleet Marine Forces and other assigned Marine Corps forces) for manpower, material, weapons, facilities and services, including the determination of quantities, military performance requirements and times, places and priorities of need;

(3) To exercise leadership in maintaining a high degree of competence among Navy officer, enlisted and civilian personnel in necessary fields of specialization, through education training and equal opportunities for personal advancement, and maintaining the morale and motivation of Navy personnel and the prestige of a Navy career;

(4) To plan and provide health care for personnel of the naval service, their dependents and eligible beneficiaries;

(5) To direct the organization, administration, training and support of the Naval Reserve;

(6) To inspect and investigate components of the Department of the Navy to determine and maintain efficiency, discipline, readiness, effectiveness and economy, except in those areas where such responsibility rests with the Commandant of the Marine Corps;

(7) To determine the requirements of naval forces and activities, to include requirements for research, development, test, and evaluation to plan and provide for the conduct of test and evaluation which are adequate and responsive to long range objectives, immediate requirements, and fiscal limitations; and to provide assistance to the Assistant Secretary of the Navy (Research, Development and Acquisition) in the review and appraisal of the overall Navy program to ensure fulfillment of stated requirements;

(8) To formulate Navy strategic plans and policies and participate in the formulation of Joint and combined strategic plans and policies and related command relationships; and

(9) Subject to guidance from the Assistant Secretary of the Navy (Financial Management), to formulate budget proposals for the Office of the Chief of Naval Operations, the Operating Forces of the Navy and assigned shore activities, and other activities and programs as assigned;

(10) To exercise authority for intelligence within the Navy.

(d) The Chief of Naval Operations, under the direction of the Secretary of the Navy, shall exercise overall authority throughout the Department of the Navy in matters related to:

(1) The effectiveness of the support of the Operating Forces of the Navy and assigned shore activities;

(2) The coordination and direction of assigned Navy wide programs and functions, including those assigned by higher authority;

(3) Matters essential to naval military administration, such as:

(i) Security;

(ii) Discipline;

(iii) Communications; and

(iv) Matters related to the customs and traditions of the naval service.

(4) Except for those areas wherein such responsibility rests with the Commandant of the Marine Corps, the coordination of activities of the Department of the Navy in matters concerning effectiveness, efficiency and economy.

[64 FR 56062, Oct. 15, 1999, as amended at 68 FR 2697, Jan. 21, 2003]

### § 700.406 Naval Vessel Register, classification of naval craft, and status of ships and service craft.

(a) The Chief of Naval Operations shall be responsible for the Naval Vessel Register (except the Secretary of the Navy shall strike vessels from the Register) and the assignment of classification for administrative purposes to water borne craft and the designation of status for each ship and service craft.

(b) Commissioned vessels and craft shall be called ''United States Ship'' or ''U.S.S.''

(c) Civilian manned ships, of the Military Sealift Command or other commands, designated ''active status,

in service'' shall be called ''United States Naval Ship'' or ''U.S.N.S.''

(d) Ships and service craft designated ''active status, in service,'' except those described by paragraph (c) of this section, shall be referred to by name, when assigned, classification, and hull number (e.g., ''HIGHPOINT PCH–1'' or ''YOGN–8'').

(e) The Chief of Naval Operations shall designate hospital ships and medical aircraft as he or she deems necessary. Such designation shall be in compliance with the Geneva Convention for the Amelioration of the Conditions of Wounded, Sick and Ship wrecked Members of the Armed Forces at Sea of 12 August 1949. The Chief of Naval Operations shall ensure compliance with the notice shall ensure compliance with the notice provisions of that Convention.

## Subpart E—The Commandant of the Marine Corps

### § 700.501 Precedence.

The Commandant of the Marine Corps, while so serving, has the grade of general. In the performance of duties within the Department of the Navy, the Commandant of the Marine Corps takes precedence above all other officers of the Marine Corps, except an officer of the Marine Corps who is serving as Chairman or Vice Chairman of the Joint Chiefs of Staff.

### § 700.502 Succession.

When there is a vacancy in the office of Commandant of the Marine Corps, or during the absence or disability of the Commandant:

(a) The Assistant Commandant of the Marine Corps shall perform the duties of the Commandant until a successor is appointed or the absence or disability ceases; or

(b) If there is a vacancy in the office of the Assistant Commandant of the Marine Corps or the Assistant Commandant is absent or disabled, unless the President directs otherwise, the most senior officer of the Marine Corps in the Headquarters, Marine Corps, who is not absent or disabled and who is not restricted in the performance of duty shall perform the duties of the Commandant until a successor to the Commandant or the Assistant Commandant is appointed or until the absence or disability of the Commandant or the Assistant Commandant ceases, whichever occurs first.

### § 700.503 Statutory authority and responsibility of the Commandant of the Marine Corps.

(a) Except as otherwise prescribed by law and subject to the statutory authority of the Secretary of the Navy to assign functions, powers and duties, the Commandant of the Marine Corps performs duties under the authority, direction and control of the Secretary of the Navy and is directly responsible to the Secretary.

(b) Subject to the authority, direction and control of the Secretary of the Navy, the Commandant of the Marine Corps shall:

(1) Preside over the Headquarters, Marine Corps;

(2) Transmit the plans and recommendations of the Headquarters, Marine Corps, to the Secretary and advise the Secretary with regard to such plans and recommendations;

(3) After approval of the plans or recommendations of the Headquarters, Marine Corps, by the Secretary, act as the agent of the Secretary in carrying them into effect;

(4) Exercise supervision, consistent with the statutory authority assigned to commanders of unified or specified combatant commands, over such of the members and organizations of the Navy and the Marine Corps as the Secretary determines;

(5) Perform the duties prescribed for a member of the Armed Forces Policy Council and other statutory duties; and

(6) Perform such other military duties, not otherwise assigned by law, as are assigned to the Commandant of the Marine Corps by the President, the Secretary of Defense or the Secretary of the Navy.

(c) The Commandant of the Marine Corps shall also perform the statutory duties prescribed for a member of the Joint Chiefs of Staff.

(1) To the extent that such action does not impair the independence of the Commandant of the Marine Corps in the performance of duties as a member of the Joint Chiefs of Staff, the

Commandant of the Marine Corps shall inform the Secretary of the Navy regarding military advice rendered by members of the Joint Chiefs of Staff on matters affecting the Department of the Navy.

(2) Subject to the authority, direction and control of the Secretary of Defense, the Commandant of the Marine Corps shall keep the Secretary of the Navy fully informed of significant military operations affecting the duties and responsibilities of the Secretary of the Navy.

### § 700.504 Statutory authority and responsibility of the Headquarters, Marine Corps.

(a) The Headquarters, Marine Corps, shall furnish professional assistance to the Secretary, the Under Secretary and the Assistant Secretaries of the Navy, and to the Commandant of the Marine Corps.

(1) Under the authority, direction and control of the Secretary of the Navy, the Headquarters, Marine Corps shall:

(i) Subject to § 700.311(a), prepare for such employment of the Marine Corps, and for such recruiting, organizing, supplying, equipping (including those aspects of research and development assigned by the Secretary of the Navy), training, servicing, mobilizing, demobilizing, administering, and maintaining of the Marine Corps, as will assist in the execution of any power, duty or function of the Secretary or the Commandant;

(ii) Investigate and report upon the efficiency of the Marine Corps and its preparation to support military operations by combatant commands;

(iii) Prepare detailed instructions for the execution of approved plans and supervise the execution of those plans and instructions;

(iv) As directed by the Secretary or the Commandant, coordinate the action of organizations of the Marine Corps; and

(v) Perform such other duties, not otherwise assigned by law, as may be prescribed by the Secretary.

(2) [Reserved]

(b) Except as otherwise specifically prescribed by law, the Headquarters, Marine Corps, shall be organized in such manner, and its members shall perform such duties and have such titles, as the Secretary may prescribe.

### § 700.505 Delegated authority and responsibility.

(a)(1) Internal to the administration of the Department of the Navy, the Commandant of the Marine Corps, consistent with the statutory authority assigned to commanders of unified or specified combatant commands, under the direction of the Secretary of the Navy, shall command:

(i) The operating forces of the Marine Corps; and

(ii) Such shore activities as may be assigned by the Secretary.

(2) The Commandant shall be responsible to the Secretary of the Navy for the utilization of resources by, and the operating efficiency of, all commands and activities under such command.

(b) In addition, the Commandant has the following specific responsibilities:

(1) To plan for and determine the needs of the Marine Corps for equipment, weapons or weapons systems, materials, supplies, facilities, maintenance, and supporting services. This responsibility includes the determination of Marine Corps characteristics of equipment and material to be procured or developed, and the training required to prepare Marine Corps personnel for combat. It also includes the operation of the Marine Corps Material Support System.

(2) Subject to guidance from the Assistant Secretary of the Navy (Financial Management), to formulate budget proposals for the Headquarters, Marine Corps, the Operating Forces of the Marine Corps, and other activities and programs as assigned.

(3) To develop, in coordination with other military services, the doctrines, tactics and equipment employed by landing forces in amphibious operations.

(4) To formulate Marine Corps strategic plans and policies and participate in the formulation of joint and combined strategic plans and policies and related command relationships.

(5) To exercise authority for intelligence within the Marine Corps.

(6) To plan for and determine the present and future needs, both quantitative and qualitative, for manpower, including reserve personnel and civilian personnel, of the United States Marine Corps. This includes responsibility for leadership in maintaining a high degree of competence among Marine Corps officer and enlisted personnel and Marine Corps civilian personnel in necessary fields of specialization through education, training and equal opportunities for personal advancement; and for leadership in maintaining the morale and motivation of Marine Corps personnel and the prestige of a career in the Marine Corps.

[64 FR 56062, Oct. 15, 1999, as amended at 68 FR 2697, Jan. 21, 2003]

## Subpart F—The United States Coast Guard (When Operating as a Service in the Navy)

### § 700.601 Relationship and operation as a service in the Navy.

(a) Upon the declaration of war or when the President directs, the Coast Guard shall operate as a service in the Navy, and shall be subject to the orders of the Secretary of the Navy. While so operating as a service in the Navy, and to the extent practicable, Coast Guard operations shall be integrated and uniform with Navy operation.

(b) Whenever the Coast Guard operates as a service in the Navy:

(1) Applicable appropriations of the Coast Guard to cover expenses shall be available for transfer to the Department of the Navy and supplemented, as required, from applicable appropriations of the Department of the Navy;

(2) Personnel of the Coast Guard shall be eligible to receive gratuities, medals and other insignia of honor on the same basis as personnel in the naval service or serving in any capacity with the Navy; and

(3) To the extent practicable, Coast Guard personnel, ships, aircraft and facilities will be utilized as organized Coast Guard units.

### § 700.602 The Commandant of the Coast Guard.

(a) The Commandant of the Coast Guard is the senior officer of the United States Coast Guard.

(b) When reporting to the Secretary of the Navy, the Commandant will report to the Chief of Naval Operations.

(c) The Chief of Naval Operations shall represent the Coast Guard before the Joint Chiefs of Staff.

### § 700.603 Duties and responsibilities.

In exercising command over the Coast Guard while operating as a service of the Navy, the Commandant shall:

(a) Organize, train, prepare and maintain the readiness of the Coast Guard to function as a specialized service in the Navy for the performance of national defense missions, as directed;

(b) Plan for and determine the present and future needs of the Coast Guard, both quantitative and qualitative, for personnel, including reserve personnel;

(c) Budget for the Coast Guard, except as may be otherwise directed by the Secretary of the Navy;

(d) Plan for and determine the support needs of the Coast Guard for equipment, materials, weapons or combat systems, supplies, facilities, maintenance and supporting services;

(e) Exercise essential military administration of the Coast Guard. This includes, but is not limited to, such matters as discipline, communications, personnel records and accounting, conforming, as practicable, to Navy procedures;

(f) In conjunction with the Director of Naval Intelligence, and the National Intelligence Community, where appropriate, establish and maintain an intelligence and security capability to provide support for the maritime defense zones, port security, narcotics interdiction, anti-terrorist activity, fishery activity, pollution monitoring and other Coast Guard missions;

(g) Enforce or assist in enforcing Federal laws on and under the high seas and waters subject to the jurisdiction of the United States;

(h) Administer, promulgate and enforce regulations for the promotion of safety of life and property on and under the high seas and waters subject to the

jurisdiction of the United States. This applies to those matters not specifically delegated by law to some other executive department;

(i) Develop, establish, maintain and operate, with due regard to the requirements of national defense, aids to maritime navigation, ice breaking facilities, for the promotion of safety on, under and over the high seas and waters subject to the jurisdiction of the United States;

(j) Engage in oceanographic surveys in conjunction with the Office of the Oceanographer of the Navy; and

(k) Continue in effect under the Secretary of the Navy those other functions, powers and duties vested in the Commandant by appropriate orders and regulations of the Secretary of Transportation on the day prior to the effective date of transfer of the Coast Guard to the Department of the Navy until specifically modified or terminated by the Secretary of the Navy.

## Subpart G—Commanders In Chief and Other Commanders

TITLES AND DUTIES OF COMMANDERS

### § 700.701 Titles of commanders.

(a) The commander of a principal organization of the operating forces of the Navy, as determined by the Chief of Naval Operations, or the officer who has succeeded to such command as provided elsewhere in these regulations, shall have the title ''Commander.'' The name of the organization under the command of such an officer shall be added to form his or her official title, e.g., ''Commander, U.S. Atlantic Fleet.'' Commander, U.S. Atlantic Fleet, Commander, U.S. Pacific Fleet, and Commander, U.S. Naval Forces Europe, may also be referred to as a ''Geographic Fleet Commander.''

(b) The commander of each other organization of units of the operating forces of the Navy or marine corps, or organization of units of shore activities, shall have the title ''Commander,'' ''Commandant,'' ''Commanding General'' or other appropriate title. The name of the organization under the command of such an officer shall be added to form his or her official title.

[64 FR 56062, Oct. 15, 1999, as amended at 68 FR 2697, Jan. 21, 2003]

### § 700.702 Responsibility and authority of commanders.

(a) Commanders shall be responsible for the satisfactory accomplishment of the mission and duties assigned to their commands. Their authority shall be commensurate with their responsibilities. Normally, commanders shall exercise authority through their immediate subordinate commanders, but they may communicate directly with any of their subordinates.

(b) Commanders shall ensure that subordinate commands are fully aware of the importance of strong, dynamic leadership and its relationship to the overall efficiency and readiness of naval forces. Commanders shall exercise positive leadership and actively develop the highest qualities of leadership in persons with positions of authority and responsibility throughout their commands.

(c) Subject to orders of higher authority, and subject to the provisions of § 700.106 of these regulations, commanders shall issue such regulations and instructions as may be necessary for the proper administration of their commands.

(d) Commanders shall hold the same relationship to their flagships, or to shore activities of the command in which their headquarters may be located, in regard to internal administration and discipline, as to any other ship or shore activity of their commands.

### § 700.703 To announce assumption of command.

(a) Upon assuming command, commanders shall so advise appropriate superiors, and the units of their commands.

(b) When appropriate, commanders shall also advise the following officers and officials located within the area encompassed by the command concerning their assumption of command.

(1) Senior commanders of other United States armed services;

(2) Officials of other federal agencies; and

(3) Officials of foreign governments.

### § 700.704 Readiness.

Commanders shall take all practicable steps to maintain their commands in a state of readiness to perform their missions. In conformity with the orders and policies of higher authority, they shall:

(a) Organize the forces and resources under their command and assign duties to their principal subordinate commanders;

(b) Prepare plans for the employment of their forces to meet existing and foreseeable situations;

(c) Collaborate with the commanders of other United States armed services and with appropriate officials of other federal agencies and foreign governments located within the area encompassed by their commands;

(d) Maintain effective intelligence and keep themselves informed of the political and military aspects of the national and international situation;

(e) Make, or cause to be made, necessary inspections to ensure the readiness, effectiveness and efficiency of the components of their commands; and

(f) Develop, in accordance with directives issued by higher authority, training strategies and plans for their commands.

### § 700.705 Observance of international law.

At all times, commanders shall observe, and require their commands to observe, the principles of international law. Where necessary to fulfill this responsibility, a departure from other provisions of Navy Regulations is authorized.

### § 700.706 Keeping immediate superiors informed.

Commanders shall keep their immediate superiors appropriately informed of:

(a) The organization of their commands, the prospective and actual movements of the units of their commands, and the location of their headquarters;

(b) Plans for employment of their forces;

(c) The condition of their commands and of any required action pertaining thereto which is beyond their capacity or authority;

(d) Intelligence information which may be of value;

(e) Any battle, engagement or other significant action involving units of their commands;

(f) Any important service or duty performed by persons or units of their commands; and

(g) Unexecuted orders and matters of interest upon being relieved of command.

## STAFFS OF COMMANDERS

### § 700.710 Organization of a staff.

(a) The term ''staff'' means those officers and other designated persons assigned to a commander to assist him or her in the administration and operation of his or her command.

(b) The officer detailed as chief of staff and aide to a fleet admiral or admiral normally shall be a vice admiral or a rear admiral. The officer detailed as chief of staff and aide to a vice admiral or rear admiral shall normally be a rear admiral or a captain. The detailing of a vice commander or a deputy to a commander shall be reserved for selected commanders. An officer detailed as chief staff officer to another officer shall normally not be of the same grade as that officer.

(c) The staff shall be organized into such divisions as may be prescribed by the commander concerned or by higher authority. These divisions shall conform in nature and designation, as practicable and as appropriate, to those of the staffs of superiors.

(d) The staff of a flag or general officer may include one or more personal aides.

### § 700.711 Authority and responsibilities of officers of a staff.

(a) The chief of staff and aide or chief staff officer, under the commander, shall be responsible for supervising and coordinating the work of the staff and shall be kept informed of all matters pertaining to that work. All persons attached to the staff, except a vice commander or deputy responsible directly to the commander shall be subordinate to the chief of staff and aide

or chief staff officer while he or she is executing the duties of that office.

(b) The officers of a staff shall be responsible for the performance of those duties assigned to them by the commander and shall advise the commander on all matters pertaining thereto. In the performance of their staff duties they shall have no command authority of their own. In carrying out such duties, they shall act for, and in the name of, the commander.

ADMINISTRATION AND DISCIPLINE

**§ 700.720 Administration and discipline: Staff embarked.**

In matters of general discipline, the staff of a commander embarked and all enlisted persons serving with the staff shall be subject to the internal regulations and routine of the ship. They shall be assigned regular stations for battle and emergencies. Enlisted persons serving with the staff shall be assigned to the ship for administration and discipline, except in the case of a staff embarked for passage only, and provided in that case that an organization exists and is authorized to act for such purposes.

**§ 700.721 Administration and discipline: Staff based ashore.**

When a staff is based ashore, the enlisted persons serving with the staff shall, when practicable, be assigned to an appropriated activity for purposes of administration and discipline. The staff officers may be similarly assigned. Members of a staff assigned for any purpose to a command or activity shall conform in matters of general discipline to the internal regulations and routine of that command or activity.

**§ 700.722 Administration and discipline: Staff unassigned to an administrative command.**

(a) When it is not practicable to assign enlisted persons serving with the staff of a commander to an established activity for administration and discipline, the commander may designate an officer of the staff to act as the commanding officer of such persons and shall notify the Judge Advocate General and the Commandant of the Marine Corps, or the Chief of Naval Personnel, as appropriate, of such action.

(b) If the designating commander desires the commanding officer of staff enlisted personnel to possess authority to convene courts-martial, the commander should request the Judge Advocate General to obtain such authorization from the Secretary of the Navy.

**§ 700.723 Administration and discipline: Separate and detached command.**

Any flag or general officer in command, any officer authorized to convene general courts-martial, or the senior officer present may designate organizations which are separate or detached commands. Such officer shall state in writing that it is a separate or detached command and shall inform the Judge Advocate General of the action taken. If authority to convene courts-martial is desired for the commanding officer or officer in charge of such separate or detached command, the officer designating the organization as separate or detached shall request the Judge Advocate general to obtain authorization from the Secretary of the Navy.

## Subpart H—The Commanding Officer

COMMANDING OFFICERS IN GENERAL

**§ 700.801 Applicability.**

In addition to commanding officers, the provisions of this chapter shall apply, where pertinent, to aircraft commanders, officers in charge (including warrant officers and petty officers when so detailed) and those persons standing the command duty.

**§ 700.802 Responsibility.**

(a) The responsibility of the commanding officer for his or her command is absolute, except when, and to the extent, relieved therefrom by competent authority, or as provided otherwise in these regulations. The authority of the commanding officer is commensurate with his or her responsibility. While the commanding officer may, at his or her discretion, and when not contrary to law or regulations, delegate authority to subordinates for the

execution of details, such delegation of authority shall in no way relieve the commanding officer of his or her continued responsibility for the safety, well-being, and efficiency of the entire command.

(b) A commanding officer who departs from his or her orders or instructions, or takes official action which is not in accordance with such orders or instructions, does so upon his or her own responsibility and shall report immediately the circumstances to the officer from whom the prior orders or instructions were received. Of particular importance is the commanding officer's duty to take all necessary and appropriate action in self-defense of the command.

(c) The commanding officer shall be responsible for economy within his or her command. To this end the commanding officer shall require from his or her subordinates a rigid compliance with the regulations governing the receipt, accounting, and expenditure of public money and materials, and the implementation of improved management techniques and procedures.

(d) The commanding officer and his or her subordinates shall exercise leadership through personal example, moral responsibility, and judicious attention to the welfare of persons under their control or supervision. Such leadership shall be exercised in order to achieve a positive, dominant influence on the performance of persons in the Department of the Navy.

### § 700.804 Organization of commands.

All commands and other activities of the Department of the Navy shall be organized and administered in accordance with law, United States Navy Regulations, and the orders of competent authority. All orders and instructions of the commanding officer shall be in accordance therewith.

### § 700.809 Persons found under incriminating circumstances.

(a) The commanding officer shall keep under restraint or surveillance, as necessary, any person not in the armed services of the United States who is found under incriminating or irregular circumstances within the command, and shall immediately initiate an investigation.

(b) Should an investigation indicate that such person is not a fugitive from justice or has not committed or attempted to commit an offense, he shall be released at the earliest opportunity, except:

(1) If not a citizen of the United States, and the place of release is under the jurisdiction of the United States, the nearest federal immigration authorities shall be notified as to the time and place of release sufficiently in advance to permit them to take such steps as they deem appropriate.

(2) Such persons shall not be released in territory not under the jurisdiction of the United States without first obtaining the consent of the proper foreign authorities, except where the investigation shows that he entered the command from territory of the foreign state, or that he is a citizen or subject of that state.

(c) If the investigation indicates that such person has committed or attempted to commit an offense punishable under the authority of the commanding officer, the latter shall take such action as he deems necessary.

(d) If the investigation indicates that such a person is a fugitive from justice, or has committed or attempted to commit an offense which requires actions beyond the authority of the commanding officer, the latter shall, at the first opportunity, deliver such person, together with a statement of the circumstances, to the proper civil authorities.

(e) In all cases under paragraph (d) of this section, a report shall be made promptly to the Chief of Naval Operations or the Commandant of the Marine Corps, as appropriate.

### § 700.810 Rules for visits.

(a) Commanding officers are responsible for the control of visitors to their commands and shall comply with the relevant provisions of Department of the Navy concerning classified information and physical security.

(b) Commanding officers shall take such measures and impose such restrictions on visitors as are necessary to safeguard the classified material under

their jurisdiction. Arrangements for general visiting shall always be made with due regard for physical security and based on the assumption that foreign agents will be among the visitors.

(c) Commanding officers and others officially concerned shall exercise reasonable care to safeguard the persons and property of visitors to naval activities as well as taking those necessary precautions to safeguard the persons and property within the command.

### § 700.811 Dealers, tradesmen, and agents.

(a) In general, dealers or tradesmen or their agents shall not be admitted within a command, except as authorized by the commanding officer:

(1) To conduct public business;

(2) To transact specific private business with individuals at the request of the latter; or

(3) To furnish services and supplies which are necessary and are not otherwise, or are insufficiently, available to the personnel of the command.

(b) Personal commercial solicitation and the conduct of commercial transactions are governed by policies of the Department of Defense.

### § 700.812 Postal matters.

Commanding officers shall ensure that mail and postal funds are administered in accordance with instructions issued by the Postmaster General and approved for the naval service by the Chief of Naval Operations, and instructions issued by the Chief of Naval Operations, the Chief of Naval Personnel, or the Commandant of the Marine Corps, as appropriate; and that postal clerks or other persons authorized to handle mail perform their duties strictly in accordance with those instructions.

### § 700.815 Deaths.

The commanding officer, in the event of the death of any person within his or her command, shall ensure that the cause of death and the circumstances under which death occurred are established, that the provisions of the Manual of the Judge Advocate General are adhered to in documenting the cause and circumstances, and that the appropriate casualty report is submitted.

### § 700.816 The American National Red Cross.

(a) Pursuant to the request of the Secretary of the Navy, and subject to such instructions as the Secretary may issue, the American National Red Cross is authorized to conduct a program of welfare, including social, financial, medical and dental aid, for naval personnel; to assist in matters pertaining to prisoners of war; and to provide such other services as are appropriate functions for the Red Cross. The American National Red Cross is the only volunteer society authorized by the Government to render medical and dental aid to the armed forces of the United States. Other organizations desiring to render medical and dental aid may do so only through the Red Cross.

(b) Requests for Red Cross services shall be made to the Chief of Naval Personnel or the Commandant of the Marine Corps or, in the case of medical services, to the Commander, Naval Medical Command.

(c) Activities and personnel of the American National Red Cross in areas subject to naval jurisdiction shall conform to such administrative regulations as may be prescribed by appropriate naval authority.

(d) Red Cross personnel shall be considered to have the status of commissioned officers, subject to such restrictions as may be imposed by the Chief of Naval Personnel or the Commandant of the Marine Corps.

### § 700.819 Records.

The commanding officer shall require that records relative to personnel, material and operations, as required by current instructions, are maintained properly by those responsible therefor.

### § 700.822 Delivery of personnel to civil authorities and service of subpoena or other process.

(a) Commanding officers or other persons in authority shall not deliver any person in the naval service to civil authorities except as provided by the Manual of the Judge Advocate General.

(b) Commanding officers are authorized to permit the service of subpoenas or other process as provided by the Manual of the Judge Advocate General.

**§ 700.826 Physical security.**

(a) The commanding officer shall take appropriate action to safeguard personnel, to prevent unauthorized access to installations, equipment, materials and documents, and to safeguard them against acts of sabotage, damage, theft, or terrorism.

(b) The commanding officer shall take action to protect and maintain the security of the command against dangers from fire, windstorms, or other acts of nature.

**§ 700.827 Effectiveness for service.**

The commanding officer shall:

(a) Exert every effort to maintain the command in a state of maximum effectiveness for war or other service consistent with the degree of readiness as may be prescribed by proper authority. Effectiveness for service is directly related to the state of personnel and material readiness; and

(b) Make him or herself aware of the progress of any repairs, the status of spares, repair parts and other components, personnel readiness and other factors or conditions that could lessen the effectiveness of his or her command. When the effectiveness is lessened appreciably, that fact shall be reported to appropriate superiors.

**§ 700.828 Search by foreign authorities.**

(a) The commanding officer shall not permit a ship under his or her command to be searched on any pretense whatsoever by any person representing a foreign state, nor permit any of the personnel within the confines of his or her command to be removed from the command by such person, so long as he has the capacity to repel such act. If force should be exerted to compel submission, the commanding officer is to resist that force to the utmost of his or her power.

(b) Except as may be provided by international agreement, the commanding officer of a shore activity shall not permit his or her command to be searched by any person representing a foreign state, nor permit any of the personnel within the confines of his or her command to be removed from the command by such person, so long as he or she has the power to resist.

**§ 700.832 Environmental pollution.**

The commanding officer shall cooperate with Federal, state and local governmental authorities in the prevention, control and abatement of environmental pollution. If the requirements of any environmental law cannot be achieved because of operational considerations, insufficient resources or other reason, the commanding officer shall report to the immediate superior in the chain of command. The commanding officer shall be aware of existing policies regarding pollution control, and should recommend remedial measures when appropriate.

**§ 700.834 Care of ships, aircraft, vehicles and their equipment.**

The commanding officer shall cause such inspections and tests to be made and procedures carried out as are prescribed by competent authority, together with such others as he or she deems necessary, to ensure the proper preservation, repair, maintenance and operation of any ship, aircraft, vehicle, and their equipment assigned to his or her command.

**§ 700.835 Work, facilities, supplies, or services for other Government departments, State or local governments, foreign governments, private parties and morale, welfare, and recreational activities.**

(a) Work may be done for or on facilities, supplies, or services furnished to departments and agencies of the Federal and State governments, local governments, foreign governments, private parties, and morale, welfare, and recreational activities with the approval of a commanding officer provided:

(1) The cost does not exceed limitations the Secretary of the Navy may approve or specify; and

(2) In the case of private parties, it is in the interest of the government to do so and there is no issue of competition with private industry; and

(3) In the case of foreign governments, a disqualification of a government has not been issued for the benefits of this article.

(b) Work shall not be started nor facilities, supplies, or services furnished

morale, welfare, and recreational activities not classified as instrumentalities of the United States, or state or local governments or private parties, until funds to cover the estimated cost have been deposited with the commanding officer or unless otherwise provided by law.

(c) Work shall not be started, nor facilities, supplies, or services furnished other Federal Government departments and agencies, or expenses charged to non-appropriated funds of morale, welfare and recreational activities classified as instrumentalities of the United States, until reimbursable funding arrangements have been made.

(d) Work, facilities, supplies, or services furnished non-appropriated fund activities classified as instrumentalities of the United States in the Navy Comptroller Manual shall be funded in accordance with regulations of the Comptroller of the Navy.

(e) Supplies or services may be furnished to naval vessels and military aircraft of friendly foreign governments (unless otherwise provided by law or international treaty or agreement):

(1) On a reimbursable basis without an advancement of funds, when in the best interest of the United States:

(i) Routine port services (including pilotage, tugs, garbage removal, linehandling and utilities) in territorial waters or waters under United States control.

(ii) Routine airport services (including air traffic control, parking, servicing and use of runways).

(iii) Miscellaneous supplies (including fuel, provisions, spare parts, and general stores) but not ammunition. Supplies are subject to approval of the cognizant fleet or force commanders when provided overseas.

(iv) With approval of Chief of Naval Operations in each instance, overhauls, repairs, and alterations together with necessary equipment and its installation required in connection therewith, to vessels and military aircraft.

(2) Routine port and airport services may be furnished at no cost to the foreign government concerned where such services are provided by persons of the naval service without direct cost to the Department of the Navy.

(f) In cases of emergency involving possible loss of life or valuable property, work may be started or facilities furnished prior to authorization, or provision for payment, but in all such cases a detailed report of the facts and circumstances shall be made promptly to the Secretary of the Navy or the appropriate authority.

(g) Charges and accounting for any work, supplies, or services shall be as prescribed in the Navy Comptroller Manual.

COMMANDING OFFICERS AFLOAT

### § 700.840 Unauthorized persons on board.

The commanding officer shall satisfy him or herself that there is no unauthorized person on board before proceeding to sea or commencing a flight.

### § 700.841 Control of passengers.

(a) Control of passage in and protracted visits to aircraft and ships of the Navy by all persons, within or without the Department of the Navy, shall be exercised by the Chief of Naval Operations.

(b) Nothing in this section shall be interpreted as prohibiting the senior officer present from authorizing the passage in ships and aircraft of the Navy by such persons as he or she judges necessary in the public interest or in the interest of humanity. The senior officer present shall report the circumstances to the Chief of Naval Operations when he or she gives such authorization.

### § 700.842 Authority over passengers.

Except as otherwise provided in these regulations or in orders from competent authority, all passengers in a ship or aircraft of the naval service are subject to the authority of the commanding officer and shall conform to the internal regulations and routine of the ship or aircraft. The commanding officer of such ship or aircraft shall take no disciplinary action against a passenger not in the naval service, other than that authorized by law. The commanding officer may, when he or

she deems such an action to be necessary for the safety of the ship or aircraft or of any persons embarked, subject a passenger not in the naval service to such restraint as the circumstances require until such time as delivery to the proper authorities is possible. A report of the matter shall be made to an appropriate superior of the passenger.

**§ 700.844 Marriages on board.**

The commanding officer shall not perform a marriage ceremony on board his or her ship or aircraft. He or she shall not permit a marriage ceremony to be performed on board when the ship or aircraft is outside the territory of the United States, except:

(a) In accordance with local laws and the laws of the state, territory, or district in which the parties are domiciled, and

(b) In the presence of a diplomatic or consular official of the United States, who has consented to issue the certificates and make the returns required by the consular regulations.

**§ 700.845 Maintenance of logs.**

(a) A deck log and an engineering log shall be maintained by each ship in commission, and by such other ships and craft as may be designated by the Chief of Naval Operations.

(b) A compass record shall be maintained as an adjunct to the deck log. An engineer's bell book shall be maintained as an adjunct to the engineering log.

(c) The Chief of Naval Operations shall prescribe regulations governing the contents and preparation of the deck and engineering logs and adjunct records.

(d) In the case of a ship or craft equipped with automated data logging equipment, the records generated by such equipment satisfy the requirements of this section.

**§ 700.846 Status of logs.**

The deck log, the engineering log, the compass record, the bearing hooks, the engineer's bell book, and any records generated by automated data logging equipment shall each constitute an official record of the command.

**§ 700.847 Responsibility of a master of an in-service ship of the Military Sealift Command.**

(a) In an in-service ship of the Military Sealift Command, the master's responsibility is absolute, except when, and to the extent, relieved therefrom by competent authority. The authority of the master is commensurate with the master's responsibility. The master is responsible for the safety of the ship and all persons on board. He or she is responsible for the safe navigation and technical operation of the ship and has paramount authority over all persons on board. He or she is responsible for the preparation of the abandon ship bill and has exclusive authority to order the ship abandoned. The master may, using discretion, and when not contrary to law or regulation, delegate authority for operation of shipboard functions to competent subordinates. However, such delegation of authority shall in no way relieve the master of continued responsibility for the safety, well-being, and efficiency of the ship.

(b) All orders and instructions of the master shall be in accordance with appropriate laws of the United States, and all applicable orders and regulations of the Navy, Military Sealift Command, and the Office of Personnel Management. A master who departs from the orders or instructions of competent authority or takes official action contrary to such orders or instructions, shall report immediately the circumstances to the authority from whom the prior orders or instructions were received.

**§ 700.848 Relations with merchant seamen.**

When in foreign waters, the commanding officer, with the approval of the senior officer present, may receive on board as supernumeraries for rations and passage:

(a) Distressed seamen of the United States for passage to the United States, provided they bind themselves to be amenable in all respects to Navy Regulations.

(b) As prisoners, seamen from merchant vessels of the United States, provided that the witnesses necessary to substantiate the charges against them

are received, or adequate means adopted to ensure the presence of such witnesses on arrival of the prisoners at the place where they are to be delivered to the civil authorities.

**§ 700.855 Status of boats.**

(a) Boats shall be regarded in all matters concerning the rights, privileges and comity of nations as part of the ship or aircraft to which they belong.

(b) In ports where war, insurrection or armed conflict exists or threatens, the commanding officer shall:

(1) Require that boats away from the ship or aircraft have some appropriate and competent person in charge; and

(2) See that steps are taken to make their nationality evident at all times.

**§ 700.856 Pilotage.**

(a) The commanding officer shall:

(1) Pilot the ship under all ordinary circumstances, but he may employ pilots whenever, in his or her judgment such employment is prudent;

(2) Not call a pilot on board until the ship is ready to proceed;

(3) Not retain a pilot on board after the ship has reached her destination or a point where the pilot is no longer required;

(4) Give preference to licensed pilots; and

(5) Pay pilots no more than the local rates.

(b) A pilot is merely an adviser to the commanding officer. The presence on board of a pilot shall not relieve the commanding officer or any subordinate from his or her responsibility for the proper performance of the duties with which he or she may be charged concerning the navigation and handling of the ship. For an exception to the provisions of this paragraph, see ''Rules and Regulations Covering Navigation of the Panama Canal and Adjacent Waters,'' (35 CFR Chapter I, subchapter C) which directs that the pilot assigned to a vessel in those waters shall have control of the navigation and movement of the vessel. Also see the provisions of these regulations concerning the navigation of ships at a naval shipyard or station, or in entering or leaving drydock.

**§ 700.857 Safe navigation and regulations governing operation of ships and aircraft.**

(a) The commanding officer is responsible for the safe navigation of his or her ship or aircraft, except as prescribed otherwise in these regulations for ships at a naval shipyard or station, in drydock, or in the Panama Canal. During an armed conflict, an exercise simulating armed conflict, or an authorized law enforcement activity, competent authority may modify the use of lights or other safeguards against collision. Except in time of actual armed conflict, such modifications will be authorized only when ships or aircraft clearly will not be hazarded.

(b) Professional standards and regulations governing shiphandling, safe navigation, safe anchoring and related operational matters shall be promulgated by the Chief of Naval Operations.

(c) Professional standards and regulations governing the operation of naval aircraft and related matters shall be promulgated by the Chief of Naval Operations or the Commandant of the Marine Corps, as appropriate.

(d) The Commanding Officer is responsible for ensuring that weather and oceanic effects are considered in the effective and safe operation of his or her ship or aircraft.

**§ 700.859 Quarantine.**

(a) The commanding officer or aircraft commander of a ship or aircraft shall comply with all quarantine regulations and restrictions, United States or foreign, for the port or area within which the ship or aircraft is located.

(b) The commanding officer shall give all information required by authorized foreign officials, insofar as permitted by military security, and will meet the quarantine requirements promulgated by proper authority for United States or foreign ports. However, nothing in this section shall be interpreted as authorizing commanding officers to permit on board inspections by foreign officials, or to modify in any manner the provisions of § 700.828 of these regulations.

(c) The commanding officer shall allow no intercourse with a port or area or with other ships or aircraft

until after consultation with local health authorities when:

(1) Doubt exists as to the sanitary regulations or health conditions of the port or area;

(2) A quarantine condition exists aboard the ship or aircraft;

(3) Coming from a suspected port or area, or one actually under quarantine.

(d) No concealment shall be made of any circumstance that may subject a ship or aircraft of the Navy to quarantine.

(e) Should there appear at any time on board a ship or aircraft conditions which present a hazard of introduction of a communicable disease outside the ship or aircraft, the commanding officer or aircraft commander shall at once report the fact to the senior officer present, to other appropriate higher authorities and, if in port, to the health authorities having quarantine jurisdiction. The commanding officer or aircraft commander shall prevent all contracts likely to spread disease until pratique is received. The commanding officer of a ship in port shall hoist the appropriate signal.

### § 700.860 Customs and immigration inspections.

(a) The commanding officer or aircraft commander shall facilitate any proper examination which it may be the duty of a customs officer or immigration officer of the United States to make on board the ship or aircraft. The commanding officer or air craft commander shall not permit a foreign customs officer or an immigration officer to make any examination whatsoever, except as hereinafter provided, on board the ship, aircraft or boats under his or her command.

(b) When a ship or aircraft of the Navy or a public vessel manned by naval personnel and operating under the direction of the Department of the Navy is carrying cargo for private commercial account, such cargo shall be subject to the local customs regulations of the port, domestic or foreign, in which the ship or aircraft may be, and in all matters relating to such cargo, the procedure prescribed for private merchant vessels and aircraft shall be followed. Government-owned stores or cargo in such ship or aircraft not landed nor intended to be landed nor in any manner trafficked in, are, by the established precedent of international courtesy, exempt from customs duties, but a declaration of such stores or cargo, when required by local customs regulations, shall be made. Commanding officers shall prevent, as far as possible, disputes with the local authorities in such cases, but shall protect the ship or aircraft and the Government-owned stores and cargo from any search or seizure.

(c) Upon arrival from a foreign country, at the first port of entry in United States territory, the commanding officer, or the senior officer of ships or aircraft in company, shall notify the collector of the port. Each individual aboard shall, in accordance with customs regulations, submit a list of articles purchased or otherwise acquired by him abroad. Dutiable articles shall not be landed until the customs officer has completed his inspection.

(d) Commanding officers of naval vessels and aircraft transporting United States civilian and foreign military and civilian passengers shall satisfy themselves that the passenger clearance requirements of the Immigration and Naturalization Service are complied with upon arrival at points within the jurisdiction of the United States. Clearance for such passengers by an immigration officer is necessary upon arrival from foreign ports and at the completion of movements between any of the following: Continental United States (including Alaska and Hawaii), the Canal Zone, Puerto Rico, Virgin Islands, Guam, American Samoa, or other outlying places subject to United States jurisdiction. Commanding officers, prior to arriving, shall advise the cognizant naval or civilian port authority of the aforementioned passengers aboard and shall detain them for clearance as required by the Immigration and Naturalization Service.

(e) The provisions of this section shall not be construed to require delaying the movements of any ship or aircraft of the Navy in the performance of her assigned duty.

SPECIAL CIRCUMSTANCES/SHIPS IN NAVAL STATIONS AND SHIPYARDS

**§ 700.871 Responsibility for safety of ships and craft at a naval station or shipyard.**

(a) The commanding officer of a naval station or shipyard shall be responsible for the care and safety of all ships and craft at such station or shipyard not under a commanding officer or assigned to another authority, and for any damage that may be done by or to them. In addition, the commanding officer of a naval station or shipyard shall be responsible for the safe execution of work performed by that activity upon any ship located at the activity.

(b) It shall be the responsibility of the commanding officer of a ship in commission which is undergoing overhaul, or which is otherwise immobilized at a naval station or shipyard, to request such services as are necessary to ensure the safety of the ship. The commanding officer of the naval station or shipyard shall be responsible for providing requested services in a timely and adequate manner.

(c) When a ship or craft not under her own power is being moved by direction of the commanding officer of a naval station or shipyard, that officer shall be responsible for any damage that may result therefrom. The pilot or other person designated for the purpose shall be in direct charge of such movement, and all persons on board shall cooperate with and assist the pilot as necessary. Responsibility for such actions in a private shipyard will be assigned by contract to the contractor.

(d) When a ship operating under her own power is being drydocked, the commanding officer shall be fully responsible for the safety of his ship until the extremity of the ship first to enter the drydock reaches the dock sill and the ship is pointed fair for entering the drydock. The docking officer shall then take charge and complete the docking, remaining in charge until the ship has been properly landed, bilge blocks hauled, and the dock pumped down. In undocking, the docking officer shall assume charge when flooding the dock preparatory to undocking is started, and shall remain in charge until the extremity of the ship last to leave the dock clears the sill, and the ship is pointed fair for leaving the drydock, when the ship's commanding officer shall assume responsibility for the safety and control of the ship.

(e) When a naval ship is to be drydocked in a private shipyard under a contract being administered by a supervisor of shipbuilding, the responsibilities of the commanding officer are the same as in the case of drydocking in a naval shipyard. The responsibilities for the safety of the actual drydocking, normally assigned to the commanding officer of a naval shipyard through the docking officer, will be assigned by contract to the contractor. The supervisor of shipbuilding is responsible, however, for ensuring that the contractor facilities, methods, operations, and qualifications meet the standards of efficiency and safety prescribed by Navy directives.

(f) If the ship is elsewhere than at a naval station or shipyard, the relationship between the commanding officer and the supervisor of shipbuilding, or other appropriate official, shall be the same as that between the commanding officer and the commanding officer of a naval station or naval shipyard as specified in this article.

**§ 700.872 Ships and craft in drydock.**

(a) The commanding officer of a ship in drydock shall be responsible for effecting adequate closure, during such periods as they will be unattended, of all openings in the ship's bottom upon which no work is being undertaken by the docking activity. The commanding officer of the docking activity shall be responsible for the closing, at the end of working hours, of all valves and other openings in the ship's bottom upon which work is being undertaken by the docking activity, when such closing is practicable.

(b) Prior to undocking, the commanding officer of a ship shall report to the docking officer any material changes in the amount and location of weights on board which have been made by the ship's force while in dock, and shall ensure, and so report, that all sea valves and other openings in the ship's bottom are properly closed. The level of water in the dock shall not be

permitted to rise above the keel blocks prior to receipt of this report. The above valves and openings shall be tended during flooding of the dock.

(c) When a ship or craft, not in commission, is in a naval drydock, the provisions of this article shall apply, except that the commanding officer of the docking activity or his representative shall act in the capacity of the commanding officer of the ship or craft.

(d) When a naval ship or craft is in drydock in a private shipyard, responsibility for actions normally assigned by the commanding officer of the docking activity will be assigned by contract to the contractor.

### § 700.873 Inspection incident to commissioning of ships.

When a ship is to be commissioned, the authority designated to place such ship in commission shall, just prior to commissioning, cause an inspection to be made to determine the cleanliness and readiness of the ship to receive its crew and outfit. In the case of the delivery of a ship by a contractor, the above inspection shall precede acceptance of the ship. A copy of the report of this inspection shall be furnished the officer detailed to command the ship and to appropriate commands.

## SPECIAL CIRCUMSTANCES/PROSPECTIVE COMMANDING OFFICERS

### § 700.880 Duties of the prospective commanding officer of a ship.

(a) Except as may be prescribed by the Chief of Naval Operations, the prospective commanding officer of a ship not yet commissioned shall have no independent authority over the preparation of the ship for service by virtue of his assignment to such duty, until the ship is commissioned and placed under his or her command. The prospective commanding officer shall:

(1) Procure from the commander of the naval shipyard or the supervisor of shipbuilding the general arrangement plans of the ship, and all pertinent information relative to the general condition of the ship and the work being undertaken on the hull, machinery and equipment, upon reporting for duty;

(2) Inspect the ship as soon after reporting for duty as practicable, and frequently thereafter, in order to keep him or herself informed of the state of her preparation for service. If, during the course of these inspections he or she notes an unsafe or potentially unsafe condition, he or she shall report such fact to the commander of the naval shipyard or the supervisor of shipbuilding and to his or her superior for resolution;

(3) Keep him or herself informed as to the progress of the work being done, including tests of equipment, and make such recommendations to the commander of the naval shipyard or the supervisor of shipbuilding as he or her she deems appropriate;

(4) Ensure that requisitions are submitted for articles to outfit the ship which are not otherwise being provided;

(5) Prepare the organization of the ship;

(6) Train the nucleus crew to effectively and efficiently take charge of and operate the ship upon commissioning; and

(7) Make such reports as may be required by higher authority, and include therein a statement of any deficiency in material or personnel.

(b) If the prospective commanding officer does not consider the ship in proper condition to be commissioned at the time the commander of the naval shipyard or the supervisor of shipbuilding signifies his intention of transferring the ship to the prospective commanding officer, he or she shall report that conclusion with his reasons therefor, in writing, to the commander of the naval shipyard or the supervisor of shipbuilding and to the appropriate higher authority.

(c) If the ship is elsewhere than at a naval shipyard, the relationship between the prospective commanding officer and the supervisor of shipbuilding, or other appropriate official, shall be the same as that between the prospective commanding officer and the commander of a naval shipyard as specified in this article.

(d) The Chief of Naval Operations shall be responsible for providing the commanding officer or prospective commanding officer of a naval nuclear

powered ship with the authority and direction necessary to carry out his or her responsibilities.

## Subpart I—The Senior Officer Present

CONTENTS

### § 700.901 The senior officer present.

Unless some other officer has been so designated by competent authority, the ''senior officer present'' is the senior line officer of the Navy on active duty, eligible for command at sea, who is present and in command of any part of the Department of the Navy in the locality or within an area prescribed by competent authority, except where personnel of both the Navy and the Marine Corps are present on shore and the officer of the Marine Corps who is in command is senior to the senior line officer of the Navy. In such cases, the officer of the Marine Corps shall be the senior officer present on shore.

### § 700.902 Eligibility for command at sea.

All officers of the line of the Navy, including Naval Reserve, on active duty, except those designated for the performance of engineering, aeronautical engineering or special duties, and except those limited duty officers who are not authorized to perform all deck duties afloat, are eligible for command at sea.

### § 700.903 Authority and responsibility.

At all times and places not excluded in these regulations, or in orders from competent authority, the senior officer present shall assume command and direct the movements and efforts of all persons in the Department of the Navy present, when, in his or her judgment, the exercise of authority for the purpose of cooperation or otherwise is necessary. The senior officer present shall exercise this authority in a manner consistent with the operational command responsibility vested in the commanders of unified or specified commands.

### § 700.904 Authority of senior officer of the Marine Corps present.

The authority and responsibility of the senior officer present are also conferred upon the senior commanding officer of the Marine Corps present with respect to those units of the Marine Corps, including Navy personnel attached, which are in the locality and not under the authority of the senior officer present.

### § 700.922 Shore patrol.

(a) When liberty is granted to any considerable number of persons, except in an area that can absorb them without danger of disturbance or disorder, the senior officer present shall cause to be established, temporarily or permanently, in charge of an officer, a sufficient patrol of officers, petty officers, and noncommissioned officers to maintain order and suppress any unseemly conduct on the part of any person on liberty. The senior patrol officer shall communicate with the chief of police or other local officials and make such arrangements as may be practicable to aid the patrol in carrying out its duties properly. Such duties may include providing assistance to military personnel in relations with civil courts and police, arranging for release of service personnel from civil authorities to the parent command, and providing other services that favorably influence discipline and morale.

(b) A patrol shall not be landed in any foreign port without first obtaining the consent of the proper local officials. Tact must be used in requesting permission; and, unless it is given willingly and cordially, the patrol shall not be landed. If consent cannot be obtained, the size of liberty parties shall be held to such limits as may be necessary to render disturbances unlikely.

(c) Officers and enlisted personnel on patrol duty in a foreign country normally should not be armed. In the United States, officers and men may be armed as prescribed by the senior officer present.

(d) No officer or enlisted person who is a member of the shore patrol or beach guard, or is assigned in support thereof, shall partake of or indulge in any form of intoxicating beverage or other form of intoxicant while on duty,

on post, or at other times prescribed by the senior patrol officer. The senior patrol officer shall ensure that the provisions of this paragraph are strictly observed and shall report promptly in writing to the senior officer present all violations of these provisions that may come to his or her notice. All officers and enlisted personnel of the patrol shall report to the senior patrol officer all violations of the provisions of this paragraph on the part of those under them.

**§ 700.923 Precautions for health.**

The senior officer present shall take precautions to preserve the health of the persons under his or her authority. He or she shall obtain information regarding the healthfulness of the area and medical facilities available therein and shall adopt such measures as are required by the situation.

**§ 700.924 Medical or dental aid to persons not in the naval service.**

The senior officer present may require the officers of the Medical Corps and Dental Corps under his or her authority to render emergency professional aid to persons not in the naval service when such aid is necessary and demanded by the laws of humanity or the principles of international courtesy.

**§ 700.934 Exercise of power of consul.**

When upon the high seas or in any foreign port where there is no resident consul of the United States, the senior officer present afloat has the authority to exercise all powers of a consul in relation to mariners of the United States.

**§ 700.939 Granting of asylum and temporary refuge.**

(a) If an official of the Department of the Navy is requested to provide asylum or temporary refuge, the following procedures shall apply:

(1) On the high seas or in territories under exclusive United States jurisdiction (including territorial seas, the Commonwealth of Puerto Rico, territories under United States administration, and possessions):

(i) At his or her request, an applicant for asylum will be received on board any naval aircraft or waterborne craft, Navy or Marine Corps activity or station.

(ii) Under no circumstances shall the person seeking asylum be surrendered to foreign jurisdiction or control, unless at the personal direction of the Secretary of the Navy or higher authority. Persons seeking political asylum should be afforded every reasonable care and protection permitted by the circumstances.

(2) In territories under foreign jurisdiction (including foreign territorial seas, territories, and possessions):

(i) Temporary refuge shall be granted for humanitarian reasons on board a naval aircraft or waterborne craft, Navy or Marine Corps activity or station, only in extreme or exceptional circumstances wherein life or safety of a person is put in imminent danger, such as pursuit by a mob. When temporary refuge is granted, such protection shall be terminated only when directed by the Secretary of the Navy or higher authority.

(ii) A request by foreign authorities for return of custody of a person under the protection of temporary refuge will be reported to the CNO or Commandant of the Marine Corps. The requesting foreign authorities will be informed that the case has been referred to higher authorities for instructions.

(iii) Persons whose temporary refuge is terminated will be released to the protection of the authorities designated in the message authorizing release.

(iv) While temporary refuge can be granted in the circumstances set forth above, permanent asylum will not be granted.

(v) Foreign nationals who request assistance in forwarding requests for political asylum in the United States will not be received on board, but will be advised to apply in person at the nearest American Embassy or Consulate. If a foreign national is already on board, however, such person will not be surrendered to foreign jurisdiction or control unless at the personal direction of the Secretary of the Navy.

(3) The Chief of Naval Operations or Commandant of the Marine Corps, as appropriate, will be informed by the most expeditious means of all action

taken pursuant to paragraphs (a)(1)(i) and (a)(1)(ii) of this section, as well as the attendant circumstances. Telephone or voice communications will be used where possible, but must be confirmed as soon as possible with an immediate precedence message, information to the Secretary of State (for actions taken pursuant to paragraphs (a)(2)(i) and (a)(2)(v) of this section, also make the appropriate American Embassy or Consular Office an information addressee). If communication by telephone or voice is not possible, notification will be effected by an immediate precedence message, as described above. The Chief of Naval Operations or Commandant of the Marine Corps will cause the Secretary of the Navy and the Deputy Director for Operations of the National Military Command Center to be notified without delay.

(b) Personnel of the Department of the Navy shall neither directly nor indirectly invite persons to seek asylum or temporary refuge.

## Subpart J—Precedence, Authority and Command

AUTHORITY

### § 700.1020 Exercise of authority.

(a) All persons in the naval service on active service, and those on the retired list with pay, and transferred members of the Fleet Reserve and the Fleet Marine Corps Reserve, are at all times subject to naval authority. While on active service they may, if not on leave of absence except as noted below, on the sick list, taken into custody, under arrest, suspended from duty, in confinement or otherwise incapable of discharging their duties, exercise authority over all persons who are subordinated to them.

(b) A person in the naval service, although on leave, may exercise authority:

(1) When in a naval ship or aircraft and placed on duty by the commanding officer or aircraft commander.

(2) When in a ship or aircraft of the armed services of the United States, other than a naval ship or aircraft, as the commanding officer of naval personnel embarked, or when placed on duty by such officer.

(3) When senior officer at the scene of a riot or other emergency, or when placed on duty by such officer.

### § 700.1026 Authority of an officer who succeeds to command.

(a) An officer who succeeds to command due to incapacity, death, departure on leave, detachment without relief or absence due to orders from competent authority of the officer detailed to command, has the same authority and responsibility as the officer whom he or she succeeds.

(b) An officer who succeeds to command during the temporary absence of the commanding officer shall make no changes in the existing organization, and shall endeavor to have the routine and other affairs of the command carried on in the usual manner.

(c) When an officer temporarily succeeding to command signs official correspondence, the word ''Acting'' shall appear below his or her signature.

### § 700.1038 Authority of a sentry.

A sentry, within the limits stated in his or her orders, has authority over all persons on his or her post.

DETAIL TO DUTY

### § 700.1052 Orders to active service.

(a) No person who is on leave of absence or not on active service shall be ordered into active service or on duty without permission of the Commandant of the Marine Corps, or the Chief of Naval Personnel, as appropriate, except:

(1) In the case of a person on leave of absence, by the officer who granted the leave or a superior, or

(2) By the senior officer present on a foreign station.

(b) In the event that the senior officer present of a foreign station issues any orders as contemplated by this article, he or she shall report the facts, including the reasons for issuing such orders, to the Commandant of the Marine Corps or the Chief of Naval Personnel, without delay.

(c) Retired officers of the Navy and Marine Corps may be ordered to active service, with their consent, in time of

peace. In time of war or a national emergency, such retired officers may, at the discretion of the Secretary of the Navy, be ordered to active service.

### § 700.1053 Commander of a task force.

(a) A geographic fleet commander, and any other naval commander, may detail in command of a task force, or other task command, any eligible officer within his or her command whom he or she desires. All other officers ordered to the task force or the task command shall be considered subordinate to the designated commander.

(b) All orders issued under the authority of this article shall continue in effect after the death or disability of the officer issuing them until they are revoked by his or her successor in command or higher authority.

(c) The powers delegated to a commander by this article are not conferred on any other officer by virtue of the fact that he or she is the senior officer present.

[64 FR 56062, Oct. 15, 1999, as amended at 68 FR 2697, Jan. 21, 2003]

### § 700.1054 Command of a naval base.

The officer detailed to command a naval base shall be an officer of the line in the Navy, eligible for command at sea.

### § 700.1055 Command of a naval shipyard.

The officer detailed to command a naval shipyard shall be trained in the technical aspects of building and repair of ships and shall have had substantial previous experience in the technical and management phases of such work. Such officer may have been designated for engineering duty.

### § 700.1056 Command of a ship.

(a) The officer detailed to command a commissioned ship shall be an officer of the line in the Navy eligible for command at sea.

(b) The officer detailed to command an aircraft carrier, an aircraft tender, or a ship with a primary task of operating or supporting aircraft shall be an officer of the line in the navy, eligible for command at sea, designated as a naval aviator or naval flight officer.

### § 700.1057 Command of an air activity.

(a) The officer detailed to command a naval aviation school, a naval air station, or a naval air unit organized for flight tactical purposes shall be an officer of the line in the navy, designated as a naval aviator or naval flight officer, eligible for command at sea.

(b) For the purposes of Title 10 U.S.C. § 5942, a naval air training squadron is not considered to be a naval aviation school or a naval air unit organized for flight tactical purposes. The officer detailed to command a naval air training squadron or an air unit organized for administrative purposes shall be a line officer of the naval service, designated as a naval aviator or naval flight officer, eligible for command. If a naval air training squadron has been designated a multi-service training squadron, the officer detailed to command that squadron may be a line officer from any armed service designated as the equivalent of a naval aviator naval flight officer and otherwise eligible to command an aviation squadron or unit under that officer's pertinent service regulations.

(c) The officer detailed to command a naval air activity of a technical nature on shore may be an officer of the line in the navy not eligible for command at sea, but designated as a naval aviator or a naval flight officer or designated for aeronautical engineering duty.

(d) The officer detailed to command a Marine Corps air unit organized for flight tactical purpose shall be an officer of the Marine Corps, designated as a naval aviator or naval flight officer.

(e) Other than an air training squadron, an officer of the Navy shall not normally be detailed to command an aviation unit of the Marine Corps nor shall an officer of the Marine Corps normally be detailed to command an aviation unit of the Navy. Aircraft units of the Marine Corps may, however, be assigned to ships or to naval air activities in the same manner as aircraft units of the navy and, conversely, aircraft units of the navy may be so assigned to Marine Corps air activities. A group composed of aircraft units of the Navy and aircraft units of the Marine Corps may be commanded

either by an officer of the Navy or an officer of the Marine Corps.

### § 700.1058 Command of a submarine.

The officer detailed to command a submarine shall be an officer of the line in the Navy, eligible for command at sea and qualified for command of submarines.

### § 700.1059 Command of a staff corps activity.

Officers in a staff corps shall be detailed to command only such activities as are appropriate to their corps.

## Subpart K—General Regulations

STANDARDS OF CONDUCT

### § 700.1101 Demand for court-martial.

Except as otherwise provided in the Uniform Code of Military Justice, no person in the naval service may demand a court martial either on him or herself or on any other person in the naval service.

### § 700.1113 Endorsement of commercial product or process.

Except as necessary during contract administration to determine specification or other compliance, no person in the Department of the Navy, in his or her official capacity, shall endorse or express an opinion of approval or disapproval of any commercial product or process.

### § 700.1120 Personal privacy and rights of individuals regarding their personal records.

(a) Except as specifically provided in this section, maintenance of personal records of individuals, and the release of those records, shall be in accordance with the provisions of the Privacy Act and directives issued by the Secretary of the Navy.

(b) Except as specifically provided in this section, the release of departmental records to private parties shall be in accordance with the provisions of the Freedom of Information Act and directives issued by the Secretary of the Navy.

OFFICIAL RECORDS

### § 700.1121 Disclosure, publication and security of official information.

(a) No person in the Department of the Navy shall convey or disclose by oral or written communications, publication, graphic (including photographic) or other means, any classified information except as provided in directives governing the release of such information. Additionally, no person in the Department of the Navy shall communicate or otherwise deal with foreign entities, even on an unclassified basis, when this would commit the Department of the Navy to disclose classified military information except as may be required in that person's official duties and only after coordination with and approval by a release authority designated by competent authority.

(b) No person in the Department of the Navy shall convey or disclose by oral or written communication, publication or other means except as may be required by his or her official duties, any information concerning the Department of Defense or forces, or any person, thing, plan or measure pertaining thereto, where such information might be of possible assistance to a foreign power; nor shall any person in the Department of the Navy make any public speech or permit publication of an article written by or for that person which is prejudicial to the interests of the United States. The regulations concerned with the release of information to the public through any media will be as prescribed by the Secretary of the Navy.

(c) No person in the Department of the Navy shall disclose any information whatever, whether classified or unclassified, or whether obtained from official records or within the knowledge of the relator, which might aid or be of assistance in the prosecution or support of any claim against the United States. The prohibitions prescribed by the first sentence of this paragraph are not applicable to an officer or employee of the United States who is acting in the proper course of, and within the scope of, his or her official duties, provided that the disclosure of such information is otherwise authorized by stature, Executive Order

of the President or departmental regulation.

(d) Any person in the Department of the Navy receiving a request from the public for Department of the Navy records shall be governed by the provisions of the Freedom of Information Act and implementing directives issued by the Secretary of the Navy.

(e) Persons in the Department of the Navy desiring to submit manuscripts to commercial publishers on professional, political or international subjects shall comply with regulations promulgated by the Secretary of the Navy.

(f) No persons in the naval service on active duty or civilian employee of the Department of the Navy shall act as correspondent of a news service or periodical, or as a television or radio news commentator or analyst, unless assigned to such duty in connection with the public affairs activities of the Department of the Navy, or authorized by the Secretary of the Navy. Except as authorized by the Secretary of the Navy, no person assigned to duty in connection with public affairs activities of the Department of the Navy shall receive any compensation for acting as such correspondent, commentator or analyst.

### § 700.1126 Correction of naval records.

(a) Any military record in the Department of the Navy may be corrected by the Secretary of the Navy, acting through the Board for Correction of Naval Records, when the Secretary considers that such action should be taken in order to correct an error or to remove an injustice.

(b) Applications for corrections under this article may be made only after exhaustion of all other administrative remedies afforded by law or regulation.

(c) Applications for such corrections should be submitted to the Secretary of the Navy (Board for Correction of Naval Records) in accordance with procedural regulations established by the Secretary of the Navy and approved by the Secretary of Defense.

### § 700.1127 Control of official records.

(a) No person, without proper authority, shall withdraw official records or correspondence from the files, or destroy them, or withhold them from those persons authorized to have access to them.

(b) Except as specifically provided in this section, maintenance of personal records of individuals, and the release of those records, shall be in accordance with the provisions of the Privacy Act and directives issued by the Secretary of the Navy.

(c) Except as specifically provided in this section, the release of departmental records to private parties shall be in accordance with the provisions of the Freedom of Information Act and directives issued by the Secretary of the Navy.

### § 700.1128 Official records in civil courts.

(a) Department of the Navy personnel shall not provide official information, testimony, or documents, submit to interview, or permit a view or visit, for litigation purposes, without special written authorization.

(b) Department of the Navy personnel shall not provide, with or without compensation, opinion or expert testimony concerning official Department of Defense information, subjects, personnel or activities, except on behalf of the United States or a party represented by the Department of Justice, or with special written authorization.

## DUTIES OF INDIVIDUALS

### § 700.1138 Responsibilities concerning marijuana, narcotics, and other controlled substances.

(a) All personnel shall endeavor to prevent and eliminate the unauthorized use of marijuana, narcotics and other controlled substances within the naval service.

(b) The wrongful possession, use, introduction, manufacture, distribution and possession, or introduction with intent to distribute, of a controlled substance by persons in the naval service are offenses under Article 112a, Uniform Code of Military Justice. Except for authorized medicinal or other authorized purposes, the possession, use, introduction, sale, or other transfer of marijuana, narcotics or other controlled substances on board any ship or aircraft of the Department of the Navy or within any naval base, station or

other place under the jurisdiction of the Department of the Navy by all persons is prohibited.

(c) The term ''controlled substance'' means: a drug or other substance included in Schedule I, II, III, IV, or V established by section 202 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (84 Stat. 1236), as updated and republished under the provisions of that Act (21 U.S.C. 812).

### § 700.1139 Rules for preventing collisions, afloat and in the air.

(a) All persons in the naval service responsible for the operation of naval ships, craft and aircraft shall diligently observe the International Rules for Preventing Collisions at Sea (commonly called the COLREGS) (33 CFR chapter I), Inland Navigation Rules (33 CFR chapter I), domestic and international air traffic regulations (14 CFR chapter I), and such other rules and regulations as may be established by the Secretary of Transportation or other competent authority for regulating traffic and preventing collisions on the high seas, in inland waters or in the air, where such laws, rules and regulations are applicable to naval ships and aircraft. In those situations where such law, rule or regulation is not applicable to naval ships, craft or aircraft, they shall be operated with due regard for the safety of others.

(b) Any significant infraction of the laws, rules and regulations governing traffic or designed to prevent collisions on the high seas, in inland waters, or in the air which may be observed by persons in the naval service shall be promptly reported to their superiors, including the Chief of Naval Operations or Commandant of the Marine Corps when appropriate.

(c) Reports need not be made under this article if the facts are otherwise reported in accordance with other directives, including duly authorized safety programs.

## RIGHTS AND RESTRICTIONS

### § 700.1162 Alcoholic beverages.

(a) Except as may be authorized by the Secretary of the Navy, the introduction, possession or use of alcoholic beverages on board any ship, craft, aircraft, or in any vehicle of the Department of the Navy is prohibited. The transportation of alcoholic beverages for personal use ashore is authorized, subject to the discretion of the officer in command or officer in charge, or higher authority, when the beverages are delivered to the custody of the officer in command or officer in charge of the ship, craft, or aircraft in sealed packages, securely packed, properly marked and in compliance with customs laws and regulations, and stored in securely locked compartments, and the transportation can be performed without undue interference with the work or duties of the ship, craft, or aircraft. Whenever an alcoholic beverage is brought on board any ship, craft, or aircraft for transportation for personal use ashore, the person who brings it on board shall at that time file with the officer in command or officer in charge of the ship, craft or aircraft, a statement of the quantity and kind of alcoholic beverage brought on board, together with a certification that its importation will be in compliance with customs and internal revenue laws and regulations and applicable State or local laws at the place of debarkation.

(b) The introduction, possession and use of alcoholic beverages for personal consumption or sale is authorized within naval activities and other places ashore under naval jurisdiction to the extent and in such manner as the Secretary of the Navy may prescribe.

### § 700.1167 Supremacist activity.

No person in the naval service shall participate in any organization that espouses supremacist causes; attempts to create illegal discrimination based on race, creed, color, sex, religion, or national origin; advocates the use of force or violence against the Government of the United States or the Government of any state, territory, district, or possession thereof, or the Government of any subdivision therein; or otherwise engages in efforts to deprive individuals of their civil rights. The term ''participate'', as used in this article, includes acts or conduct, performed alone or in concert with another, such as demonstrating, rallying, fundraising, recruiting, training, or organizing or leading such organizations.

The term ''participate'' also includes engaging in any other activities in relation to such organizations or in furtherance of the objectives of such organizations when such activities are detrimental to good order, discipline, or mission accomplishment.

# PART 701—AVAILABILITY OF DEPARTMENT OF THE NAVY RECORDS AND PUBLICATION OF DEPARTMENT OF THE NAVY DOCUMENTS AFFECTING THE PUBLIC

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AUTHORITY: 5 U.S.C. 552.

SOURCE: 64 FR 49850, Sept. 14, 1999, unless otherwise noted.

## Subpart A—Department of the Navy Freedom of Information Act (FOIA) Program

### § 701.1 Purpose.

Subparts A, B, C, and D of this part issue policies and procedures for implementing the Freedom of Information Act (5 U.S.C. 552), and Department of Defense Directives 5400.7 and 5400.7–R series[1] ,Department of Defense Freedom of Information Act Program, (See 32 CFR part 286) and promote uniformity in the Department of the Navy Freedom of Information Act (FOIA) Program.

### § 701.2 Navy FOIA website/FOIA handbook.

(a) The Navy FOIA website (*http://www.ogc.secnav.hq.navy.mil/foia/index.html*) is an excellent resource for requesters and FOIA coordinators. It provides connectivity to the Navy's official website, to other FOIA and non/FOIA websites, and to the Navy's electronic reading rooms.

(b) FOIA requesters are encouraged to visit the Navy FOIA website prior to filing a request. It features a FOIA Handbook which provides: guidance on how and where to submit requests; what's releasable/what's not; addresses for frequently requested information; time limits and addresses for filing appeals, etc. FOIA requesters may also use the electronic FOIA request form on the website to seek access to records originated by the Secretary of the Navy (SECNAV) or the Chief of Naval Operations (CNO).

### § 701.3 Applicability.

(a) Subparts A, B, C, and D of this part apply throughout the Department of the Navy (DON) and take precedence over other DON instructions, which may serve to supplement it [*i.e.*, Public Affairs Regulations, Security Classification Regulations, Navy Regulations, Marine Corps Orders, etc.]. Further, issuance of supplementary instructions by DON activities, deemed essential to the accommodation of perceived requirements peculiar to those activities, may not conflict.

(b) The FOIA applies to ''records'' maintained by ''agencies'' within the Executive Branch of the Federal government, including the Executive Office of the President and independent regulatory agencies. It states that ''any person'' (U.S. citizen; foreigner, whether living inside or outside the United States; partnerships; corporations; associations; and foreign and domestic governments) has the right enforceable by law, to access Federal agency records, except to the extent that such records (or portions thereof) are protected from disclosure by one or more of the nine FOIA exemptions or one of three special law enforcement exclusions.

(c) Neither Federal agencies nor fugitives from justice may use the FOIA to access agency records.

(d) The Department of Defense (DoD) FOIA directive states that the FOIA programs of the U.S. Atlantic Command and the U.S. Pacific Command

[1] Copies may be obtained if needed from the Navy FOIA Website at *http://www.ogc.secnav.hq.navy.mil/foia/index.html*

fall under the jurisdiction of the Department of Defense and not the Department of the Navy. This policy represents an exception to the policies directed under DoD Directive 5100.3, ''Support of the Headquarters of Unified, Specified, and Subordinate Commands.''

**§ 701.4 Responsibility and authority.**

(a) The Head, DON PA/FOIA Policy Branch [CNO (N09B30)] has been delegated the responsibility for managing the DON's FOIA program, which includes setting FOIA policy and administering, supervising, and overseeing the execution of the 5 U.S.C. 552 and Department of Defense Directives 5400.7 and 5400.7-R series, Department of Defense Freedom of Information Act Program (see 32 CFR part 286).

(1) As principal DON FOIA policy official, CNO (N09B30) issues SECNAV Instruction 5720.42; oversees the administration of the DON FOIA program; issues and disseminates FOIA policy; oversees the Navy FOIA website; represents the DON at all meetings, symposiums, and conferences that address FOIA matters; writes the Navy's FOIA Handbook; serves on FOIA boards and committees; serves as principal policy advisor and oversight official on all FOIA matters; prepares the DON Annual FOIA Report for submission to the Attorney General; reviews all FOIA appeals to determine trends that impact on the DON; reviews all FOIA litigation matters involving the DON and apprises the Director, Freedom of Information and Security Review, DoD of same; responds to depositions and litigation regarding DON FOIA policy Secretary of the Navy Instruction 5820.8A, Release of Information for Litigation Purposes and Testimony by DON Personnel; reviews/analyzes all proposed FOIA legislation to determine its impact on the DON; develops a Navy-wide FOIA training program and serves as training oversight manager; conducts staff assistance visits/reviews within the DON to ensure compliance with 5 U.S.C. 552 and this part; reviews all SECNAV and Operations Navy instructions/forms that address FOIA; and oversees the processing of FOIA requests received by SECNAV and Chief of Naval Operations (CNO), to ensure responses are complete, timely, and accurate. Additionally, N09B30 works closely with other DoD and DON officials to ensure they are aware of highly visible and/or sensitive FOIA requests being processed by the DON.

(2) SECNAV has delegated Initial Denial Authority (IDA) to N09B30 for requests at the Secretariat and OPNAV level.

(b) The Commandant of the Marine Corps is delegated responsibility for administering and supervising the execution of this instruction within the Marine Corps. To accomplish this task, the Director of Administrative Resource Management (Code ARAD) serves as the FOIA Coordinator for Headquarters, U.S. Marine Corps, and assists CNO (N09B30) in promoting the Department of the Navy FOIA Program by issuing a Marine Corps FOIA Handbook; utilizing the Marine Corps FOIA website to disseminate FOIA information; consolidating its activities Annual FOIA Reports and submitting it to CNO (N09B30); maintaining a current list of Marine Corps FOIA coordinators, etc.

(c) The DON Chief Information Officer (DONCIO) is responsible for preparing and making publicly available upon request an index of all DON major information systems and a description of major information and record locator systems maintained by the Department of the Navy as required by 5 U.S.C. 552 and DoD 5400.7–R, ''DoD Freedom of Information Act Program.''

(d) FOIA coordinators will:

(1) Implement and administer a local FOIA program under this instruction; serve as principal point of contact on FOIA matters; issue a command/activity instruction that implements SECNAVINST 5740.42F by reference and highlights only those areas unique to the command/activity (*i.e.*, designate the command/activity's FOIA Coordinator and IDA; address internal FOIA processing procedures; and address command/activity level FOIA reporting requirements); receive and track FOIA requests to ensure responses are made in compliance with 5 U.S.C. 552 and DoD Directives 5400.7 and 5400.7–R and this part; provide general awareness training to command/activity personnel on the provisions of

5 U.S.C. 552 and this instruction; collect and compile FOIA statistics and submit a consolidated Annual FOIA Report to Echelon 2 FOIA coordinator for consolidation; provide guidance on how to process FOIA requests; and provide guidance on the scope of FOIA exemptions.

(2) Additionally, CMC (ARAD) and Echelon 2 FOIA coordinators will:

(i) Ensure that reading room materials are placed in the activity's electronic reading room and that the activity's website is linked to the Navy FOIA website and the activity's reading room is linked to the Navy's FOIA reading room lobby. Documents placed in the reading room shall also be indexed as a Government Information Locator Service (GILS) record, as this will serve as an index of available records.

(ii) Review proposed legislation and policy recommendations that impact the FOIA and provide comments to CNO (N09B30).

(iii) Review SECNAVINST 5720.42F and provide recommended changes/comments to CNO (N09B30).

(iv) Routinely conduct random staff assistance visits/reviews/self-evaluations within the command and lower echelon commands to ensure compliance with FOIA.

(v) Collect and compile command and feeder reports for the Annual FOIA Report and provide a consolidated report to CNO (N09B30).

(vi) Maintain a listing of their subordinate activities' FOIA coordinators to include full name, address, and telephone (office and fax) and place on their website.

NOTE TO PARAGRAPH (d)(2)(vi): Do not place names of FOIA coordinators who are overseas, routinely deployable or in sensitive units on the website. Instead just list ''FOIA Coordinator''

(vii) Notify CNO (N09B30) of any change of name, address, office code and zip code, telephone and facsimile number, and/or e-mail address of Echelon 2 FOIA Coordinators.

(viii) Conduct overview training to ensure all personnel are knowledgeable of the FOIA and its requirements. See § 701.12.

(ix) Work closely with the activity webmaster to ensure that information placed on the activity's website does not violate references in paragraphs (a), (c) and (f).

(e) *Initial Denial Authorities (IDAs)*. The following officials are delegated to serve as Initial Denial Authorities, on behalf of SECNAV (see § 701.30 for definition):

(1) Under Secretary of the Navy; Deputy Under Secretary of the Navy; Assistant Secretaries of the Navy (ASNs) and their principal deputy assistants; Assistant for Administration (SECNAV); Director, Administrative Division (SECNAV); Special Assistant for Legal and Legislative Affairs (SECNAV); Director, Office of Program Appraisal (SECNAV); DONCIO; Director, Small and Disadvantaged Business Utilization (SECNAV); Chief of Information (CHINFO); Director, Navy International Programs Office; Chief of Legislative Affairs; CNO; Vice CNO; Director, Naval Nuclear Propulsion Program (NOON); Director, Navy Staff (N09B); Head, DON PA/FOIA Policy Branch (N09B30); Director of Naval Intelligence (N2); Director of Space, Information Warfare, Command and Control (N6); Director of Navy Test & Evaluation & Technology Requirements (N091); Surgeon General of the Navy (N093); Director of Naval Reserve (N095); Oceanographer of the Navy (N096); Director of Religious Ministries/Chief of Chaplains of the Navy (N097); all Deputy Chiefs of Naval Operations; Chief of Naval Personnel; Director, Strategic Systems Programs; Chief, Bureau of Medicine and Surgery; Director, Office of Naval Intelligence; Naval Inspector General; Auditor General of the Navy; Commanders of the Naval Systems Commands; Chief of Naval Education and Training; Commander, Naval Reserve Force; Chief of Naval Research; Director, Naval Criminal Investigative Service; Deputy Commander, Naval Legal Service Command; Commander, Navy Personnel Command; Director, Naval Center of Cost Analysis; Commander, Naval Meteorology and Oceanography Command; Director, Naval Historical Center; heads of DON staff offices, boards, and councils; Program Executive Officers; and all general officers.

(2) Within the Marine Corps: CMC and his Assistant, Chief of Staff, Deputy Chiefs of Staff; Director, Personnel Management Division; Fiscal Director of the Marine Corps; Counsel for the Commandant; Director of Intelligence; Director, Command, Communications and Computer Systems Division; Legislative Assistant to the Commandant; Director, Judge Advocate Division; Inspector General of the Marine Corps; Director, Manpower, Plans, and Policy Division; Head, Freedom of Information and Privacy Acts Section, HQMC; Director of Public Affairs; Director of Marine Corps History and Museums; Director, Personnel Procurement Division; Director, Morale Support Division; Director, Human Resources Division; Director of Headquarters Support; commanding generals; directors, Marine Corps districts; commanding officers, not in the administrative chain of command of a commanding general or district director. For each official listed above, the deputy or principal assistant is also authorized denial authority.

(3) JAG and his Deputy and the DON General Counsel (DONGC) and his deputies are excluded from this grant of authorization, since SECNAV has delegated them to serve as his appellate authorities. However, they are authorized to designate IDA responsibilities to other senior officers/ officials within JAG and DONGC. DONGC has delegated IDA responsibilities to the Assistant General Counsels and the Associate General Counsel (Litigation).

(4) For the shore establishment and operating forces: All officers authorized by Article 22, Uniform Code of Military Justice (UCMJ) or designated in section 0120, Manual of the Judge Advocate General (JAGINST 5800.7C) to convene general courts-martial.

(5) IDAs must balance their decision to centralize denials for the purpose of promoting uniform decisions against decentralizing denials to respond to requests within the FOIA time limits. Accordingly, the IDAs listed in paragraphs (e)(1) through (4) are authorized to delegate initial denial authority to subordinate activities for the purpose of streamlining FOIA processing. They may also delegate authority to a specific staff member, assistant, or individuals acting during their absence if this serves the purpose of streamlining and/or complying with the time limits of FOIA.

NOTE TO PARAGRAPH (e)(5): Such delegations shall be limited to comply with DoD Directive 5400.7, ''DoD Freedom of Information Act Program''.

(6) Delegations of IDA authority should be reflected in the activity's supplementing FOIA instruction or by letter, with a copy to CNO (N09B30) or CMC (ARAD), as appropriate.

(f) Release authorities. Release authorities are authorized to grant requests on behalf of the Office of the Secretary of the Navy for agency records under their possession and control for which no FOIA exemption applies; to respond to requesters concerning refinement of their requests; to provide fee estimates; and to offer appeal rights for adequacy of search or fee estimates to the requester.

(g) Appellate authorities are addressed in §701.12.

### §701.5 Policy.

(a) *Compliance with the FOIA.* DON policy is to comply with the FOIA as set forth in the Department of Defense's FOIA Directives 5400.7 and 5400.7–R, and this instruction in this part in both letter and spirit; conduct its activities in an open manner consistent with the need for security and adherence to other requirements of law and regulation; and provide the public with the maximum amount of accurate and timely information concerning its activities.

(b) *Prompt action.* DON activities shall act promptly on requests when a member of the public complies with the procedures established in the instruction in this part (*i.e.*, files a ''perfected request'') and the request is received by the official designated to respond. See §701.11 for minimum requirements of the FOIA.

(c) *Provide assistance.* DON activities shall assist requesters in understanding and complying with the procedures established by the instruction in this part, ensuring that procedural matters do not unnecessarily impede a requester from obtaining DON records promptly.

(d) *Grant access.* (1) DON activities shall grant access to agency records when a member of the public complies with the provisions of the instruction in this part and there is no FOIA exemption available to withhold the requested information (see subpart D of this part).

(2) In those instances where the requester has not cited FOIA, but the records are determined to be releasable in their entirety, the request shall be honored without requiring the requester to invoke FOIA.

(e) *Create a record.* (1) A record must exist and be in the possession and control of the DON at the time of the request to be considered subject to the instruction in this part and the FOIA. Accordingly, DON activities need not process requests for records which are not in existence at the time the request is received. In other words, requesters may not have a ''standing FOIA request'' for release of future records.

(2) There is no obligation to create, compile, or obtain a record to satisfy a FOIA request. However, this is not to be confused with honoring form or format requests (see § 701.8). A DON activity, however, may compile a new record when so doing would result in a more useful response to the requester, or be less burdensome to the agency than providing existing records, and the requester does not object. Cost of creating or compiling such a record may not be charged to the requester unless the fee for creating the record is equal to or less than the fee which would be charged for providing the existing record. Fee assessments shall be in accordance with subpart C of this part.

(3) With respect to electronic data, the issue of whether records are actually created or merely extracted from an existing database is not always readily apparent. Consequently, when responding to FOIA requests for electronic data where creation of a record, programming, or particular format are questionable, DON activities should apply a standard of reasonableness. In other words, if the capability exists to respond to the request, and the effort would be a business as usual approach, then the request should be processed. However, the request need not be processed when the capability to respond does not exist without a significant expenditure of resources, thus not being a normal business as usual approach. As used in this sense, a significant interference with the operation of the DON activity's automated information system would not be a business as usual approach.

(f) *Disclosures*—(1) *Discretionary Disclosures.* DON activities shall make discretionary disclosures whenever disclosure would not foreseeably harm an interest protected by a FOIA exemption. A discretionary disclosure is normally not appropriate for records clearly exempt under exemptions (b)(1), (b)(3), (b)(4), (b)(6), (b)(7)(C) and (b)(7)(F). Exemptions (b)(2), (b)(5), and (b)(7)(A), (b)(7)(B), (b)(7)(D) and (b)(7)(E) are discretionary in nature and DON activities are encouraged to exercise discretion whenever possible. Exemptions (b)(4), (b)(6), and (b)(7)(C) cannot be claimed when the requester is the ''submitter'' of the information. While discretionary disclosures to FOIA requesters constitute a waiver of the FOIA exemption that may otherwise apply, this policy does not create any legally enforceable right.

(2) *Public domain.* Non-exempt records released under FOIA to a member of the public are considered to be in the public domain. Accordingly, such records may also be made available in reading rooms, in paper form, as well as electronically to facilitate public access.

(3) *Limited disclosures.* Disclosure of records to a properly constituted advisory committee, to Congress, or to other Federal agencies does not waive a FOIA exemption.

(4) *Unauthorized disclosures.* Exempt records disclosed without authorization by the appropriate DON official do not lose their exempt status.

(5) *Official versus personal disclosures.* While authority may exist to disclose records to individuals in their official capacity, the provisions of the instruction in this part apply if the same individual seeks the records in a private or personal capacity.

(6) *Distributing information.* DON activities are encouraged to enhance access to information by distributing information on their own initiative through the use of electronic information systems, such as the Government Information Locator Service (GILS).

(g) *Honor form or format requests.* DON activities shall provide the record in any form or format requested by the requester, if the record is readily reproducible in that form or format. DON activities shall make reasonable efforts to maintain their records in forms or formats that are reproducible. In responding to requests for records, DON activities shall make reasonable efforts to search for records in electronic form or format, except when such efforts would significantly interfere with the operation of the DON activities' automated information system. Such determinations shall be made on a case-by-case basis.

(h) *Authenticate documents.* Records provided under the instruction in this part shall be authenticated with an appropriate seal, whenever necessary, to fulfill an official Government or other legal function. This service, however, is in addition to that required under the FOIA and is not included in the FOIA fee schedule. DON activities may charge for the service at a rate of $5.20 for each authentication.

### § 701.6 Reading rooms.

The FOIA requires that (a)(2) records created on or after 1 November 1996, be made available electronically (starting 1 November 1997) as well as in hard copy, in the FOIA reading room for inspection and copying, unless such records are published and copies are offered for sale. DoD 5400.7–R, ''DoD Freedom of Information Act Program,'' requires that each DoD Component provide an appropriate facility or facilities where the public may inspect and copy or have copied the records held in their reading rooms. To comply, the Navy FOIA website includes links that assist members of the public in locating Navy libraries, online documents, and Navy electronic reading rooms maintained by SECNAV/CNO, CMC, OGC, JAG and Echelon 2 commands. Although each of these activities will maintain their own document collections on their own servers, the Navy FOIA website provides a common gateway for all Navy online resources. To this end, DON activities shall:

(a) Establish their reading rooms and link them to the Navy FOIA Reading Room Lobby which is found on the Navy FOIA website.

(b) Ensure that responsive documents held by their subordinate activities are also placed in the reading room.

NOTE TO PARAGRAPH (b): SECNAV/ASN and OPNAV offices shall ensure that responsive documents are provided to CNO (N09B30) for placement in the reading room.

(c) Ensure that documents placed in a reading room are properly excised to preclude the release of personal or contractor-submitted information prior to being made available to the public. In every case, justification for the deletion must be fully explained in writing, and the extent of such deletion shall be indicated on the record which is made publicly available, unless such indication would harm an interest protected by an exemption under which the deletion was made. If technically feasible, the extent of the deletion in electronic records or any other form of record shall be indicated at the place in the record where the deletion was made. However, a DON activity may publish in the FEDERAL REGISTER a description of the basis upon which it will delete identifying details of particular types of records to avoid clearly unwarranted invasions of privacy, or competitive harm to business submitters. In appropriate cases, the DON activity may refer to this description rather than write a separate justification for each deletion. DON activities may remove (a)(2)(D) records from their electronic reading room when the appropriate officials determine that access is no longer necessary.

(d) Should a requester submit a FOIA request for FOIA-processed (a)(2) records, and insist that the request be processed, DON activities shall process the FOIA request. However, DON activities have no obligation to process a FOIA request for 5 U.S.C. 552(a)(2)(A), (B), and (C) [5 U.S.C. 552] records because these records are required to be made public and not FOIA-processed under paragraph (a)(3) of the FOIA.

(e) DON activities may share reading room facilities if the public is not unduly inconvenienced. When appropriate, the cost of copying may be imposed on the person requesting the material in accordance with FOIA fee guidelines (see subpart C of this part).

(f) DON activities shall maintain an index of all available documents. A general index of FOIA-processed (a)(2) records shall be made available to the public, both in hard copy and electronically by 31 December 1999. To comply with this requirement, DON activities shall establish a GILS record for each document it places in a reading room. No (a)(2) materials issued or adopted after 4 July 1967, that are not indexed and either made available or published may be relied upon, used or cited as precedent against any individual unless such individual has actual and timely notice of the contents of such materials. Such materials issued or adopted before 4 July 1967, need not be indexed, but must be made available upon request if not exempted under the instruction in this part.

(g) An index and copies of unclassified Navy instructions, forms, and addresses for DON activities (*i.e.*, the Standard Navy Distribution List (SNDL) are located on the Navy Electronics Directives System (*http://neds.nebt.daps.mil/*).

(h) DON material published in the FEDERAL REGISTER, such as material required to be published by Section 552(a)(1) of the FOIA, shall be made available by JAG in their FOIA reading room and electronically to the public.

(i) Although not required to be made available in response to FOIA requests or made available in FOIA Reading Rooms, ''(a)(1)'' materials may, when feasible, be made available to the public in FOIA reading rooms for inspection and copying, and by electronic means. Examples of ''(a)(1)'' materials are: descriptions of an agency's central and field organization, and to the extent they affect the public, rules of procedures, descriptions of forms available, instruction as to the scope and contents of papers, reports, or examinations, and any amendment, revision, or report of the aforementioned.

**§ 701.7 Relationship between the FOIA and PA.**

Not all requesters are knowledgeable of the appropriate statutory authority to cite when requesting records. In some instances, they may cite neither Act, but will imply one or both Acts. For these reasons, the following guidelines are provided to ensure requesters receive the greatest amount of access rights under both Acts:

(a) If the record is required to be released under the FOIA, the PA does not bar its disclosure. Unlike the FOIA, the PA applies only to U.S. citizens and aliens admitted for permanent residence. Subpart F of this part implements the DON's Privacy Act Program.

(b) Requesters who seek records about themselves contained in a PA system of records and who cite or imply only the PA, will have their requests processed under the provisions of both the PA and the FOIA. If the PA system of records is exempt from the provisions of 5 U.S.C. 552a(d)(1) and the records, or any portion thereof are exempt under the FOIA, the requester shall be so advised with the appropriate PA and FOIA exemption. Appeals shall be processed under both Acts.

(c) Requesters who seek records about themselves that are not contained in a PA system of records and who cite or imply the PA will have their requests processed under the provisions of the FOIA, since the PA does not apply to these records. Appeals shall be processed under the FOIA.

(d) Requesters who seek records about themselves that are contained in a PA system of records and who cite or imply the FOIA or both Acts will have their requests processed under the provisions of both the PA and the FOIA. If the PA system of records is exempt from the provisions of 5 U.S.C. 552a(d)(1), and the records, or any portion thereof are exempt under the FOIA, the requester shall be so advised with the appropriate PA and FOIA exemption. Appeals shall be processed under both Acts.

(e) Requesters who seek access to agency records that are not part of a PA system of records, and who cite or imply the PA and FOIA, will have their requests processed under FOIA, since

the PA does not apply to these records. Appeals shall be processed under the FOIA.

(f) Requesters who seek access to agency records and who cite or imply the FOIA will have their requests and appeals processed under the FOIA.

(g) Requesters shall be advised in final responses which Act(s) was (were) used, inclusive of appeal rights.

(h) The time limits for responding to the request will be determined based on the Act cited. For example, if a requester seeks access under the FOIA for his or her personal records which are contained in a PA system of records, the time limits of the FOIA apply.

(i) Fees will be charged based on the kind of records being requested (*i.e.*, FOIA fees if agency records are requested; PA fees for requesters who are seeking access to information contained in a PA system of record which is retrieved by their name and/or personal identifier).

### § 701.8 Processing FOIA requests.

Upon receipt of a FOIA request, DON activities shall:

(a) Review the request to ensure it meets the minimum requirements of the FOIA to be processed.

(1) *Minimum requirements of a FOIA request*. A request must be in writing; cite or imply FOIA; reasonably describe the records being sought so that a knowledgeable official of the agency can conduct a search with reasonable effort; and if fees are applicable, the requester should include a statement regarding willingness to pay all fees or those up to a specified amount or request a waiver or reduction of fees.

(2) If a request does not meet the minimum requirements of the FOIA, DON activities shall apprise the requester of the defect and assist him/her in perfecting the request.

NOTE TO PARAGRAPH (a)(2): The statutory 20 working day time limit applies upon receipt of a ''perfected'' FOIA request.

(b) When a requester or his/her attorney requests personally identifiable information in a record, the request may require a notarized signature or a statement certifying under the penalty of perjury that their identity is true and correct. Additionally, written consent of the subject of the record is required for disclosure from a Privacy Act System of records, even to the subject's attorney.

(c) *Review description of requested record(s)*. (1) The FOIA requester is responsible for describing the record he/she seeks so that a knowledgeable official of the activity can locate the record with a reasonable amount of effort. In order to assist DON activities in conducting more timely searches, a requester should endeavor to provide as much identifying information as possible. When a DON activity receives a request that does not reasonably describe the requested record, it shall notify the requester of the defect in writing. The requester should be asked to provide the type of information outlined in this paragraph. DON activities are not obligated to act on the request until the requester responds to the specificity letter. When practicable, DON activities shall offer assistance to the requester in identifying the records sought and in reformulating the request to reduce the burden on the agency in complying with the FOIA. The following guidelines are provided to deal with generalized requests and are based on the principle of reasonable effort. Descriptive information about a record may be divided into two broad categories.

(i) Category I is file-related and includes information such as type of record (for example, memorandum), title, index citation, subject area, date the record was created, and originator.

(ii) Category II is event-related and includes the circumstances that resulted in the record being created or the date and circumstances surrounding the event the record covers.

(2) Generally, a record is not reasonably described unless the description contains sufficient Category I information to permit the conduct of an organized, non random search based on the DON activity's filing arrangements and existing retrieval systems, or unless the record contains sufficient Category II information to permit inference of the Category I elements needed to conduct such a search.

(3) The following guidelines deal with requests for personal records: Ordinarily, when personal identifiers are provided solely in connection with a request for records concerning the requester, only records in Privacy Act system of records that can be retrieved by personal identifiers need be searched. However, if a DON activity has reason to believe that records on the requester may exist in a record system other than a PA system, the DON activity shall search the system under the provisions of the FOIA. In either case, DON activities may request a reasonable description of the records desired before searching for such records under the provisions of the FOIA and the PA. If the records are required to be released under the FOIA, the PA does not bar its disclosure.

(4) The guidelines in paragraph (c)(3) notwithstanding, the decision of the DON activity concerning reasonableness of description must be based on the knowledge of its files. If the description enables the DON activity personnel to locate the record with reasonable effort, the description is adequate. The fact that a FOIA request is broad or burdensome in its magnitude does not, in and of itself, entitle a DON activity to deny the request on the ground that it does not reasonably describe the records sought. The key factor is the ability of the staff to reasonably ascertain and locate which records are being requested.

(d) *Review request to determine if FOIA fees may be applicable.* (1) FOIA fee issues shall be resolved before a DON activity begins processing a FOIA request.

(2) FOIA fees shall be at the rates prescribed at subpart C of this part.

(3) If fees are applicable, a requester shall be apprised of what category of requester he/she has been placed and provided a complete breakout of fees to include any and all information provided before fees are assessed (e.g., first two hours of search and first 100 pages of reproduction have been provided without charge.)

(4) Forms DD 2086 (for FOIA requests) and 2086–1 (for FOIA requests for technical data) serve as an administrative record of all costs incurred to process a request; actual costs charged to a requester (*i.e.*, search, review, and/or duplication and at what salary level and the actual time expended); and as input to the Annual FOIA Report. Requesters may request a copy of the applicable form to review the time and costs associated with the processing of a request.

(5) Final response letters shall address whether or not fees are applicable or have been waived. A detailed explanation of FOIA fees is provided at subpart C of this part.

(e) *Control FOIA Request.* Each FOIA request should be date stamped upon receipt; given a case number; and entered into a formal control system to track the request from receipt to response. Coordinators may wish to conspicuously stamp, label, and/or place the request into a brightly colored folder/cover sheet to ensure it receives immediate attention by the action officer.

(f) *Enter request into multitrack processing system.* When a DON activity has a significant number of pending requests that prevents a response determination being made within 20 working days, the requests shall be processed in a multitrack processing system, based on the date of receipt, the amount of work and time involved in processing the requests, and whether the request qualifies for expedited processing.

(1) DON activities may establish as many queues as they wish, however, at a minimum three processing tracks shall be established, all based on a first-in, first-out concept, and rank ordered by the date of receipt of the request: one track for simple requests, one track for complex requests, and one track for expedited processing. Determinations as to whether a request is simple or complex shall be made by each DON activity.

(2) DON activities shall provide a requester whose request does not qualify for the fastest queue (except for expedited processing), an opportunity to limit in writing by hard copy, facsimile, or electronically the scope of the request in order to qualify for the fastest queue.

(3) This multitrack processing system does not obviate the activity's responsibility to exercise due diligence in processing requests in the most expeditious manner possible.

(4) Referred requests shall be processed according to the original date received by the initial activity and then placed in the appropriate queue.

(5) Establish a separate queue for expedited processing. A separate queue shall be established for requests meeting the test for expedited processing. Expedited processing shall be granted to a requester after the requester requests such and demonstrates a compelling need for the information. Notice of the determination as to whether to grant expedited processing in response to a requester's compelling need shall be provided to the requester within 10 calendar days after receipt of the request in the office which will determine whether to grant expedited access. Once the determination has been made to grant expedited processing, DON activities shall process the request as soon as practicable. Actions by DON activities to initially deny or affirm the initial denial on appeal of a request for expedited processing, and failure to respond in a timely manner shall be subject to judicial review.

(i) Compelling need means that the failure to obtain the records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual.

(ii) Compelling need also means that the information is urgently needed by an individual primarily engaged in disseminating information in order to inform the public concerning actual or alleged Federal Government activity. An individual primarily engaged in disseminating information means a person whose primary activity involves publishing or otherwise disseminating information to the public. Representatives of the news media would normally qualify as individuals primarily engaged in disseminating information. Other persons must demonstrate that their primary activity involves publishing or otherwise disseminating information to the public.

(iii) Urgently needed means that the information has a particular value that will be lost if not disseminated quickly. Ordinarily this means a breaking news story of general public interest. However, information of historical interest only, or information sought for litigation or commercial activities would not qualify, nor would a news media publication or broadcast deadline unrelated to the news breaking nature of the information.

(iv) A demonstration of compelling need by a requester shall be made by a statement certified by the requester to be true and correct to the best of his/her knowledge. This statement must accompany the request in order to be considered and responded to within the 10 calendar days required for decisions on expedited access.

(v) Other reasons that merit expedited processing by DON activities are an imminent loss of substantial due process rights and humanitarian need. A demonstration of imminent loss of substantial due process rights shall be made by a statement certified by the requester to be true and correct to the best of his/her knowledge. Humanitarian need means that disclosing the information will promote the welfare and interests of mankind. A demonstration of humanitarian need shall also be made by a statement certified by the requester to be true and correct to the best of his/her knowledge. Both of these statements must accompany the request in order to be considered and responded to within the 10 calendar days required for decisions on expedited access. Once the decision has been made to expedite the request for either of these reasons, the request may be processed in the expedited processing queue behind those requests qualifying for compelling need.

(6) These same procedures also apply to requests for expedited processing of administrative appeals.

(g) *Respond to request within FOIA time limits.* Once an activity receives a ''perfected'' FOIA request, it shall inform the requester of its decision to grant or deny access to the requested records within 20 working days. Activities are not necessarily required to release records within the 20 working days, but access to releasable records should be granted promptly thereafter and the requester apprised of when he/she may expect to receive a final response to his/her request. Naturally,

interim releases of documents are encouraged if appropriate. Sample response letters are provided on the Navy FOIA website.

(1) If a significant number of requests, or the complexity of the requests prevents a final response determination within the statutory time period, DON activities shall advise the requester of this fact, and explain how the request will be responded to within its multitrack processing system. A final response determination is notification to the requester that the records are released, or will be released by a certain date, or the records are denied under the appropriate FOIA exemption(s) or the records cannot be provided for one or more of the ''other reasons'' (see § 701.8(n)). Interim responses acknowledging receipt of the request, negotiations with the requester concerning the scope of the request, the response timeframe, and fee agreements are encouraged; however, such actions do not constitute a final response determination under FOIA.

(2) *Formal extension*. In those instances where a DON activity cannot respond within the 20 working day time limit, the FOIA provides for extension of initial time limits for an additional 10 working days for three specific situations: the need to search for and collect records from separate offices; the need to examine a voluminous amount of records required by the request; and the need to consult with another agency or agency component. In such instances, naval activities shall apprise requesters in writing of their inability to respond within 20 working days and advise them of their right to appeal to the appellate authority.

NOTE TO PARAGRAPH (g)(2): Formal extension letters require IDA signature.

(3) *Informal extension*. A recommended alternative to taking a formal extension is to call the requester and negotiate an informal extension of time with the requester. The advantages include the ability to agree on a mutually acceptable date to respond that exceeds a formal extension of an additional 10 working days, and the letter of confirmation does not require the signature of an IDA. Additionally, it does not impact on the additional days the appellate authority may take when responding to a FOIA appeal.

(h) *Conduct a search for responsive records*. (1) Conduct a search for responsive records, keeping in mind a test for reasonableness (*i.e.*, file disposition requirements set forth in SECNAVINST 5212.5D, ''Navy and Marine Corps Records Disposal Manual''). This includes making a manual search for records as well as an electronic search for records. Do not assume that because a document is old, it does not exist. Rather, ensure that all possible avenues are considered before making a determination that no record could be found (*i.e.*, such as determining if the record was transferred to a federal records center for holding).

(2) Requesters can appeal ''adequacy of search.'' To preclude unnecessary appeals, you are encouraged to detail your response letter to reflect the search undertaken so the requester understands the process. It is particularly helpful to address the records disposal requirements set forth in SECNAVINST 5212.5D, ''Navy and Marine Corps Records Disposal Manual'' for the records being sought.

(i) *Review documents for release*. Once documents have been located, the originator or activity having possession and control is responsible for reviewing them for release and coordinating with other activities/agencies having an interest. The following procedures should be followed:

(1) Sort documents by originator and make necessary referrals (see § 701.9).

(2) Documents for which the activity has possession and control should be reviewed for release. If the review official determines that all or part of the documents requested require denial, and the head of the activity is an IDA, he/she shall respond directly to the requester. If, however, the activity head is not an IDA, then the request, a copy of the responsive documents (unexcised), proposed redacted copy of the documents, and a detailed explanation regarding their release must be referred to the IDA for a final release determination and the requester shall be notified in writing of the transfer.

(3) Documents for which the activity does not have possession and control, but has an interest, should be referred

to the originator along with any recommendations regarding release (see § 701.9).

(j) *Process non-responsive information in responsive documents.* DON activities shall interpret FOIA requests liberally when determining which records are responsive to the requests, and may release non-responsive information. However, should DON activities desire to withhold non-responsive information, the following steps shall be accomplished:

(1) Consult with the requester, and ask if the requester views the information as responsive, and if not, seek the requester's concurrence to deletion of non-responsive information without a FOIA exemption. Reflect this concurrence in the response letter.

(2) If the responsive record is unclassified and the requester does not agree to deletion of non-responsive information without a FOIA exemption, release all non-responsive and responsive information which is not exempt. For non-responsive information that is exempt, notify the requester that even if the information were determined responsive, it would likely be exempted (state the appropriate exemption(s).) Advise the requester of the right to request this information under a separate FOIA request. The separate request shall be placed in the same location within the processing queue as the original request.

(3) If the responsive record is classified, and the requester does not agree to deletion of non-responsive information without a FOIA exemption, release all unclassified responsive and non-responsive information which is not exempt. If the non-responsive information is exempt, follow the procedures provided. The classified, non-responsive information need not be reviewed for declassification at this point. Advise the requester than even if the classified information were determined responsive, it would likely be exempt under 5 U.S.C. 552 (b)(1) and other exemptions if appropriate. Advise the requester of the right to request this information under a separate FOIA request. The separate request shall be placed in the same location within the processing queue as the original request.

(k) *Withholding/excising information.* (1) DON records may only be withheld if they qualify for exemption under one or more of the nine FOIA exemptions/three exclusions and it is determined that a foreseeable harm to an interest protected by those exemptions would result if the information is released. There are nine FOIA exemptions. See subpart D of this part for the scope of each exemption.

(2) Although a FOIA exemption may apply, DON activities are encouraged to consider discretionary disclosures of information when an exemption permits such disclosure (see § 701.5(f).)

(3) *Excising documents.* The excision of information within a document should be made so that the requester can readily identify the amount of information being withheld and the reason for the withholding. Accordingly, ensure that any deletion of information is bracketed and all applicable exemptions listed. In those instances, where multiple pages of documents are determined to be exempt from disclosure in their entirety, indicate the number of pages being denied and the basis for the denial.

(l) *Reasonably segregable information.* DON activities must release all ''reasonably segregable information'' when the meaning of these portions is not distorted by deletion of the denied portions, and when it reasonably can be assumed that a skillful and knowledgeable person could not reasonably reconstruct excised information. When a record is denied in whole, the response to the requester will specifically state that it is not reasonable to segregate portions of the record for release.

(m) *Making a discretionary disclosure.* A discretionary disclosure to one requester may preclude the withholding of similar information under a FOIA exemption if subsequently requested by the same individual or someone else. The following suggested language should be included with the discretionary disclosure of any record that could be subject to withholding: ''The information you requested is subject to being withheld under section (b)(__) of the FOIA. The disclosure of this material to you by the DON is discretionary and does not constitute a waiver of our

right to claim this exemption for similar records in the future.''

(n) *Other reasons.* There are 10 reasons for not complying with a request for a record under FOIA:

(1) *No record.* The DON activity conducts a reasonable search of files and fails to identify records responsive to the request.

NOTE TO PARAGRAPH (n)(1): Requester must be advised that he/she may appeal the adequacy of search and provided appeal rights. Response letter does not require signature by IDA.

(2) *Referral.* The request is referred to another DoD/DON activity or to another executive branch agency for their action.

NOTE TO PARAGRAPH (n)(2): Referral does not need to be signed by IDA.

(3) *Request withdrawn.* The requester withdraws request.

NOTE TO PARAGRAPH (n)(3): Response letter does not require signature by IDA.

(4) *Fee-related reason.* Requester is unwilling to pay fees associated with the request; is past due in payment of fees from a previous request; or disagrees with the fee estimate.

NOTE TO PARAGRAPH (n)(4): Requester must be advised that he/she may appeal the fee estimate. Response letter does not require signature by IDA.

(5) *Records not reasonably described.* A record has not been described with sufficient particularity to enable the DON activity to locate it by conducting a reasonable search.

NOTE TO PARAGRAPH (n)(5): Response letter does not require signature by IDA.

(6) *Not a proper FOIA request for some other reason.* When the requester fails unreasonably to comply with procedural requirements, other than those fee-related issues described in paragraph (n)(4), imposed by the instruction in this part and/or other published rules or directives.

NOTE TO PARAGRAPH (n)(6): Response letter does not require signature by IDA.

(7) *Not an agency record.* When the requester is provided a response indicating that the requested information was ''not an agency record'' within the meaning of the FOIA and the instruction in this part.

NOTE TO PARAGRAPH (n)(7): Response letter does not require signature by IDA.

(8) *Duplicate request.* When a request is duplicative of another request which has already been completed or currently in process from the same requester.

NOTE TO PARAGRAPH (n)(8): Response letter does not require signature by IDA.

(9) *Other (specify).* When a FOIA request cannot be processed because the requester does not comply with published rules, other than for those reasons described in paragraphs (n) (1) through (8). DON activities must document the specific discrepancy.

NOTE TO PARAGRAPH (n)(9): Response letter does not require signature by IDA.

(10) *Denial of request.* The record is denied in whole or in part in accordance with procedures set forth in 5 U.S.C. 552, DoD 5400.7–R, and the instruction in this part.

NOTE TO PARAGRAPH (n)(10): The requester is advised that he/she may appeal the determination and response letter must be signed by IDA.

(o) *Writing a response letter.* FOIA response letters should contain the following information:

(1) The date of the request; when it was received; if records were not located, where the search was conducted and what the records disposal requirements are for those records.

(2) Cut-off dates. Normally, DON activities shall consider the date of receipt of a FOIA request as the cut-off date for a records search. Where a DON activity employs a particular cut-off date, however, it should give notice of that date in the response letter to the requester.

(3) If a request is denied in whole or in part, the denial response letter should cite the exemption(s) claimed; if possible, delineate the kinds of information withheld (*i.e.*, social security numbers, date of birth, home addresses, etc.) as this may satisfy the requester and thus eliminate an appeal; provide appeal rights, and be signed by an IDA. However, there is no requirement that

the response contain the same documentation necessary for litigation (*i.e.*, FOIA requesters are not entitled to a Vaughn index (see definition in § 701.39 during the administrative process).

(4) The fees charged or waived; if fees were charged, what category was the requester placed in and provide a breakout of the fees charged (*i.e.*, the first 2 hours of search were waived and so you are being charged for the remaining 4 hours of search at $25 per hour, or $100; the first 100 pages of reproduction were waived and the remaining 400 pages being provided were charged at $.15 per page, resulting in $60 in reproduction fees, for a total of $160). These figures are derived from Form DD 2086 (FOIA Fees) or Form DD 2086–1 (Technical Data Fees).

(5) Sample response letters are provided on the Navy FOIA website.

(p) *Press responses.* Ensure responses being made to the press are cleared through public affairs channels.

(q) *Special mail services.* DON activities are authorized to use registered mail, certified mail, certificates of mailing and return receipts. However, their use should be limited to instances where it appears advisable to establish proof of dispatch or receipt of FOIA correspondence.

### § 701.9 Referrals.

(a) The DoD/DON FOIA referral policy is based upon the concept of the originator of a record making a release determination on its information. If a DON activity receives a request for records originated by another DoD/DON activity, it should contact the activity to determine if it also received the request, and if not, obtain concurrence to refer the request. In either situation, the requester shall be advised of the action taken, unless exempt information would be revealed.

(b) While referrals to originators of information result in obtaining the best possible decision on release of the information, the policy does not relieve DON activities from the responsibility of making a release decision on a record should the requester object to referral of the request and the record. Should this situation occur, DON activities should coordinate with the originator of the information prior to making a release determination.

(c) A request received by a DON activity having no records responsive to a request shall be referred routinely to another DoD/DON activity, if the other activity has reason to believe it has the requested record. Prior to notifying a requester of a referral to another DoD/DON activity, the DON activity receiving the initial request shall consult with the other DoD/DON activity to determine if that activity's association with the material is exempt. If the association is exempt, the activity receiving the initial request will protect the association and any exempt information without revealing the identity of the protected activity. The protected activity shall be responsible for submitting the justifications required in any litigation.

(d) Any DON activity receiving a request that has been misaddressed shall refer the request to the proper address and advise the requester. DON activities making referrals of requests or records shall include with the referral, a point of contact by name, a telephone number (commercial and DSN), and an e-mail address (if available).

(e) A DON activity shall refer a FOIA request for a record that it holds but was originated by another Executive Branch agency, to them for a release determination and direct response to the requester. The requester shall be informed of the referral, unless it has been determined that notification would reveal exempt information. Referred records shall only be identified to the extent consistent with security requirements.

(f) A DON activity may refer a request for a record that it originated to another activity or agency when the activity or agency has a valid interest in the record, or the record was created for the use of the other agency or activity. In such situations, provide the record and a release recommendation on the record with the referral action. DON activities should include a point of contact and telephone number in the referral letter. If that organization is to respond directly to the requester, apprise the requester of the referral.

(g) Within the DON/DoD, a DON activity shall ordinarily refer a FOIA request and a copy of the record it holds, but that was originated by another DON/DoD activity or that contains substantial information obtained from that activity, to that activity for direct response, after direct coordination and obtaining concurrence from the activity. The requester shall be notified of such referral. In any case, DON activities shall not release or deny such records without prior consultation with the activity, except as provided in paragraph (c) of this section.

(h) Activities receiving a referred request shall place it in the appropriate processing queue based on the date it was initially received by the referring activity/agency.

(i) *Agencies outside the DON that are subject to the FOIA.* (1) A DON activity may refer a FOIA request for any record that originated in an agency outside the DON or that is based on information obtained from an outside agency to the agency for direct response to the requester after coordination with the outside agency, if that agency is subject to FOIA. Otherwise, the DON activity must respond to the request.

NOTE: DON activities shall not refer documents originated by entities outside the Executive Branch of Government (e.g., Congress, State and local government agencies, police departments, private citizen correspondence, etc.), to them for action and direct response to the requester, since they are not subject to the FOIA.

(2) A DON activity shall refer to the agency that provided the record any FOIA request for investigative, intelligence, or any other type of records that are on loan to the DON for a specific purpose, if the records are restricted from further release and so marked. However, if for investigative or intelligence purposes, the outside agency desires anonymity, a DON activity may only respond directly to the requester after coordination with the outside agency.

### § 701.10 Processing requests received from governmental officials.

(a) *Members of Congress.* Many constituents seek access to information through their Member of Congress. Members of Congress who seek access to records on behalf of their constituent are provided the same information that the constituent would be entitled to receive. There is no need to verify that the individual has authorized the release of his/her record to the Congressional member, since the Privacy Act's ''blanket routine use'' for Congressional inquiries applies.

(b) *Privileged release to U.S. Government officials.* DON records may be authenticated and released to U.S. Government officials if they are requesting them in their official capacity on behalf of Federal governmental bodies, whether legislative, executive, administrative, or judicial. To ensure adequate protection of these documents, DON activities shall inform officials receiving records under the provisions of this paragraph that those records are exempt from public release under FOIA. DON activities shall also mark the records as ''Privileged'' and ''Exempt from Public Disclosure'' and annotate any special handling instructions on the records. Because such releases are not made under the provisions of the FOIA, they do not impact on future decisions to release/deny requests for the same records to other requesters. Examples of privileged releases are:

(1) In response to a request from a Committee or Subcommittee of Congress, or to either House sitting as a whole.

(2) To the Federal Courts, whenever ordered by officers of the court as necessary for the proper administration of justice.

(3) To other Federal agencies, both executive and administrative, as determined by the head of a DON activity or designee.

(c) *State or local government officials.* Requests from State or local government officials for DON records are treated the same as any other requester.

(d) *Non-FOIA requests from foreign governments.* Requests from foreign governments that do not invoke the FOIA shall be referred to the appropriate foreign disclosure channels and the requester so notified. See § 701.11(c) regarding processing FOIA requests

from foreign governments and/or their officials.

### § 701.11 Processing specific kinds of records.

DON activities that possess copies or receive requests for the following kinds of records shall promptly forward the requests to the officials named in this section and if appropriate apprise the requester of the referral:

(a) *Classified records*. Executive Order 12958 governs the classification of records.

(1) Glomar response. In the instance where a DON activity receives a request for records whose existence or nonexistence is itself classifiable, the DON activity shall refuse to confirm or deny the existence or non-existence of the records. This response is only effective as long as it is given consistently. If it were to be known that an agency gave a ''Glomar'' response only when records do exist and gave a ''no records'' response otherwise, then the purpose of this approach would be defeated. A Glomar response is a denial and exemption (b)(1) is cited and appeal rights are provided to the requester.

(2) Processing classified documents originated by another activity. DON activities shall refer the request and copies of the classified documents to the originating activity for processing. If the originating activity simply compiled the classified portions of the document from other sources, it shall refer, as necessary, those portions to the original classifying authority for their review and release determination and apprise that authority of any recommendations they have regarding release. If the classification authority for the information cannot be determined, then the originator of the compiled document has the responsibility for making the final determination. Records shall be identified consistent with security requirements. Only after consultation and approval from the originating activity, shall the requester be apprised of the referral. In most cases, the originating activity will make a determination and respond directly to the requester. In those instances where the originating activity determines a Glomar response is appropriate, the referring agency shall deny the request.

(b) *Courts-martial records of trial*. The release/denial authority for these records is the Office of the Judge Advocate General (Code 20), Washington Navy Yard, Building 111, Washington, DC 20374–1111. Promptly refer the request and/or documents to this activity and apprise the requester of the referral.

(c) *Foreign requests/information*. (1) FOIA requests received from foreign governments/foreign government officials should be processed as follows:

(i) When a DON activity receives a FOIA request for a record in which an affected DoD/DON activity has a substantial interest in the subject matter, or the DON activity receives a FOIA request from a foreign government, a foreign citizen, or an individual or entity with a foreign address, the DON activity receiving the request shall provide a copy of the request to the affected DON activity.

(ii) Upon receiving the request, the affected activity shall review the request for host nation relations, coordinate with Department of State as appropriate, and if necessary, provide a copy of the request to the appropriate foreign disclosure office for review. Upon request by the affected activity, the DON activity receiving the initial request shall provide a copy of releasable records to the affected activity. The affected activity may further release the records to its host nation after coordination with Department of State if release is in the best interest of the United States Government. If the record is released to the host nation government, the affected DON activity shall notify the DON activity which initially received the request of the release to the host nation.

(iii) Such processing must be done expeditiously so as not to impede the processing of the FOIA request by the DON activity that initially received the request.

(2) Non-U.S. Government Records (*i.e.*, records originated by multinational organizations such as the North Atlantic Treaty Organization (NATO), the North American Air Defense (NORAD) and foreign governments) which are under the possession

and control of DON shall be coordinated prior to a final release determination being made. Coordination with foreign governments shall be made through the Department of State.

(d) *Government Accounting Office (GAO) documents.* (1) On occasion, the DON receives FOIA requests for GAO documents containing DON information, either directly from requesters or as referrals from GAO. Since the GAO is outside of the Executive Branch and therefore not subject to FOIA, all FOIA requests for GAO documents containing DON information will be processed by the DON under the provisions of the FOIA.

(2) In those instances when a requester seeks a copy of an unclassified GAO report, DON activities may apprise the requester of its availability from the Director, GAO Distribution Center, ATTN: DHISF, P.O. Box 6015, Gaithersburg, MD 20877–1450 under the cash sales program.

(e) *Judge Advocate General Manual (JAGMAN) investigative records.* These records are no longer centrally processed. Accordingly, requests for investigations should be directed to the following officials:

(1) JAGMAN Investigations conducted prior to 1 Jul 95—to the Judge Advocate General (Code 35), Washington Navy Yard, Suite 3000, 1322 Patterson Avenue, SE, Washington, DC 20374–5066.

(2) Command Investigation—to the command that conducted the investigation.

(3) Litigation-Report Investigation—to the Judge Advocate General (Code 35), Washington Navy Yard, Suite 3000, 1322 Patterson Avenue, SE, Washington, DC 20374–5066.

(4) Court or Board of Inquiry—to the Echelon 2 commander over the command that convened the investigation.

(f) *Mailing lists.* Numerous FOIA requests are received for mailing lists of home addresses or duty addresses of DON personnel. Processing of such requests is as follows:

(1) Home addresses are normally not releasable without the consent of the individuals concerned. This includes lists of home addresses and military quarters' addresses without the occupant's name (*i.e.*, exemption (b)(6) applies).

(2) Disclosure of lists of names and duty addresses or duty telephone numbers of persons assigned to units that are stationed in foreign territories, routinely deployable, or sensitive, has also been held by the courts to constitute a clearly unwarranted invasion of personal privacy and must be withheld from disclosure under 5 U.S.C. 552(b)(6). General officers and public affairs officers information is releasable. Specifically, disclosure of such information poses a security threat to those service members because it reveals information about their degree of involvement in military actions in support of national policy, the type of Navy and/or Marine Corps units to which they are attached, and their presence or absence from households. Release of such information aids in the targeting of service members and their families by terrorists or other persons opposed to implementation of national policy. Only an extraordinary public interest in disclosure of this information can outweigh the need and responsibility of the DON to protect the tranquility and safety of service members and their families who repeatedly have been subjected to harassment, threats, and physical injury. Units covered by this policy are:

(i) Those located outside of the 50 States, District of Columbia, Commonwealth of Puerto Rico, Guam, U.S. Virgin Islands, and American Samoa.

(ii) Routinely deployable units—Those units that normally deploy from homeport or permanent station on a periodic or rotating basis to meet operational requirements or participate in scheduled exercises. This includes routinely deployable ships, aviation squadrons, operational staffs, and all units of the Fleet Marine Force (FMF). Routinely deployable units do not include ships undergoing extensive yard work or those whose primary mission is support of training, e.g., yard craft and auxiliary aircraft landing training ships.

(iii) Units engaged in sensitive operations. Those primarily involved in

training for or conduct of covert, clandestine, or classified missions, including units primarily involved in collecting, handling, disposing, or storing of classified information and materials. This also includes units engaged in training or advising foreign personnel. Examples of units covered by this exemption are nuclear power training facilities, SEAL Teams, Security Group Commands, Weapons Stations, and Communications Stations.

(3) Except as otherwise provided, lists containing names and duty addresses of DON personnel, both military and civilian, who are assigned to units in the Continental United States (CONUS) and U.S. territories shall be released regardless of who has initiated the request.

(4) Exceptions to this policy must be coordinated with CNO (N09B30) or CMC (ARAD) prior to responding to requests, including those from Members of Congress. The policy in paragraphs (f) (1) through (3) should be considered when weighing the releasability of the address or telephone number of a specifically named individual.

(5) DON activities are reminded that e-mail addresses that identify an individual who is routinely deployable, overseas, or assigned to a sensitive unit should not be made available. Additionally, organizational charts for these kinds of units and activities that identify specific members should not be placed on the Internet.

(g) *Medical quality assurance documents*. The Chief, Bureau of Medicine and Surgery (BUMED) is the release/denial authority for all naval medical quality assurance documents as defined by Title 10, United States Code, Section 1102. Requests for medical quality assurance documents shall be promptly referred to BUMED and the requester notified of the referral.

(h) *Mishap investigation reports (MIRs)*. The Commander, Naval Safety Center (NAVSAFECEN) is the release/denial authority for all requests for mishap investigations or documents which contain mishap information. All requests or documents located which apply shall be promptly referred to the Commander, Naval Safety Center, Code 503, 375 A Street, Norfolk, VA 23511–4399 for action. Telephonic liaison with NAVSAFECEN is encouraged. The requester shall be notified of the referral.

(i) *National Security Council (NSC)/White House*. (1) DON activities that receive requests for records of NSC, the White House, or the White House/Military Office (WHMO) shall process the requests.

(2) DON records in which the NSC or the White House has a concurrent reviewing interest, and NSC, White House, or WHMO records discovered in DON activity files, shall be forwarded to CNO (N09B30), 2000 Navy Pentagon, Washington, DC 20350–2000. N09B30, in turn, will coordinate the request directly with DFOISR, so DFOISR can coordinate the request with NSC, White House, or WHMO. After coordination, the records will be returned to the DON activity for their direct response to the requester. During the interim, DON activities should notify the requester that they are coordinating their request and a response will therefore be delayed.

(j) *Naval attache documents/information*. The Director, Defense Intelligence Agency (DIA) has the responsibility for reviewing for release/denial any naval attache-originated documents/information. Accordingly, FOIA requests for naval attache documents or copies of the documents located in DON files or referred in error to a DON activity shall be promptly referred to the Chief, Freedom of Information Act Staff, Defense Intelligence Agency (SVI–1), Washington, DC 20340–5100 for action and direct response to the requester. Ensure that the requester is notified in writing of the transfer to DIA.

(k) *Naval Audit Service reports*. The Director, Naval Audit Service is the release/denial authority for their reports. All requests or documents located which apply shall be promptly referred to the Director, Naval Audit Service, 5611 Columbia Pike, NASSIF Building, Falls Church, VA 22041–5080 for action. The requester shall be notified of the referral.

(l) *Naval Criminal Investigative Service (NCIS) reports*. The Director, NCIS is the release/denial authority for all NCIS reports/information. All requests for and copies of NCIS reports located in DON activity files shall be promptly referred to the Director, NCIS (Code

OOJF), Washington Navy Yard, Building 111, 716 Sicard Street, SE, Washington, DC 20388–5380 for action and, if appropriate, the requester so notified. Telephonic liaison with NCIS Headquarters is strongly encouraged.

(m) *Naval Inspector General (NAVINSGEN) reports.* (1) NAVINSGEN is the release/denial authority for all investigations and inspections conducted by or at the direction of NAVINSGEN and for any records held by any command that relate to Navy hotline complaints that have been referred to the NAVINSGEN. Accordingly, such actions shall be promptly referred to the Naval Inspector General (Code OOL), Building 200, Room 100, Washington Navy Yard, 901 M Street, SE, Washington, DC 20374–5006 for action and, if appropriate, the requester so notified.

(2) Requests for local command inspector general reports which have not been referred to NAVINSGEN should be processed by the command that conducted the investigation and NAVINSGEN advised as necessary.

(3) The Deputy Naval Inspector General for Marine Corps Matters (DNIGMC) is the release/denial authority for all investigations conducted by the DNIGMC. Requests for local Marine Corps command Inspector General reports shall be coordinated with the DNIGMC.

(n) *Naval Nuclear Propulsion Information (NNPI).* The Director, Naval Nuclear Propulsion Program (CNO (NOONB)/NAVSEA (08)) is the release/denial authority for all information and requests concerning NNPI. Naval activities receiving such requests are responsible for searching their files for responsive records. If no documents are located, the naval activity shall respond to the requester and provide CNO (NOONB) with a copy of the request and response. If documents are located, the naval activity shall refer the request, responsive documents, and a recommendation regarding release to the Director, Naval Nuclear Propulsion Program (NOONB), 2000 Navy Pentagon, Washington, DC 20350–2000, who will make the final release determination to the requester, after coordinating the release through DoD activities.

(o) *Naval Telecommunications Procedures (NTP) publications.* The Commander, Naval Computer and Telecommunications Command is the release/denial authority for NTP publications. All requests or documents located which apply shall be promptly referred to the Commander, Naval Computer and Telecommunications Command (Code NOOJ), 4401 Massachusetts Avenue, NW, Washington, DC 20394–5460 for action and direct response to the requester.

(p) *News media requests.* (1) Respond promptly to requests received from news media representatives through public information channels, if the information is releasable under FOIA. This eliminates the requirement to invoke FOIA and may result in timely information being made available to the public.

(2) In those instances where records/information are not releasable, either in whole or in part, or are not currently available for a release consideration, Public Affairs Officers shall promptly advise the requester of where and how to submit a FOIA request.

(3) DON activities receiving and processing requests from members of the press shall ensure that responses are cleared through their public affairs channels.

(q) *Records originated by other government agencies.* (1) A DON activity may refer a FOIA request for any record that originated in an agency outside the DON or that is based on information obtained from an outside agency to the cognizant agency for direct response to the requester after coordination with the outside agency, if that agency is subject to FOIA. Otherwise, the DON activity must respond to the request.

(2) A DON activity shall refer to the agency that provided the record any FOIA request for investigative, intelligence, or any other type of records that are on loan to the DON for a specific purpose, if the records are restricted from further release and so marked. However, if for investigative or intelligence purposes, the outside agency desires anonymity, a DON activity may only respond directly to the requester after coordination with the outside agency.

(r) *Submitter documents.* (1) When a request is received for a record containing confidential commercial information that was submitted to the Government, the requirements of Executive Order 12600 shall apply. Specifically, the submitter shall be notified of the request (telephonically, by letter, or by facsimile) and afforded a reasonable amount of time (anywhere from 2 weeks to a month depending on the circumstances) to present any objections concerning release, unless it is clear there can be no valid basis for objection. For example, the record was provided with actual or presumptive knowledge of the submitter that it would be made available to the public upon request.

(2) The DON activity will evaluate any objections and negotiate with the submitter as necessary. When a substantial issue has been raised, the DON activity may seek additional information from the submitter and afford the submitter and requester reasonable opportunities to present their arguments in legal and substantive issues prior to making an agency determination.

(3) The final decision to disclose information claimed to be exempt under exemption (b)(4) shall be made by an official at least equivalent in rank to the IDA and the submitter advised that he or she may seek a restraining order or take court action to prevent the release. The submitter is given 10 days to take action.

(4) Should the submitter take such action, the requester will be notified and no action will be taken on the request until the outcome of the court action is known.

(s) Technical Documents Controlled by Distribution Statements B, C, D, E, F, or X shall be referred to the controlling DoD office for review and release determination.

### § 701.12 FOIA appeals/litigation.

(a) *Appellate authorities.* SECNAV has delegated his appellate authority to the JAG and the DONGC to act on matters under their cognizance. Their responsibilities include adjudicating appeals made to SECNAV on: denials of requests for copies of DON records or portions thereof; disapproval of a fee category claim by a requester; disapproval of a request to waive or reduce fees; disputes regarding fee estimates; reviewing determinations not to grant expedited access to agency records, and reviewing ''no record'' determinations when the requester considers such responses adverse in nature. They have the authority to release or withhold records, or portions thereof; to waive or reduce fees; and to act as required by SECNAV for appeals under 5 U.S.C. 552 and this instruction. The JAG has further delegated this appellate authority to the Assistant Judge Advocate General (Civil Law). The DONGC has further delegated this appellate authority to the Principal Deputy General Counsel, the Deputy General Counsel, and the Associate General Counsel (Management).

(1) In their capacity, appellate authorities will serve as principal points of contact on DON FOIA appeals and litigation; receive and track FOIA appeals and ensure responses are made in compliance with 5 U.S.C. 552, DoD 5400.7 and 5400.7–R, and the instruction in this part; complete responsive portions of the Annual FOIA Report that addresses actions on appeals and litigation costs during the fiscal year and submit to CNO (N09B30); provide CNO (N09B30) with a copy of all appeal determinations as they are issued; and keep CNO (N09B30) informed in writing of all FOIA lawsuits as they are filed against the DON. Appellate authorities shall facsimile a copy of the complaint to CNO (N09B30) for review and provide updates to CNO (N09B30) to review and disseminate to DFOISR.

(2) OGC's cognizance: Legal advice and services to SECNAV and the Civilian Executive Assistants on all matters affecting DON; legal services in subordinate commands, organizations, and activities in the areas of business and commercial law, real and personal property law, intellectual property law, fiscal law, civilian personnel and labor law, environmental law, and in coordination with the JAG, such other legal services as may be required to support the mission of the Navy and the Marine Corps, or the discharge of the General Counsel's responsibilities; and conducting litigation involving the areas enumerated above and oversight of all litigation affecting the DON.

(3) JAG's cognizance: In addition to military law, all matters except those falling under the cognizance of the DONGC.

(b) Appellants may file an appeal if they have been denied information in whole or in part; have been denied a waiver or reduction of fees; have been denied/have not received a response within 20 working days; or received a ''no record'' response or wish to challenge the ''adequacy of a search'' that was made. Appeal procedures also apply to the disapproval of a fee category claim by a requester, disputes regarding fee estimates, review of an expedited basis determination not to grant expedited access to agency records, or any determination found to be adverse in nature by the requester.

(c) *Action by the appellate authority.* (1) Upon receipt, JAG (34) or Assistant to the General Counsel (FOIA) will promptly notify the IDA of the appeal. In turn, the IDA will provide the appellate authority with the following documents so that a determination can be made: a copy of the request, responsive documents both excised and unexcised, a copy of the denial letter, and supporting rationale for continued withholding. IDAs shall respond to the appellate authority within 10 working days.

(2) Final determinations on appeals normally shall be made within 20 working days after receipt. When the appellate authority has a significant number of appeals preventing a response determination within 20 working days, the appeals shall be processed in a multitrack processing system based, at a minimum, on the three processing tracks established for initial requests.

(3) If the appeal is received by the wrong appellate authority, the time limits do not take effect until it is received by the right one. If, however, the time limit for responding cannot be met, the appellate authority shall advise the appellant that he/she may consider his/her administrative remedies exhausted. However, he/she may await a substantive response without prejudicing his/her right of judicial remedy. Nonetheless, the appellate authority will continue to process the case expeditiously, whether or not the appellant seeks a court order for release of records. In such cases, a copy of the response will be provided to the Department of Justice (DOJ).

(d) *Addresses for filing appeals.* (1) General Counsel of the Navy, 720 Kennon Street, SE, Room 214, Washington Navy Yard, Washington, DC 20374–5012, or

(2) Judge Advocate General, Washington Navy Yard, 1322 Patterson Avenue, SE, Suite 3000, Washington, DC 20374–5066.

(e) *Appeal letter requirements.* The appellant shall file a written appeal with the cognizant appellate authority (*i.e.*, DONGC or JAG). The appeal should include a copy of the DON response letter and supporting rationale on why the appeal should be granted.

(f) *Consultation/coordination.* (1) The Special Assistant for Naval Investigative Matters and Security (CNO (N09N)) may be consulted to resolve inconsistencies or disputes involving classified records.

(2) Direct liaison with officials within DON and other interested Federal agencies is authorized at the discretion of the appellate authority, who also coordinates with appropriate DoD and DOJ officials.

(3) SECNAV, appropriate Assistant or Deputy Assistant Secretaries, and CNO (N09B30) shall be consulted and kept advised of cases with unusual implications. CHINFO shall be consulted and kept advised on cases involving public affairs implications.

(4) Final refusal involving issues not previously resolved or that the DON appellate authority knows to be inconsistent with rulings of other DoD components ordinarily should not be made before consultation with the DoD Office of General Counsel (OGC).

(5) Tentative decisions to deny records that raise new and significant legal issues of potential significance to other agencies of the Government shall be provided to the DoD OGC.

(g) *Copies of final appeal determinations.* Appellate authorities shall provide copies of final appeal determinations to the activity affected and to CNO (N09B30) as appeals are decided.

(h) *Denying an appeal.* The appellate authority must render his/her decision in writing with a full explanation as to why the appeal is being denied along

with a detailed explanation of the basis for refusal with regard to the applicable statutory exemption(s) invoked. With regard to denials involving classified information, the final refusal should explain that a declassification review was undertaken and based on the governing Executive Order and implementing security classification guides (identify the guides), the information cannot be released and that information being denied does not contain meaningful portions that are reasonably segregable. In all instances, the final denial letter shall contain the name and position title of the official responsible for the denial and advise the requester of the right to seek judicial review.

(i) *Granting an appeal.* The appellate authority must render his/her decision in writing. When an appellate authority makes a determination to release all or a portion of records withheld by an IDA, a copy of the releasable records should be promptly forwarded to the requester after compliance with any procedural requirements, such as payment of fees.

(j) *Processing appeals made under PA and FOIA.* When denials have been made under the provisions of PA and FOIA, and the denied information is contained in a PA system of records, the appeal shall be processed under both PA and FOIA. If the denied information is not maintained in a PA system of records, the appeal shall be processed under FOIA.

(k) *Response letters.* (1) When an appellate authority makes a final determination to release all or portion of records withheld by an IDA, a written response and a copy of the records so released should be forwarded promptly to the requester after compliance with any preliminary procedural requirements, such as payment of fees.

(2) Final refusal of an appeal must be made in writing by the appellate authority or by a designated representative. The response at a minimum shall include the following:

(i) The basis for the refusal shall be explained to the requester in writing, both with regard to the applicable statutory exemption or exemptions invoked under the provisions of the FOIA, and with respect to other issues appealed for which an adverse determination was made.

(ii) When the final refusal is based in whole or in part on a security classification, the explanation shall include a determination that the record meets the cited criteria and rationale of the governing Executive Order, and that this determination is based on a declassification review, with the explanation of how that review confirmed the continuing validity of the security classification.

(iii) The final denial shall include the name and title or position of the official responsible for the denial.

(iv) In the case of appeals for total denial of records, the response shall advise the requester that the information being denied does not contain meaningful portions that are reasonably segregable.

(v) When the denial is based upon an exemption (b)(3) statute, the response, in addition to citing the statute relied upon to deny the information, shall state whether a court has upheld the decision to withhold the information under the statute, and shall contain a concise description of the scope of the information withheld.

(vi) The response shall advise the requester of the right to judicial review.

(l) *Time limits/requirements.* (1) A FOIA appeal has been received by a DON activity when it reaches the appellate authority having jurisdiction. Misdirected appeals should be referred expeditiously to the proper appellate authority.

(2) The requester shall be advised to file an appeal so that it is postmarked no later than 60 calendar days after the date of the initial denial letter. If no appeal is received, or if the appeal is postmarked after the conclusion of the 60 day period, the case may be considered closed. However, exceptions may be considered on a case-by-case basis.

(3) In cases where the requester is provided several incremental determinations for a single request, the time for the appeal shall not begin until the date of the final response. Requests and responsive records that are denied shall be retained for a period of 6 years to meet the statute of limitations requirement.

(4) Final determinations on appeals normally shall be made within 20 working days after receipt. When a DON appellate authority has a significant number of appeals preventing a response determination within 20 working days, the appeals shall be processed in a multitrack processing system, based at a minimum on the three processing tracks established for initial requests. (See § 701.8(f)).

(5) If additional time is needed due to unusual circumstances, the final decision may be delayed for the number of working days (not to exceed 10) that were not used as additional time for responding to the initial request.

(6) If a determination cannot be made and the requester notified within 20 working days, the appellate authority shall acknowledge to the requester, in writing, the date of receipt of the appeal, the circumstances surrounding the delay, and the anticipated date for substantive response. Requesters shall be advised that, if the delay exceeds the statutory extension provision or is for reasons other than the unusual circumstances, they may consider their administrative remedies exhausted. They may, however, without prejudicing their right of judicial remedy, await a substantive response. The appellate authority shall continue to process the case expeditiously.

(m) *FOIA litigation*. The appellate authority is responsible for providing CNO (N09B30) with a copy of any FOIA litigation filed against the DON and any subsequent status of the case. CNO (N09B30) will, in turn, forward a copy of the complaint to DFOISR for their review.

## Subpart B—FOIA Definitions and Terms

### § 701.13 5 U.S.C. 552(a)(1) materials.

Section (a)(1) of the FOIA requires publication in the FEDERAL REGISTER of descriptions of agency organizations, functions, substantive rules, and statements of general policy.

### § 701.14 5 U.S.C. 552(a)(2) materials.

Section (a)(2) of the FOIA requires that certain materials routinely be made available for public inspection and copying. The (a)(2) materials are commonly referred to as ''reading room'' materials and are required to be indexed to facilitate public inspection. (a)(2) materials consist of:

(a) *5 U.S.C. 552(a)(2)(A) records*. Final opinions, including concurring and dissenting opinions, and orders made in the adjudication of cases, as defined in 5 U.S.C. 551, that may be cited, used, or relied upon as precedents in future adjudications.

(b) *5 U.S.C. 552(a)(2)(B) records*. Statements of policy and interpretations that have been adopted by the agency and are not published in the FEDERAL REGISTER.

(c) *5 U.S.C. 552(a)(2)(C) records*. Administrative staff manuals and instructions, or portions thereof, that establish DON policy or interpretations of policy that affect a member of the public. This provision does not apply to instructions for employees on tactics and techniques to be used in performing their duties, or to instructions relating only to the internal management of the DON activity. Examples of manuals and instructions not normally made available are:

(1) Those issued for audit, investigation, and inspection purposes, or those that prescribe operational tactics, standards of performance, or criteria for defense, prosecution, or settlement of cases.

(2) Operations and maintenance manuals and technical information concerning munitions, equipment, systems, and foreign intelligence operations.

(d) *5 U.S.C. 552(a)(2)(D) records*. Those (a)(2) records, which because of the nature of the subject matter, have become or are likely to become the subject of subsequent requests for substantially the same records. These records are referred to as FOIA-processed (a)(2) records. DON activities shall decide on a case-by-case basis whether records fall into this category based on the following factors: previous experience of the DON activity with similar records; particular circumstances of the records involved, including their nature and the type of information contained in them; and/or the identity and number of requesters and whether there is widespread press, historic, or commercial interest in the records.

(1) This provision is intended for situations where public access in a timely manner is important and it is not intended to apply where there may be a limited number of requests over a short period of time from a few requesters. DON activities may remove the records from this access medium when the appropriate officials determine that access is no longer necessary.

(2) Should a requester submit a FOIA request for FOIA-processed (a)(2) records and insist that the request be processed under FOIA, DON activities shall process the FOIA request. However, DON activities have no obligation to process a FOIA request for (a)(2)(A), (B) and (C) records because these records are required to be made public and not FOIA-processed under paragraph (a)(3) of the FOIA.

(e) However, agency records that are withheld under FOIA from public disclosure, based on one or more of the FOIA exemptions, do not qualify as (a)(2) materials and need not be published in the FEDERAL REGISTER or made available in a library reading room.

### § 701.15 5 U.S.C. 552(a)(3) materials.

Agency records which are processed for release under the provisions of the FOIA.

### § 701.16 Administrative appeal.

A request made by a FOIA requester asking the appellate authority (JAG or OGC) to reverse a decision to: withhold all or part of a requested record; deny a fee category claim by a requester; deny a request for expedited processing due to demonstrated compelling need; deny a request for a waiver or reduction of fees; deny a request to review an initial fee estimate; and confirm that no records were located during the initial search. FOIA requesters may also appeal a non-response to a FOIA request within the statutory time limits.

### § 701.17 Affirmative information disclosure.

This is where a DON activity makes records available to the public on its own initiative. In such instance, the DON activity has determined in advance that a certain type of records or information is likely to be of such interest to members of the public, and that it can be disclosed without concern for any FOIA exemption sensitivity. Affirmative disclosures can be of mutual benefit to both the DON and the members of the public who are interested in obtaining access to such information.

### § 701.18 Agency record.

Agency records are either created or obtained by an agency and under agency control at the time of the FOIA request. Agency records are stored as various kinds of media, such as:

(a) Products of data compilation (all books, maps, photographs, machine readable materials, inclusive of those in electronic form or format, or other documentary materials), regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law in connection with the transaction of public business and in Department of the Navy possession and control at the time the FOIA request is made.

(b) Care should be taken not to exclude records from being considered agency records, unless they fall within one of the following categories:

(1) Objects or articles, such as structures, furniture, paintings, three-dimensional models, vehicles, equipment, parts of aircraft, ships, etc., whatever their historical value or value as evidence.

(2) Anything that is not a tangible or documentary record, such as an individual's memory or oral communication.

(3) Personal records of an individual not subject to agency creation or retention requirements, created and maintained primarily for the convenience of an agency employee, and not distributed to other agency employees for their official use. Personal papers fall into three categories: those created before entering Government service; private materials brought into, created, or received in the office that were not created or received in the course of transacting Government business, and work-related personal papers that are not used in the transaction of Government business.

(4) A record must exist and be in the possession and control of the DON at the time of the request to be considered subject to this instruction and the FOIA. There is no obligation to create, compile, or obtain a record to satisfy a FOIA request.

(5) Hard copy or electronic records, which are subject to FOIA requests under 5 U.S.C. 552(a)(3), and which are available to the public through an established distribution system, or through the FEDERAL REGISTER, the National Technical Information Service, or the Internet, normally need not be processed under the provisions of the FOIA. If a request is received for such information, DON activities shall provide the requester with guidance, inclusive of any written notice to the public, on how to obtain the information. However, if the requester insists that the request be processed under the FOIA, then process the request under FOIA.

**§ 701.19 Appellate authority.**

SECNAV has delegated the OGC and JAG to review administrative appeals of denials of FOIA requests on his behalf and prepare agency paperwork for use by the DOJ in defending a FOIA lawsuit. JAG is further authorized to delegate this authority to a designated Assistant JAG. The authority of OGC is further delegated to the Principal Deputy General Counsel, the Deputy General Counsel, and the Associate General Counsel (Management).

**§ 701.20 Discretionary disclosure.**

The decision to release information that could qualify for withholding under a FOIA exemption, but upon review the determination has been made that there is no foreseeable harm to the Government for releasing such information. Discretionary disclosures do not apply to exemptions (b)(1), (b)(3), (b)(4), (b)(6) and (b)(7)(C).

**§ 701.21 Electronic record.**

Records (including e-mail) which are created, stored, and retrieved by electronic means.

**§ 701.22 Exclusions.**

The FOIA contains three exclusions (c)(1), (c)(2) and (c)(3) which expressly authorize Federal law enforcement agencies for especially sensitive records under certain specified circumstances to treat the records as not subject to the requirements of the FOIA.

**§ 701.23 Executive Order 12958.**

Revoked Executive Order 12356 on October 14, 1995 and is the basis for claiming that information is currently and properly classified under (b)(1) exemption of the FOIA. It sets forth new requirements for classifying and declassifying documents. It recognizes both the right of the public to be informed about the activities of its government and the need to protect national security information from unauthorized or untimely disclosure.

**§ 701.24 Federal agency.**

A Federal agency is any executive department, military department, Government corporation, Government-controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

**§ 701.25 5 U.S.C. 552, Freedom of Information Act (FOIA).**

An access statute that pertains to agency records of the Executive Branch of the Federal Government, including the Executive Office of the President and independent regulatory agencies.

NOTE TO § 701.25: Records maintained by State governments, municipal corporations, by the courts, by Congress, or by companies and private citizens do not fall under this Federal statute.

**§ 701.26 FOIA exemptions.**

There are nine exemptions that identify certain kinds of records/information that qualify for withholding under FOIA. See subpart D of this part for a detailed explanation of each exemption.

**§ 701.27 FOIA fee terms location.**

The FOIA fee terms can be found in subpart C of this part.

**§ 701.28 FOIA request.**

A written request for DON records, made by ''any person'' including a

member of the public (U.S. or foreign citizen/entity), an organization, or a business, but not including a Federal agency or a fugitive from the law that either explicitly or implicitly invokes the FOIA by citing DoD FOIA regulations or the instruction in this part. FOIA requests can be made for any purpose whatsoever, with no showing of relevancy required. Because the purpose for which records are sought has no bearing on the merits of the request, FOIA requesters do not have to explain or justify their requests. Written requests may be received by postal service or other commercial delivery means, by facsimile or electronically.

**§ 701.29 Glomar response.**

Refusal by the agency to either confirm or deny the existence or non-existence of records responsive to a FOIA request. See exemptions (b)(1), (b)(6), and (b)(7)(C) at subpart D of this part.

**§ 701.30 Initial Denial Authority (IDA).**

SECNAV has delegated authority to a limited number of officials to act on his behalf to withhold records under their cognizance that are requested under the FOIA for one or more of the nine categories of records exempt from mandatory disclosure; to deny a fee category claim by a requester; to deny a request for expedited processing due to demonstrated compelling need; to deny or grant a request for waiver or reduction of fees when the information sought relates to matters within their respective geographical areas of responsibility or chain of command; fees; to review a fee estimate; and to confirm that no records were located in response to a request. IDAs may also grant access to requests.

**§ 701.31 Mosaic or compilation response.**

The concept that apparently harmless pieces of information when assembled together could reveal a damaging picture. See exemption (b)(1) at subpart D of this part.

**§ 701.32 Perfected request.**

A request which meets the minimum requirements of the FOIA to be processed and is received by the DON activity having possession and control over the documents/information.

**§ 701.33 Public domain.**

Agency records released under the provisions of FOIA and the instruction in this part to a member of the public.

**§ 701.34 Public interest.**

The interest in obtaining official information that sheds light on a DON activity's performance of its statutory duties because the information falls within the statutory purpose of the FOIA to inform citizens what their government is doing. That statutory purpose, however, is not fostered by disclosure of information about private citizens accumulated in various governmental files that reveals nothing about an agency's or official's own conduct.

**§ 701.35 Reading room.**

Location where (a)(2) materials are made available for public inspection and copying.

**§ 701.36 Release authorities.**

Commanding officers and heads of Navy and Marine Corps shore activities or their designees are authorized to grant requests on behalf of SECNAV for agency records under their possession and control for which no FOIA exemption applies. As necessary, they will coordinate releases with other officials who may have an interest in the releasability of the record.

**§ 701.37 Reverse FOIA.**

When the ''submitter'' of information, usually a corporation or other business entity, that has supplied the agency with data on its policies, operations and products, seeks to prevent the agency that collected the information from revealing the data to a third party in response to the latter's FOIA request.

**§ 701.38 Technical data.**

Recorded information, regardless of form or method of the recording, of a scientific or technical nature (including computer software documentation).

### § 701.39 Vaughn index.

Itemized index, correlating each withheld document (or portion) with a specific FOIA exemption(s) and the relevant part of the agency's nondisclosure justification. The index may contain such information as: date of document; originator; subject/title of document; total number of pages reviewed; number of pages of reasonably segregable information released; number of pages denied; exemption(s) claimed; justification for withholding; etc. FOIA requesters are not entitled to a Vaughn index during the administrative process.

## Subpart C—FOIA Fees

### § 701.40 Background.

(a) The DON follows the uniform fee schedule developed by DoD and established to conform with the Office of Management and Budget's (OMB's) Uniform Freedom of Information Act Fee Schedule and Guidelines.

(b) Fees reflect direct costs for search; review (in the case of commercial requesters); and duplication of documents, collection of which is permitted by the FOIA. They are neither intended to imply that fees must be charged in connection with providing information to the public in the routine course of business, nor are they meant as a substitute for any other schedule of fees, which does not supersede the collection of fees under the FOIA.

(c) FOIA fees do not supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records. For example, 5 U.S.C. 552 (a)(4)(A)(vi) enables a Government agency such as the Government Printing Office (GPO) or the National Technical Information Service (NTIS), to set and collect fees. DON activities should ensure that when documents that would be responsive to a request are maintained for distribution by agencies operating statutory-based fee schedule programs, such as GPO or NTIS, they inform requesters of the steps necessary to obtain records from those sources.

### § 701.41 FOIA fee terms.

(a) *Direct costs* means those expenditures a DON activity actually makes in searching for, reviewing (in the case of commercial requesters), and duplicating documents to respond to a FOIA request. Direct costs include, for example, the salary of the employee performing the work (the basic rate of pay for the employee plus 16 percent of that rate to cover benefits), and the costs of operating duplicating machinery. These factors have been included in the fee rates prescribed in this subpart. Not included in direct costs are overhead expenses such as costs of space, heating or lighting the facility in which the records are stored.

(b) *Duplication* refers to the process of making a copy of a document in response to a FOIA request. Such copies can take the form of paper copy, microfiche, audiovisual, or machine readable documentation (e.g., magnetic tape or disc), among others. Every effort will be made to ensure that the copy provided is in a form that is reasonably usable, the requester shall be notified that the copy provided is the best available, and that the activity's master copy shall be made available for review upon appointment. For duplication of computer tapes and audiovisual, the actual cost, including the operator's time, shall be charged. In practice, if a DON activity estimates that assessable duplication charges are likely to exceed $25.00, it shall notify the requester of the estimate, unless the requester has indicated in advance his or her willingness to pay fees as high as those anticipated. Such a notice shall offer a requester the opportunity to confer with activity personnel with the object of reformulating the request to meet his or her needs at a lower cost.

(c) *Review* refers to the process of examining documents located in response to a FOIA request to determine whether one or more of the statutory exemptions permit withholding. It also includes processing the documents for disclosure, such as excising them for release. Review does not include the time spent resolving general legal or policy issues regarding the application of exemptions. It should be noted that charges for commercial requesters may

be assessed only for the initial review. DON activities may not charge for reviews required at the administrative appeal level of an exemption already applied. However, records or portions of records withheld in full under an exemption that is subsequently determined not to apply may be reviewed again to determine the applicability of other exemptions not previously considered. The costs for such a subsequent review would be properly assessable.

(d) *Search* refers to time spent looking, both manually and electronically, for material that is responsive to a request. Search also includes a page-by-page or line-by-line identification (if necessary) of material in the record to determine if it, or portions thereof are responsive to the request. DON activities should ensure that searches are done in the most efficient and least expensive manner so as to minimize costs for both the activity and the requester. For example, activities should not engage in line-by-line searches when duplicating an entire document known to contain responsive information would prove to be the less expensive and quicker method of complying with the request. Time spent reviewing documents in order to determine whether to apply one or more of the statutory exemptions is not search time, but review time.

(1) DON activities may charge for time spent searching for records, even if that search fails to locate records responsive to the request.

(2) DON activities may also charge search and review (in the case of commercial requesters) time if records located are determined to be exempt from disclosure.

(3) In practice, if the DON activity estimates that search charges are likely to exceed $25.00, it shall notify the requester of the estimated amount of fees, unless the requester has indicated in advance his or her willingness to pay fees as high as those anticipated. Such a notice shall offer the requester the opportunity to confer with activity personnel with the object of reformulating the request to meet his or her needs at a lower cost.

**§ 701.42 Categories of requesters—applicable fees.**

(a) Commercial requesters refers to a request from, or on behalf of one who seeks information for a use or purpose that furthers the commercial, trade, or profit interest of the requester or the person on whose behalf the request is made. In determining whether a requester properly belongs in this category, DON activities must determine the use to which a requester will put the documents requested. More over, where an activity has reasonable cause to doubt the use to which a requester will put the records sought, or where that use is not clear from the request itself, it should seek additional clarification before assigning the request to a specific category.

(1) Fees shall be limited to reasonable standard charges for document search, review and duplication when records are requested for commercial use. Requesters must reasonably describe the records sought.

(2) When DON activities receive a request for documents for commercial use, they should assess charges which recover the full direct costs of searching for, reviewing for release, and duplicating the records sought. Commercial requesters (unlike other requesters) are not entitled to 2 hours of free search time, nor 100 free pages of reproduction of documents. Moreover, commercial requesters are not normally entitled to a waiver or reduction of fees based upon an assertion that disclosure would be in the public interest. However, because use is the exclusive determining criteria, it is possible to envision a commercial enterprise making a request that is not for commercial use. It is also possible that a non-profit organization could make a request that is for commercial use. Such situations must be addressed on a case-by-case basis.

(b) Educational Institution refers to a pre-school, a public or private elementary or secondary school, an institution of graduate high education, an institution of undergraduate higher education, an institution of professional education, and an institution of vocational education, which operates a program or programs of scholarly research.

(1) Fees shall be limited to only reasonable standard charges for document duplication (excluding charges for the first 100 pages) when the request is made by an educational institution whose purpose is scholarly research. Requesters must reasonably describe the records sought.

(2) Requesters must show that the request is being made under the auspices of a qualifying institution and that the records are not sought for commercial use, but in furtherance of scholarly research.

(3) Fees shall be waived or reduced in the public interest if criteria of § 701.58 have been met.

(c) Non-commercial Scientific Institution refers to an institution that is not operated on a ''commercial'' basis and that is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry.

(1) Fees shall be limited to only reasonable standard charges for document duplication (excluding the first 100 pages) when the request is made by a non-commercial scientific institution whose purpose is scientific research. Requesters must reasonably describe the records sought.

(2) Requesters must show that the request is being made under the auspices of a qualifying institution and that the records are not sought for commercial use, but in furtherance of or scientific research.

(d) *Representative of the news media.* (1) Refers to any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term ''news'' means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large, and publishers of periodicals (but only in those instances when they can qualify as disseminators of ''news'') who make their products available for purchase or subscription by the general public. These examples are not meant to be all-inclusive. Moreover, as traditional methods of news delivery evolve (e.g., electronic dissemination of newspapers through telecommunications services), such alternative media would be included in this category. In the case of ''freelance'' journalists, they may be regarded as working for a news organization if they can demonstrate a solid basis for expecting publication through that organization, even though not actually employed by it. A publication contract would be the clearest proof, but DON activities may also look to the past publication record of a requester in making this determination.

(2) To be eligible for inclusion in this category, a requester must meet the criteria established in paragraph (d)(1), and his or her request must not be made for commercial use. A request for records supporting the news dissemination function of the requester shall not be considered to be a request that is for a commercial use. For example, a document request by a newspaper for records relating to the investigation of a defendant in a current criminal trial of public interest could be presumed to be a request from an entity eligible for inclusion in this category, and entitled to records at the cost of reproduction alone (excluding charges for the first 100 pages).

(3) Representative of the news media does not include private libraries, private repositories of Government records, information vendors, data brokers or similar marketers of information whether to industries and businesses, or other entities.

(4) Fees shall be limited to only reasonable standard charges for document duplication (excluding charges for the first 100 pages) when the request is made by a representative of the news media. Requesters must reasonably describe the records sought. Fees shall be waived or reduced if the fee waiver criteria have been met.

(e) All other requesters. DON activities shall charge requesters who do not fit into any of the categories described in paragraph (a) through (d) fees which recover the full direct cost of searching for and duplicating records, except that the first 2 hours of search time and the first 100 pages of duplication shall be furnished without charge. Requesters must reasonably describe the records sought. Requests from subjects about themselves will continue to be treated

under the fee provisions of the Privacy Act of 1974, which permit fees only for duplication. DON activities are reminded that this category of requester may also be eligible for a waiver or reduction of fees if disclosure of the information is in the public interest.

**§ 701.43 Fee declarations.**

Requesters should submit a fee declaration appropriate for the categories in paragraphs (a) through (c) of this section, if fees are expected to exceed the minimum fee threshold of $15.00.

(a) Commercial. Requesters should indicate a willingness to pay all search, review and duplication costs.

(b) Educational or noncommercial scientific institution or news media. Requesters should indicate a willingness to pay duplication charges in excess of 100 pages if more than 100 pages of records are desired.

(c) All others. Requesters should indicate a willingness to pay assessable search and duplication costs if more than 2 hours of search effort or 100 pages of records are desired.

(d) If the conditions in paragraphs (a) through (c) are not met, then the request need not be processed and the requester shall be so informed.

**§ 701.44 Restrictions.**

(a) No fees may be charged by any DON activity if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee. With the exception of requesters seeking documents for a commercial use, activities shall provide the first 2 hours of search time, and the first 100 pages of duplication without charge. For example, for a request (other than one from a commercial requester) that involved 2 hours and 10 minutes of search time, and resulted in 105 pages of documents, an activity would determine the cost of only 10 minutes of search time, and only five pages of reproduction. If this processing cost was equal to, or less than, the cost to the activity for billing the requester and processing the fee collected, no charges would result.

(b) Requesters receiving the first 2 hours of search and the first 100 pages of duplication without charge are entitled to such only once per request. Consequently, if a DON activity, after completing its portion of a request, finds it necessary to refer the request to a subordinate office, another DON activity, or another Federal agency to action their portion of the request, the referring activity shall inform the recipient of the referral of the expended amount of search time and duplication cost to date.

(c) The elements to be considered in determining the ''cost of collecting a fee'' are the administrative costs to the DON activity of receiving and recording a remittance, and processing the fee for deposit in the Department of Treasury's special account. The cost to the Department of Treasury to handle such remittance is negligible and shall not be considered in activity determinations.

(d) For the purposes of the restrictions in this section, the word ''pages'' refers to paper copies of a standard size, which will normally be ''8½ × 11'' or ''11 × 14.'' Thus, requesters would not be entitled to 100 microfiche or 100 computer disks, for example. A microfiche containing the equivalent of 100 pages or 100 pages of computer printout however, might meet the terms of the restriction.

(e) In the case of computer searches, the first 2 free hours will be determined against the salary scale of the individual operating the computer for the purposes of the search. As an example, when the direct costs of the computer central processing unit, input-output devices, and memory capacity equal $24.00 (2 hours of equivalent search at the clerical level), amounts of computer costs in excess of that amount are chargeable as computer search time. In the event the direct operating cost of the hardware configuration cannot be determined, computer search shall be based on the salary scale of the operator executing the computer search.

**§ 701.45 Fee assessment.**

(a) Fees may not be used to discourage requesters, and to this end, FOIA fees are limited to standard charges for direct document search, review (in the case of commercial requesters) and duplication.

(b) In order to be as responsive as possible to FOIA requests while minimizing unwarranted costs to the taxpayer, DON activities shall analyze each request to determine the category of the requester. If the activity's determination regarding the category of the requester is different than that claimed by the requester, the activity shall:

(1) Notify the requester to provide additional justification to warrant the category claimed, and that a search for responsive records will not be initiated until agreement has been attained relative to the category of the requester. Absent further category justification from the requester, and within a reasonable period of time (*i.e.*, 30 calendar days), the DON activity shall render a final category determination, and notify the requester of such determination, to include normal administrative appeal rights of the determination.

(2) Advise the requester that, notwithstanding any appeal, a search for responsive records will not be initiated until the requester indicates a willingness to pay assessable costs appropriate for the category determined by the activity.

(c) Estimate of fees. DON activities must be prepared to provide an estimate of assessable fees if desired by the requester. While it is recognized that search situations will vary among activities, and that an estimate is often difficult to obtain prior to an actual search, requesters who desire estimates are entitled to such before committing to a willingness to pay. Should the activity's actual costs exceed the amount of the estimate or the amount agreed to by the requester, the amount in excess of the estimate or the requester's agreed amount shall not be charged without the requester's agreement.

(d) Advance payment of fees. DON activities may not require advance payment of any fee (*i.e.*, before work is commenced or continued on a request) unless the requester has failed to pay fees in a timely fashion (*i.e.*, 30 calendar days from the date of the assessed billing in writing), or the activity has determined that the fee will exceed $250.00.

(e) When a DON activity estimates or determines that allowable charges that a requester may be required to pay are likely to exceed $250.00, the activity shall notify the requester of the likely cost and obtain satisfactory assurance of full payment where the requester has a history of prompt payments, or require an advance payment of an amount up to the full estimated charges in the case of requesters with no payment history.

(f) Where a requester has previously failed to pay a fee charged in a timely fashion (*i.e.*, within 30 calendar days from the date of the billing), the DON activity may require the requester to pay the full amount owed, plus any applicable interest, or demonstrate that he or she has paid the fee, and to make an advance payment of the full amount of the estimated fee before the DON activity begins to process a new or pending request from the requester. Interest will be at the rate prescribed by 31 U.S.C. 3737 and confirmed with respective finance and accounting offices.

(g) After all the work is completed on a request, and the documents are ready for release, DON activities may require payment before forwarding the documents, particularly for those requesters who have no payment history, or for those requesters who have failed to previously pay a fee in a timely fashion (*i.e.*, within 30 calendar days from the date of the billing).

(h) DON activities may charge for time spent searching for records, even if that search fails to locate records responsive to the request. DON activities may also charge search and review (in the case of commercial requesters) time if records located are determined to be exempt from disclosure. In practice, if the DON activity estimates that search charges are likely to exceed $25.00, it shall notify the requester of the estimated amount of fees, unless the requester has indicated in advance his or her willingness to pay fees as high as those anticipated. Such a notice shall offer the requester the opportunity to confer with activity personnel with the object of reformulating the request to meet his or her needs at a lower cost.

### § 701.46 Aggregating requests.

Except for requests that are for a commercial use, a DON activity may not charge for the first 2 hours of

search time or for the first 100 pages of reproduction. However, a requester may not file multiple requests at the same time, each seeking portions of a document or documents, solely in order to avoid payment of fees. When an activity reasonably believes that a requester or, on rare occasions, a group of requesters acting in concert, is attempting to break a request down into a series of requests for the purpose of avoiding the assessment of fees, the activity may aggregate any such requests and charge accordingly. One element to be considered in determining whether a belief would be reasonable is the time period in which the requests have occurred. For example, it would be reasonable to presume that multiple requests of this type made within a 30-day period had been made to avoid fees. For requests made over a longer period however, such a presumption becomes harder to sustain and activities should have a solid basis for determining that aggregation is warranted in such cases. DON activities are cautioned that before aggregating requests from more than one requester, they must have a concrete basis on which to conclude that the requesters are acting in concert and are acting specifically to avoid payment of fees. In no case may an activity aggregate multiple requests on unrelated subjects.

### § 701.47 FOIA fees must be addressed in response letters.

DON activities shall ensure that requesters receive a complete breakout of all fees which are charged and apprised of the ''Category'' in which they have been placed. For example: ''We are treating you as an 'All Other Requester.' As such, you are entitled to 2 free hours of search and 100 pages of reproduction, prior to any fees being assessed. We have expended an additional 2 hours of search at $25.00 per hour and an additional 100 pages of reproduction, for a total fee of $65.00.''

### § 701.48 Fee waivers.

Documents shall be furnished without charge, or at a charge reduced below fees assessed to the categories of requesters, when the DON activity determines that waiver or reduction of the fees is in the public interest because furnishing the information is likely to contribute significantly to public understanding of the operations or activities of the DON/DoD and is not primarily in the commercial interest of the requester. When assessable costs for a FOIA request total $15.00 or less, fees shall be waived automatically for all requesters, regardless of category. Decisions to waive or reduce fees that exceed the automatic waiver threshold shall be made on a case-by-case basis, consistent with the following factors:

(a) Disclosure of the information ''is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Government.''

(b) The subject of the request. DON activities should analyze whether the subject matter of the request involves issues that will significantly contribute to the public understanding of the operations or activities of the DON/DoD. Requests for records in the possession of the DON which were originated by non-government organizations and are sought for their intrinsic content, rather than informative value, will likely not contribute to public understanding of the operations or activities of the DON/DoD. An example of such records might be press clippings, magazine articles, or records forwarding a particular opinion or concern from a member of the public regarding a DON/DoD activity. Similarly, disclosures of records of considerable age may or may not bear directly on the current activities of the DON/DoD, however, the age of a particular record shall not be the sole criteria for denying relative significance under this factor. It is possible to envisage an informative issue concerning the current activities of the DON/DoD, based upon historical documentation. Requests of this nature must be closely reviewed consistent with the requester's stated purpose for desiring the records and the potential for public understanding of the operations and activities of the DON/DoD.

(c) The informative value of the information to be disclosed. This factor requires a close analysis of the substantive contents of a record, or portion of the record, to determine whether disclosure is meaningful, and shall

inform the public on the operations or activities of the DON. While the subject of a request may contain information that concerns operations or activities of the DON, it may not always hold great potential for contributing to a meaningful understanding of these operations or activities. An example of such would be a previously released record that has been heavily redacted, the balance of which may contain only random words, fragmented sentences, or paragraph headings. A determination as to whether a record in this situation will contribute to the public understanding of the operations or activities of the DON must be approached with caution and carefully weighed against the arguments offered by the requester. Another example is information already known to be in the public domain. Disclosure of duplicative or nearly identical information already existing in the public domain may add no meaningful new information concerning the operations and activities of the DON.

(d) The contribution to an understanding of the subject by the general public likely to result from disclosure. The key element in determining the applicability of this factor is whether disclosure will inform, or have the potential to inform, the public rather than simply the individual requester or small segment of interested persons. The identity of the requester is essential in this situation in order to determine whether such requester has the capability and intention to disseminate the information to the public. Mere assertions of plans to author a book, researching a particular subject, doing doctoral dissertation work, or indigence are insufficient without demonstrating the capacity to further disclose the information in a manner that will be informative to the general public. Requesters should be asked to describe their qualifications, the nature of their research, the purpose of the requested information, and their intended means of dissemination to the public.

(e) The significance of the contribution to public understanding. In applying this factor, DON activities must differentiate the relative significance or impact of the disclosure against the current level of public knowledge, or understanding which exists before the disclosure. In other words, will disclosure on a current subject of wide public interest be unique in contributing previously unknown facts, thereby enhancing public knowledge, or will it basically duplicate what is already known by the general public? A decision regarding significance requires objective judgment, rather than subjective determination, and must be applied carefully to determine whether disclosure will likely lead to a significant public understanding of the issue. DON activities shall not make value judgments as to whether the information is important enough to be made public.

(f) Disclosure of the information ''is not primarily in the commercial interest of the requester.''

(1) The existence and magnitude of a commercial interest. If the request is determined to be of a commercial interest, DON activities should address the magnitude of that interest to determine if the requester's commercial interest is primary, as opposed to any secondary personal or non-commercial interest. In addition to profit-making organizations, individual persons or other organizations may have a commercial interest in obtaining certain records. Where it is difficult to determine whether the requester is of a commercial nature, DON activities may draw inference from the requester's identity and circumstances of the request. Activities are reminded that in order to apply the commercial standards of the FOIA, the requester's commercial benefit must clearly override any personal or non-profit interest.

(2) The primary interest in disclosure. Once a requester's commercial interest has been determined, DON activities should then determine if the disclosure would be primarily in that interest. This requires a balancing test between the commercial interest of the request against any public benefit to be derived as a result of that disclosure. Where the public interest is served above and beyond that of the requester's commercial interest, a waiver or reduction of fees would be appropriate. Conversely, even if a significant public

interest exists, and the relative commercial interest of the requester is determined to be greater than the public interest, then a waiver or reduction of fees would be inappropriate. As examples, news media organizations have a commercial interest as business organizations; however, their inherent role of disseminating news to the general public can ordinarily be presumed to be of a primary interest. Therefore, any commercial interest becomes secondary to the primary interest in serving the public. Similarly, scholars writing books or engaged in other forms of academic research may recognize a commercial benefit, either directly, or indirectly (through the institution they represent); however, normally such pursuits are primarily undertaken for educational purposes, and the application of a fee charge would be inappropriate. Conversely, data brokers or others who merely compile government information for marketing can normally be presumed to have an interest primarily of a commercial nature.

(g) The factors and examples used in this section are not all inclusive. Each fee decision must be considered on a case-by-case basis and upon the merits of the information provided in each request. When the element of doubt as to whether to charge or waive the fee cannot be clearly resolved, DON activities should rule in favor of the requester.

(h) The following additional circumstances describe situations where waiver or reduction of fees are most likely to be warranted:

(1) A record is voluntarily created to prevent an otherwise burdensome effort to provide voluminous amounts of available records, including additional information not requested.

(2) A previous denial of records is reversed in total, or in part, and the assessable costs are not substantial (e.g. $15.00–$30.00).

### § 701.49 Payment of fees.

(a) Normally, fees will be collected at the time of providing the documents to the requester when the requester specifically states that the costs involved shall be acceptable or acceptable up to a specified limit that covers the anticipated costs, and the fees do not exceed $250.00.

(b) However, after all work is completed on a request, and the documents are ready for release, DON activities may request payment before forwarding the documents, particularly for those requesters who have no payment history, or for those requesters who have failed previously to pay a fee in a timely fashion (*i.e.*, within 30 calendar days from the date of the billing).

(c) When a DON activity estimates or determines that allowable charges that a requester may be required to pay are likely to exceed $250.00, the activity shall notify the requester of the likely cost and obtain satisfactory assurance of full payment where the requester has a history of prompt payments, or require an advance payment of an amount up to the full estimated charges in the case of requesters with no history of payment.

(d) Advance payment of a fee is also applicable when a requester has previously failed to pay fees in a timely fashion (*i.e.*, 30 calendar days) after being assessed in writing by the activity. Further, where a requester has previously failed to pay a fee charged in a timely fashion (*i.e.*, within 30 calendar days from the date of the billing), the DON activity may require the requester to pay the full amount owed, plus any applicable interest, or demonstrate that he or she has paid the fee, and to make an advance payment of the full amount of the estimated fee before the activity begins to process a new or pending request from the requester. Interest will be at the rate prescribed in 31 U.S.C. 3717 and confirmed with respective finance and accounting offices.

### § 701.50 Effect of the Debt Collection Act of 1982.

The Debt Collection Act of 1982 (Pub. L. 97–365) provides for a minimum annual rate of interest to be charged on overdue debts owed the Federal Government. DON activities may levy this interest penalty for any fees that remain outstanding 30 calendar days from the date of billing (the first demand notice) to the requester of the amount owed. The interest rate shall

be as prescribed in 31 U.S.C. 3717. DON activities should verify the current interest rate with respective finance and accounting offices. After one demand letter has been sent and 30 calendar days have lapsed with no payment, DON activities may submit the debt to respective finance and accounting offices for collection.

### § 701.51 Refunds.

In the event that a DON activity discovers that it has overcharged a requester or a requester has overpaid, the DON activity shall promptly refund the charge to the requester by reimbursement methods that are agreeable to the requester and the activity.

### § 701.52 Computation of fees.

(a) It is imperative that DON activities compute all fees to ensure accurate reporting in the Annual FOIA Report, but ensure that only applicable fees be charged to the requester. For example, although we calculate correspondence and preparation costs, these fees are not recoupable from the requester.

(b) DD 2086, Record of Freedom of Information (FOI) Processing Cost, should be filled out accurately to reflect all processing costs, as requesters may solicit a copy of that document to ensure accurate computation of fees. Costs shall be computed on time actually spent. Neither time-based nor dollar-based minimum charges for search, review and duplication are authorized.

### § 701.53 FOIA fee schedule.

The following fee schedule shall be used to compute the search, review (in the case of commercial requesters) and duplication costs associated with processing a given FOIA request. The appropriate fee category of the requester shall be applied before computing fees.

(a) Manual search.

| Type | Grade | Hourly rate |
|---|---|---|
| Clerical | E9/GS8 and below | $12.00 |
| Professional | O1–O6/GS9–GS15 | 25.00 |
| Executive | O7/GS16/ES1 and above | 45.00 |

(b) *Computer search.* Fee assessments for computer search consist of two parts; individual time (hereafter referred to as human time) and machine time.

(1) *Human time.* Human time is all the time spent by humans performing the necessary tasks to prepare the job for a machine to execute the run command. If execution of a run requires monitoring by a human, that human time may be also assessed as computer search. The terms ''programmer/operator'' shall not be limited to the traditional programmers or operators. Rather, the terms shall be interpreted in their broadest sense to incorporate any human involved in performing the computer job (e.g. technician, administrative support, operator, programmer, database administrator, or action officer).

(2) *Machine time.* Machine time involves only direct costs of the central processing unit (CPU), input/output devices, and memory capacity used in the actual computer configuration. Only this CPU rate shall be charged. No other machine-related costs shall be charged. In situations where the capability does not exist to calculate CPU time, no machine costs can be passed on to the requester. When CPU calculations are not available, only human time costs shall be assessed to requesters. Should DON activities lease computers, the services charged by the lessor shall not be passed to the requester under the FOIA.

(c) Duplication.

| Type | Cost per page |
|---|---|
| Pre-Printed material | $.02 |
| Office copy | .15 |
| Microfiche | .25 |
| Computer copies (tapes, discs or printouts). | Actual cost of duplicating the tape, disc or printout (includes operator's time and cost of the medium). |

(d) *Review time (in the case of commercial requesters, only).*

| Type | Grade | Hourly rate |
|---|---|---|
| Clerical | E9/GS8 and below | $12.00 |
| Professional | O1–O6/GS9–GS15 | 25.00 |
| Executive | O7/GS16/ES1 and above | 45.00 |

(e) *Audiovisual documentary materials.* Search costs are computed as for any other record. Duplication cost is the

actual direct cost of reproducing the material, including the wage of the person doing the work. Audiovisual materials provided to a requester need not be in reproducible format or quality.

(f) *Other records.* Direct search and duplication cost for any record not described in this section shall be computed in the manner described for audiovisual documentary material.

(g) *Costs for special services.* Complying with requests for special services is at the discretion of the DON activity. Neither the FOIA nor its fee structure cover these kinds of services. Therefore, DON activities may recover the costs of special services requested by the requester after agreement has been obtained in writing from the requester to pay for such fees as certifying that records are true copies, sending records by special methods such as express mail, etc.

### § 701.54 Collection of fees and fee rates for technical data.

(a) Technical data, other than technical data that discloses critical technology with military or space application, if required to be released under the FOIA, shall be released after the person requesting such technical data pays all reasonable costs attributed to search, duplication and review of the records to be released. Technical data, as used in this section, means recorded information, regardless of the form or method of the recording of a scientific or technical nature (including computer software documentation). This term does not include computer software, or data incidental to contract administration, such as financial and/or management information.

(b) DON activities shall retain the amounts received by such a release, and it shall be merged with and available for the same purpose and the same time period as the appropriation from which the costs were incurred in complying with request. All reasonable costs as used in this sense are the full costs to the Federal Government of rendering the service, or fair market value of the service, whichever is higher. Fair market value shall be determined in accordance with commercial rates in the local geographical area. In the absence of a known market value, charges shall be based on recovery of full costs to the Federal Government. The full costs shall include all direct and indirect costs to conduct the search and to duplicate the records responsive to the request. This cost is to be differentiated from the direct costs allowable under information released under FOIA.

(c) *Waiver.* DON activities shall waive the payment of costs required in paragraph (a) of this section which are greater than the costs that would be required for release of this same information under the FOIA if:

(1) The request is made by a citizen of the United States or a United States corporation and such citizen or corporation certifies that the technical data requested is required to enable it to submit an offer or determine whether it is capable of submitting an offer to provide the product to which the technical data relates to the United States or a contractor with the United States. However, DON activities may require the citizen or corporation to pay a deposit in an amount equal to not more than the cost of complying with the request, which will be refunded upon submission of an offer by the citizen or corporation;

(2) The release of technical data is requested in order to comply with the terms of an international agreement; or,

(3) The DON activity determines in accordance with § 701.48 that such a waiver is in the interest of the United States.

(d) *Fee rates*—(1) *Manual search.*

| Type | Grade | Hourly rate |
|---|---|---|
| Clerical | E9/GS8 and below | $13.25 |
| Clerical (Minimum Charge). | | 8.30 |
| Professional | 01 to 06/GS9 to GS15 | (**) |
| Executive | 07/GS16/ES–1 and above | (**) |

** Rate to be established at actual hourly rate prior to search. A minimum charge will be established at ½ Minimum Charge)

(2) Computer search is based on the total cost of the central processing unit, input-output devices, and memory capacity of the actual computer configuration. The wage (based upon the scale for manual search) for the computer operator and/or programmer

determining how to conduct, and subsequently executing the search will be recorded as part of the computer search.

(3) *Duplication*.

| Type | Cost |
|---|---|
| Aerial photograph, maps, specifications, permits, charts, blueprints, and other technical engineering documents | $2.50 |
| Engineering data (microfilm): | |
| Aperture cards: | |
| Silver duplicate negative, per card | .75 |
| When key punched and verified, per card | .85 |
| Diazo duplicate negative, per card | .65 |
| When key punched and verified, per card | .75 |
| 35mm roll film, per frame | .50 |
| 16mm roll film, per frame | .45 |
| Paper prints (engineering drawings), each | 1.50 |
| Paper reprints of microfilm indices, each | .10 |

(4) *Review time*.

| Type | Grade | Hourly rate |
|---|---|---|
| Clerical | E9/GS8 and below | $13.25 |
| Clerical Minimum Charge. | E9/GS8 and below | 8.30 |
| Professional | 01 to 06/GS9 to GS15 | (**) |
| Executive | 07/GS16/ES1 or higher | (**) |

** Rate to be established at actual hourly rate prior to search. (A minimum charge will be established at ½ Minimum Charge)

(5) *Other technical data records*. Charges for any additional services not specifically provided in paragraph (d) of this section, consistent with Volume 11A of DoD 7000.14–R (NOTAL) shall be made by DON activities at the following rates:

Minimum charge for office copy up to six images)—$3.50
Each additional image—$ .10
Each typewritten page—$3.50
Certification and validation with seal, each—$5.20
Hand-drawn plots and sketches, each hour or fraction Thereof—$12.00

### § 701.55 Processing FOIA fee remittances.

(a) Payments for FOIA charges, less fees assessed for technical data or by a Working Capital Fund or a Non-Appropriated Fund (NAF) activity, shall be made payable to the U.S. Treasurer and deposited in Receipt Account Number 172419.1203.

(b) Payments for fees assessed for technical data shall be made payable to the DON activity that incurred the costs and will be deposited directly into the accounting line item from which the costs were incurred.

(c) Payments for fees assessed by Working Capital Fund or Non-Appropriated Fund (NAF) activities shall be made payable to the DON activity and deposited directly into their account.

## Subpart D—FOIA Exemptions

### § 701.56 Background.

The FOIA is a disclosure statute whose goal is an informed citizenry. Accordingly, records are considered to be releasable, unless they contain information that qualifies for withholding under one or more of the nine FOIA exemptions. The exemptions are identified as 5 U.S.C. 552 (b)(1) through (b)(9).

### § 701.57 Ground rules.

(a) *Identity of requester*. In applying exemptions, the identity of the requester and the purpose for which the record is sought are irrelevant with the exception that an exemption may not be invoked where the particular interest to be protected is the requester's interest. However, if the subject of the record is the requester for the record and the record is contained in a Privacy Act system of records, it may only be denied to the requester if withholding is both authorized in systems notice and by a FOIA exemption.

(b) *Reasonably segregable*. Even though a document may contain information which qualifies for withholding under one or more FOIA exemptions, FOIA requires that all ''reasonably segregable'' information be provided to the requester, unless the segregated information would have no meaning. In other words, redaction is not required when it would reduce the balance of the text to unintelligible gibberish.

(c) *Discretionary release*. A discretionary release of a record to one requester shall prevent the withholding of the same record under a FOIA exemption if the record is subsequently requested by someone else. However, a FOIA exemption may be invoked to withhold information that is similar or related that has been the subject of a discretionary release.

(d) *Initial Denial Authority (IDA) actions*. The decision to withhold information in whole or in part based on one or more of the FOIA exemptions requires the signature of an IDA. See listing of IDAs in § 701.4.

### § 701.58 In-depth analysis of FOIA exemptions.

An in-depth analysis of the FOIA exemptions is addressed in the DOJ's annual publication, ''Freedom of Information Act Guide & Privacy Act Overview.'' A copy is available on the DOJ's FOIA website (see Navy FOIA website at *http://www.ogc.secnav.hq.navy.mil/foia/index.html* for easy access).

### § 701.59 A brief explanation of the meaning and scope of the nine FOIA exemptions.

(a) 5 U.S.C. 552 (b)(1): Those properly and currently classified in the interest of national defense or foreign policy, as specifically authorized under the criteria established by Executive Order and implemented by regulations.

(1) Although material is not classified at the time of the FOIA request, a classification review may be undertaken to determine whether the information should be classified based on the Executive Order on classification (*i.e.*, Executive Order 12958) and/or a security classification guide. The procedures for reclassification are addressed in the Executive Order.

(2) If the information qualifies as exemption (b)(1) information, there is no discretion regarding its release. In addition, this exemption shall be invoked when the following situations are apparent:

(i) *Glomar response:* The fact of the existence or nonexistence of a record would itself reveal classified information. In this situation, DON activities shall neither confirm nor deny the existence or nonexistence of the record being requested. A ''refusal to confirm or deny'' response must be used consistently, not only when a record exists, but also when a record does not exist. Otherwise, the pattern of using a ''no record'' response when a record does not exist, and a ''refusal to confirm or deny'' when a record does exist will itself disclose national security information.

(ii) *Compilation:* Compilations of items of information that are individually unclassified may be classified if the compiled information reveals additional association or relationship that meets the standard for classification under an existing executive order for classification and is not otherwise revealed in the individual items of information.

(b) 5 U.S.C. 552 (b)(2): Those related solely to the internal personnel rules and practices of the DON and its activities. This exemption is entirely discretionary and has two profiles, high (b)(2) and low (b)(2):

(1) High (b)(2) are records containing or constituting statutes, rules, regulations, orders, manuals, directives, instructions, and security classification guides, the release of which would allow circumvention of these records thereby substantially hindering the effective performance of a significant function of the DON. For example:

(i) Those operating rules, guidelines, and manuals for DON investigators, inspectors, auditors, or examiners that must remain privileged in order for the DON activity fulfill a legal requirement;

(ii) Personnel and other administrative matters, such as examination questions and answers used in training courses or in the determination of the qualifications of candidates for employment, entrance on duty, advancement, or promotion;

(iii) Computer software, the release of which would allow circumvention of a statute or DON rules, regulations, orders, manuals, directives, or instructions. In this situation, the use of the software must be closely examined to ensure a circumvention possibility exists.

(2) Discussion of low (b)(2) is provided for information only, as DON activities may not invoke the low (b)(2). Low (b)(2) records are those matters which are trivial and housekeeping in nature for which there is no legitimate public interest or benefit to be gained by release, and it would constitute an administrative burden to process the request in order to disclose the records. Examples include rules of personnel's use of parking facilities or regulation of lunch hours, statements of policy as

to sick leave, and administrative data such as file numbers, mail routing stamps, initials, data processing notations, brief references to previous communications, and other like administrative markings.

(c) 5 U.S.C. 552 (b)(3): Those concerning matters that a statute specifically exempts from disclosure by terms that permit no discretion on the issue, or in accordance with criteria established by that statute for withholding or referring to particular types of matters to be withheld. A few examples of (b)(3) statutes are:

(1) 10 U.S.C. 128, Physical Protection of Special Nuclear Material, Limitation on Dissemination of Unclassified Information.

(2) 10 U.S.C. 130, Authority to Withhold From Public Disclosure Certain Technical Data.

(3) 10 U.S.C. 1102, Confidentiality of Medical Quality Assurance Records.

(4) 10 U.S.C. 2305(g), Protection of Contractor Submitted Proposals.

(5) 12 U.S.C. 3403, Confidentiality of Financial Records.

(6) 18 U.S.C. 798, Communication Intelligence.

(7) 35 U.S.C. 181–188, Patent Secrecy—any records containing information relating to inventions that are the subject of patent applications on which Patent Secrecy Orders have been issued.

(8) 35 U.S.C. 205, Confidentiality of Inventions Information.

(9) 41 U.S.C. 423, Procurement Integrity.

(10) 42 U.S.C. 2162, Restricted Data and Formerly Restricted Data.

(11) 50 U.S.C. 403 (d)(3), Protection of Intelligence Sources and Methods.

(d) 5 U.S.C. 552 (b)(4): Those containing trade secrets or commercial or financial information that a DON activity receives from a person or organization outside the Government with the understanding that the information or record will be retained on a privileged or confidential basis in accordance with the customary handling of such records. Records within the exemption must contain trade secrets, or commercial or financial records, the disclosure of which is likely to cause substantial harm to the competitive position of the source providing the information; impair the Government's ability to obtain necessary information in the future; or impair some other legitimate Government interest. Commercial or financial information submitted on a voluntary basis, absent any exercised authority prescribing criteria for submission is protected without any requirement to show competitive harm. If the information qualifies as exemption (b)(4) information, there is no discretion in its release. Examples include:

(1) Commercial or financial information received in confidence in connection with loans, bids, contracts, or proposals set forth in or incorporated by reference in a contract entered into between the DON activity and the offeror that submitted the proposal, as well as other information received in confidence or privileged, such as trade secrets, inventions, discoveries, or other proprietary data. Additionally, when the provisions of 10 U.S.C. 2305(g) and 41 U.S.C. 423 are met, certain proprietary and source selection information may be withheld under exemption (b)(3).

(2) Statistical data and commercial or financial information concerning contract performance, income, profits, losses, and expenditures, if offered and received in confidence from a contractor or potential contractor.

(3) Personal statements given in the course of inspections, investigations, or audits, when such statements are received in confidence from the individual and retained in confidence because they reveal trade secrets or commercial or financial information normally considered confidential or privileged.

(4) Financial data provided in confidence by private employers in connection with locality wage surveys that are used to fix and adjust pay schedules applicable to the prevailing wage rate of employees within the DON.

(5) Scientific and manufacturing processes or developments concerning technical or scientific data or other information submitted with an application for a research grant, or with a report while research is in progress.

(6) Technical or scientific data developed by a contractor or subcontractor

exclusively at private expense, and technical or scientific data developed in part with Federal funds and in part at private expense, wherein the contractor or subcontractor has retained legitimate proprietary interests in such data in accordance with 10 U.S.C. 2320–2321 and DoD Federal Acquisition Regulation Supplement (DFARS), chapter 2 of 48 CFR, subparts 227.71 and 227.72. Technical data developed exclusively with Federal funds may be withheld under Exemption (b)(3) if it meets the criteria of 10 U.S.C. 130 and DoD Directive 5230.25 of 6 November 1984.

(7) Computer software which is copyrighted under the Copyright Act of 1976 (17 U.S.C. 106), the disclosure of which would have an adverse impact on the potential market value of a copyrighted work.

(8) Proprietary information submitted strictly on a voluntary basis, absent any exercised authority prescribing criteria for submission. Examples of exercised authorities prescribing criteria for submission are statutes, Executive Orders, regulations, invitations for bids, requests for proposals, and contracts. Submission of information under these authorities is not voluntary.

(e) 5 U.S.C. 552(b)(5): Those containing information considered privileged in litigation, primarily under the deliberative process privilege. For example: internal advice, recommendations, and subjective evaluations, as contrasted with factual matters, that are reflected in deliberative records pertaining to the decision-making process of an agency, whether within or among agencies or within or among DON activities. In order to meet the test of this exemption, the record must be both deliberative in nature, as well as part of a decision-making process. Merely being an internal record is insufficient basis for withholding under this exemption. Also potentially exempted are records pertaining to the attorney-client privilege and the attorney work-product privilege. This exemption is entirely discretionary. Examples of the deliberative process include:

(1) The nonfactual portions of staff papers, to include after-action reports, lessons learned, and situation reports containing staff evaluations, advice, opinions, or suggestions.

(2) Advice, suggestions, or evaluations prepared on behalf of the DON by individual consultants or by boards, committees, councils, groups, panels, conferences, commissions, task forces, or other similar groups that are formed for the purpose of obtaining advice and recommendations.

(3) Those non-factual portions of evaluations by DON personnel of contractors and their products.

(4) Information of a speculative, tentative, or evaluative nature or such matters as proposed plans to procure, lease or otherwise acquire and dispose of materials, real estate, facilities or functions, when such information would provide undue or unfair competitive advantage to private personal interests or would impede legitimate government functions.

(5) Trade secret or other confidential research development, or commercial information owned by the Government, where premature release is likely to affect the Government's negotiating position or other commercial interest.

(6) Those portions of official reports of inspection, reports of the Inspector Generals, audits, investigations, or surveys pertaining to safety, security, or the internal management, administration, or operation of one or more DON activities, when these records have traditionally been treated by the courts as privileged against disclosure in litigation.

(7) Planning, programming, and budgetary information that is involved in the defense planning and resource allocation process.

(8) If any such intra- or inter-agency record or reasonably segregable portion of such record hypothetically would be made available routinely through the discovery process in the course of litigation with the agency, then it should not be withheld under the FOIA. If, however, the information hypothetically would not be released at all, or would only be released in a particular case during civil discovery where a party's particularized showing of need might override a privilege, then the record may be withheld. Discovery is the formal process by which litigants obtain information from each other for

use in the litigation. Consult with legal counsel to determine whether exemption 5 material would be routinely made available through the discovery process.

(9) Intra- or inter-agency memoranda or letters that are factual, or those reasonably segregable portions that are factual, are routinely made available through discovery, and shall be made available to a requester, unless the factual material is otherwise exempt from release, inextricably intertwined with the exempt information, so fragmented as to be uninformative, or so redundant of information already available to the requester as to provide no new substantive information.

(10) A direction or order from a superior to a subordinate, though contained in an internal communication, generally cannot be withheld from a requester if it constitutes policy guidance or a decision, as distinguished from a discussion of preliminary matters or a request for information or advice that would compromise the decision-making process.

(11) An internal communication concerning a decision that subsequently has been made a matter of public record must be made available to a requester when the rationale for the decision is expressly adopted or incorporated by reference in the record containing the decision.

(f) 5 U.S.C. 552(b)(6): Information in personnel and medical files, as well as similar personal information in other files, that, if disclosed to a requester, other than the person about whom the information is about, would result in a clearly unwarranted invasion of personal privacy. Release of information about an individual contained in a Privacy Act System of records that would constitute a clearly unwarranted invasion of privacy is prohibited, and could subject the releaser to civil and criminal penalties. If the information qualifies as exemption (b)(6) information, there is no discretion in its release. Examples of other files containing personal information similar to that contained in personnel and medical files include:

(1) Those compiled to evaluate or adjudicate the suitability of candidates for civilian employment or membership in the Armed Forces, and the eligibility of individuals (civilian, military, or contractor employees) for security clearances, or for access to particularly sensitive classified information.

(2) Files containing reports, records, and other material pertaining to personnel matters in which administrative action, including disciplinary action, may be taken.

(3) Home addresses, including private e-mail addresses, are normally not releasable without the consent of the individuals concerned. This includes lists of home addressees and military quarters' addressees without the occupant's name. Additionally, the names and duty addresses (postal and/or e-mail) of DON/DoD military and civilian personnel who are assigned to units that are sensitive, routinely deployable, or stationed in foreign territories can constitute a clearly unwarranted invasion of personal privacy.

(4) *Privacy interest.* A privacy interest may exist in personal information even though the information has been disclosed at some place and time. If personal information is not freely available from sources other than the Federal Government, a privacy interest exists in its nondisclosure. The fact that the Federal Government expended funds to prepare, index and maintain records on personal information, and the fact that a requester invokes FOIA to obtain these records indicates the information is not freely available.

(5) Names and duty addresses (postal and/or e-mail) published in telephone directories, organizational charts, rosters and similar materials for personnel assigned to units that are sensitive, routinely deployable, or stationed in foreign territories are withholdable under this exemption.

(6) This exemption shall not be used in an attempt to protect the privacy of a deceased person, but it may be used to protect the privacy of the deceased person's family if disclosure would rekindle grief, anguish, pain, embarrassment, or even disruption of peace of mind of surviving family members. In such situations, balance the surviving family members' privacy against the public's right to know to determine if

disclosure is in the public interest. Additionally, the deceased's social security number should be withheld since it is used by the next of kin to receive benefits. Disclosures may be made to the immediate next of kin as defined in DoD Directive 5154.24 of 28 October 1996 (NOTAL).

(7) A clearly unwarranted invasion of the privacy of third parties identified in a personnel, medical or similar record constitutes a basis for deleting those reasonably segregable portions of that record. When withholding third party personal information from the subject of the record and the record is contained in a Privacy Act system of records, consult with legal counsel.

(8) This exemption also applies when the fact of the existence or nonexistence of a responsive record would itself reveal personally private information, and the public interest in disclosure is not sufficient to outweigh the privacy interest. In this situation, DON activities shall neither confirm nor deny the existence or nonexistence of the record being requested. This is a Glomar response, and exemption (b)(6) must be cited in the response. Additionally, in order to insure personal privacy is not violated during referrals, DON activities shall coordinate with other DON activities or Federal agencies before referring a record that is exempt under the Glomar concept.

(i) A ''refusal to confirm or deny'' response must be used consistently, not only when a record exists, but also when a record does not exist. Otherwise, the pattern of using a ''no records'' response when a record does not exist and a ''refusal to confirm or deny'' when a record does exist will itself disclose personally private information.

(ii) Refusal to confirm or deny should not be used when the person whose personal privacy is in jeopardy has provided the requester a waiver of his or her privacy rights; the person initiated or directly participated in an investigation that led to the creation of an agency record seeks access to that record; or the person whose personal privacy is in jeopardy is deceased, the Agency is aware of that fact, and disclosure would not invade the privacy of the deceased's family.

(g) 5 U.S.C. 552(b)(7). Records or information compiled for law enforcement purposes; *i.e.*, civil, criminal, or military law, including the implementation of Executive Orders or regulations issued under law. This exemption may be invoked to prevent disclosure of documents not originally created for, but later gathered for law enforcement purposes. With the exception of (b)(7)(C) and (b)(7)(F), this exemption is discretionary. This exemption applies, however, only to the extent that production of such law enforcement records or information could result in the following:

(1) 5 U.S.C. 552(b)(7)(A): Could reasonably be expected to interfere with enforcement proceedings.

(2) 5 U.S.C. 552(b)(7)(B): Would deprive a person of the right to a fair trial or to an impartial adjudication.

(3) 5 U.S.C. 552(b)(7)(C): Could reasonably be expected to constitute an unwarranted invasion of personal privacy of a living person, including surviving family members of an individual identified in such a record.

(i) This exemption also applies when the fact of the existence or nonexistence of a responsive record would itself reveal personally private information, and the public interest in disclosure is not sufficient to outweigh the privacy interest. In this situation, Components shall neither confirm nor deny the existence or nonexistence of the record being requested. This is a Glomar response, and exemption (b)(7)(C) must be cited in the response. Additionally, in order to insure personal privacy is not violated during referrals, DON activities shall coordinate with other DON/DoD activities or Federal Agencies before referring a record that is exempt under the Glomar concept. A ''refusal to confirm or deny'' response must be used consistently, not only when a record exists, but also when a record does not exist. Otherwise, the pattern of using a ''no records'' response when a record does not exist and a ''refusal to confirm or deny'' when a record does exist will itself disclose personally private information.

(ii) Refusal to confirm or deny should not be used when the person whose personal privacy is in jeopardy has provided the requester with a waiver of his

or her privacy rights; or the person whose personal privacy is in jeopardy is deceased, and the activity is aware of that fact.

(4) 5 U.S.C. 552(b)(7)(D): Could reasonably be expected to disclose the identity of a confidential source, including a source within the DON; a State, local, or foreign agency or authority; or any private institution that furnishes the information on a confidential basis; and could disclose information furnished from a confidential source and obtained by a criminal law enforcement authority in a criminal investigation or by an agency conducting a lawful national security intelligence investigation.

(5) 5 U.S.C. 552(b)(7)(E): Would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.

(6) 5 U.S.C. 552(b)(7)(F): Could reasonably be expected to endanger the life or physical safety of any individual.

(7) Some examples of exemption 7 are: Statements of witnesses and other material developed during the course of the investigation and all materials prepared in connection with related Government litigation or adjudicative proceedings; the identity of firms or individuals being investigated for alleged irregularities involving contracting with the DoD when no indictment has been obtained nor any civil action filed against them by the United States; information obtained in confidence, expressed or implied, in the course of a criminal investigation by a criminal law enforcement agency or office within a DON activity or a lawful national security intelligence investigation conducted by an authorized agency or office within the DON; national security intelligence investigations include background security investigations and those investigations conducted for the purpose of obtaining affirmative or counterintelligence information.

(8) The right of individual litigants to investigative records currently available by law (such as, the Jencks Act, 18 U.S.C. 3500), is not diminished.

(9) *Exclusions*. Excluded from the exemption in paragraph (g)(8) are the following two situations applicable to the DON:

(i) Whenever a request is made that involves access to records or information compiled for law enforcement purposes, and the investigation or proceeding involves a possible violation of criminal law where there is reason to believe that the subject of the investigation or proceeding is unaware of its pendency, and the disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings, DON activities may, during only such times as that circumstance continues, treat the records or information as not subject to the FOIA. In such situation, the response to the requester will state that no records were found.

(ii) Whenever informant records maintained by a criminal law enforcement organization within a DON activities under the informant's name or personal identifier are requested by a third party using the informant's name or personal identifier, the DON activity may treat the records as not subject to the FOIA, unless the informant's status as an informant has been officially confirmed. If it is determined that the records are not subject to 5 U.S.C. 552(b)(7), the response to the requester will state that no records were found.

(iii) DON activities considering invoking an exclusion should first consult with the DOJ's Office of Information and Privacy.

(h) 5 U.S.C. 552(b)(8): Those contained in or related to examination, operation or condition reports prepared by, on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions.

(i) 5 U.S.C. 552(b)(9): Those containing geological and geophysical information and data (including maps) concerning wells.

## Subpart E—Indexing, Public Inspection, and Federal Register Publication of Department of the Navy Directives and Other Documents Affecting the Public

SOURCE: 65 FR 24635, Apr. 27, 2000, unless otherwise noted.

### § 701.61 Purpose.

This subpart implements 5 U.S.C. 552(a) (1) and (2) and provisions of Department of Defense Directive 5400.7 May 13, 1988 (32 CFR part 286, 55 FR 53104); Department of Defense Directive 5400.9, December 23, 1974 (32 CFR part 336, 40 FR 49111); and the Regulations of the Administrative Committee of the Federal Register (1 CFR chaps. I and II) by delineating responsibilities and prescribing requirements, policies, criteria, and procedures applicable to:

(a) Publishing the following Department of the Navy documents in the FEDERAL REGISTER:

(1) Certain classes of regulatory, organizational policy, substantive, and procedural documents required to be published for the guidance of the public;

(2) Certain classes of proposed regulatory documents required to be published for public comment prior to issuance; and

(3) Certain public notices required by law or regulation to be published;

(b) Making available, for public inspection and copying, certain classes of documents having precedential effect on decisions concerning members of the public;

(c) Maintaining current indexes of documents having precedential effect on decisions concerning members of the public, and publishing such indexes or making them available by other means;

(d) Receiving and considering petitions of members of the public for the issuance, revision, or cancellation of regulatory documents of some classes; and

(e) Distributing the FEDERAL REGISTER for official use within the Department of the Navy.

### § 701.62 Scope and applicability.

This subpart prescribes actions to be executed by, or at the direction of, Navy Department (as defined in § 700.104c of this chapter) components and specified headquarters activities for apprising members of the public of Department of the Navy regulations, policies, substantive and procedural rules, and decisions which may affect them, and for enabling members of the public to participate in Department of the Navy rulemaking processes in matters of substantial and direct concern to the public. This subpart complements subpart A, which implements Navy-wide requirements for furnishing documents to members of the public upon request. That a document may be published or indexed and made available for public inspection and copying under this instruction does not affect the possible requirement under subpart A for producing it for examination, or furnishing a copy, in response to a request made under that subpart.

### § 701.63 Policy.

In accordance with the spirit and intent of 5 U.S.C. 552, the public has the right to maximum information concerning the organization and functions of the Department of the Navy. This includes information on the policies and the substantive and procedural rules used by the Department of the Navy in its dealings with the public. In accordance with Department of Defense policy described in 32 CFR part 336, 40 FR 4911, moreover, the public is encouraged to participate in Department of the Navy rulemaking when the proposed rule would substantially and directly affect the public.

### § 701.64 Publication of adopted regulatory documents for the guidance of the public.

(a) *Classes of documents to be published*. Subject to the provisions of 5 U.S.C. 552(b) which exempt specified matters from requirements for release to the public [see subpart B of this part], the classes of Department of the Navy documents required to be published on a current basis in the FEDERAL REGISTER are listed below.

(1) *Naval organization and points of contact*—description of the central and

field organization of the Department of the Navy and the locations at which, the members or employees from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(2) *Methods and procedures for business with public*—statements of the general course and methods by which Department of the Navy functions affecting members of the public are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(3) *Procedural rules and forms*—rules of procedure for functions affecting members of the public, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations required to be submitted under such rules of procedures; and

(4) *Substantive rules and policies*—substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the Department of the Navy. Such rules are commonly contained in directives, manuals, and memorandums.

(i) *''General applicability'' defined.* The definition prescribed in 1 CFR 1.1 pertains to the classes of documents contemplated in § 701.64(b) (4).

(ii) *Internal personnel rules and internal practices.* In addition to other exemptions listed in 5 U.S.C. 552(b) and subpart B of this part, particular attention is directed to the exemption pertaining to internal personnel rules and internal practices.

(iii) *Local regulations.* It is unnecessary to publish in the FEDERAL REGISTER a regulation which is essentially local in scope or application, such as a directive issued by a base commander in the implementation of his responsibility and authority under subpart G of part 700 of this title for guarding the security of the installation or controlling the access and conduct of visitors or tradesmen. However, such publication may be authorized under extraordinary circumstances, as determined by the Chief of Naval Operations or the Commandant of the Marine Corps, as appropriate, with the concurrence of the Judge Advocate General.

(iv) *Incorporation by reference.* With the approval of the Director of the Federal Register given in the limited instances authorized in 1 CFR part 51 and 32 CFR 336.5(c), the requirement for publication in the FEDERAL REGISTER may be satisfied by reference in the FEDERAL REGISTER to other publications containing the information which must otherwise be published in the FEDERAL REGISTER. In general, matters eligible for incorporation by reference are restricted to materials in the nature of published data, criteria, standards, specifications, techniques, illustrations, or other published information which are reasonably available to members of the class affected.

(b) *Public inspection.* When feasible, Department of the Navy and Department of Defense documents published in the FEDERAL REGISTER should be made available for inspection and copying, along with available indexes of such documents, in the same locations used for copying of the documents contemplated in § 701.65.

### § 701.65 Availability, public inspection, and indexing of other documents affecting the public.

(a) *Discussion.* Section 552(a) of title 5, United States Code, requires the Department of the Navy to make available for public inspection and copying documents which have precedential significance on those Department of the Navy decisions which affect the public. These documents must be kept readily available for public inspection and copying at designated locations, unless they are promptly published and copies are offered for sale. Additionally, documents issued after July 4, 1967, are required to be indexed on a current basis. These indexes, or supplements thereto, must be published at least quarterly in accordance with the provisions of this paragraph. In determining whether a particular document is subject to the requirements of this paragraph, consideration should be given to the statutory purposes and legal effect of the provisions.

(1) *Statutory purposes.* In general, the purpose of the requirement to provide members of the public with essential

information is to enable them to deal effectively and knowledgeably with Federal agencies; to apprise members of the public of the existence and contents of documents which have potential legal consequences as precedents in administrative determinations which may affect them; and to permit public examination of the basis for administrative actions which affect the public.

(2) *Legal effect*. If a document is required to be indexed and made available under this paragraph, it may not be used or asserted as a precedent against a member of the public unless it was indexed and made available, or unless the person against whom it is asserted had actual and timely notice of its contents.

(b) *Classes of documents affected*. (1) Subject to the provisions of 5 U.S.C. 552(b) which exempt specified matters from the requirements of public disclosure, the following classes of Department of the Navy documents are included in the requirements of this paragraph:

(i) *Final adjudicative opinions and orders*—opinions (including concurring and dissenting opinions) which are issued as part of the final disposition of adjudication proceedings (as defined in 5 U.S.C. 551) and which may have precedential effect in the disposition of other cases affecting members of the public;

(ii) *Policy statements and interpretations*—statements of policy and interpretations of less than general applicability (*i.e.*, applicable only to specific cases; organizations, or persons), which are not required to be published in the FEDERAL REGISTER, but which may have precedential effect in the disposition of other cases affecting members of the public;

(iii) *Manuals and instructions*—administrative staff manuals, directives, and instructions to staff, or portions thereof, which establish Department of the Navy policy or interpretations of policy that serve as a basis for determining the rights of members of the public with regard to Department of the Navy functions. In general, manuals and instructions relating only to Internal management aspects of property or fiscal accounting, personnel administration, and most other ''proprietary'' functions of the department are not within the scope of this provision. This provision also does not apply to instructions for employees on methods, techniques, and tactics to be used in performing their duties; for example:

(A) Instructions or manuals issued for audit, investigation, and inspection purposes;

(B) Those which prescribe operational tactics; standards of performance; criteria for defense, prosecution, or settlement of cases; or negotiating or bargaining techniques, limitations, or positions; and

(C) Operations and maintenance manuals and technical information concerning munitions, equipment, and systems, and foreign intelligence operations.

(2) In determining whether a document has precedential effect, the primary test is whether it is intended as guidance to be followed either in decisions or evaluations by the issuing authority's subordinates, or by the issuing authority itself in the adjudication or determination of future cases involving similar facts or issues. The kinds of orders or opinions which clearly have precedential effect are those that are intended to operate both as final dispositions of the questions involved in the individual cases presented, and as rules of decision to be followed by the issuing authority or its subordinates in future cases involving similar questions. By contrast, many adjudicative orders and opinions issued within the Department of the Navy operate only as case-by-case applications of policies or interpretations established in provisions of manuals or directives and are not themselves used, cited, or relied on as rules of decision in future cases. In these instances, the underlying manual or directive provisions obviously would have precedential effect, but the orders and opinions themselves would not have. A recommendation by an official who is not authorized to adjudicate, or to issue a binding statement of policy or interpretation in a particular matter would not have precedential effect though an order, opinion, statement of policy, or interpretation issued by an authorized

official pursuant to such recommendation might have that effect.

(c) *Deletion of identifying details.* (1) Although the exemptions from public disclosure described in 5 U.S.C. 552 and subpart B of this part are applicable to documents which are required to be indexed and made available for public inspection and copying under this paragraph, there is no general requirement that any segregable portions of partially exempt documents be so indexed and made available for public inspection and copying. As a general rule, a record may therefore be held exempt in its entirety from the requirements of this paragraph if it is determined that it contains exempt matter and that it is reasonably foreseeable that disclosure would be harmful to an interest protected by that exemption. An exception to this general rule does exist with regard to a record which would be exempt only because it contains information which, if disclosed, would result in a clearly unwarranted invasion of privacy.

(2) Where necessary to prevent a clearly unwarranted invasion of a person's privacy, identifying details should be deleted from a record which is required to be indexed and made available for public inspection and copying under this paragraph. In every such case, the justification for the deletion must be fully stated in writing in a manner which avoids creating inferences that could be injurious to the person whose privacy is involved. Usual reasons for deletion of identifying details include the protection of privacy in a person's business affairs, medical matters, or private family matters; humanitarian considerations; and avoidance of embarrassment to a person.

(d) *Publication of indexes*—(1) *Form of indexes.* Each index should be arranged topically or by descriptive words, so that members of the public may be able to locate the pertinent documents by subject, rather than by case name or by a numbering system.

(2) *Time of publication.* Each component having cognizance of records required under this paragraph to be indexed shall compile and maintain an index of such records on a continually current basis. Each such index was required to initially be published by July 1, 1975. An updated version of each such index, or a current supplement thereto, shall be published by an authorized method at least annually thereafter.

(3) *Methods of publication.* The methods authorized for publication of the indexes contemplated in this paragraph are:

(i) Publication in the FEDERAL REGISTER;

(ii) Commercial publication, provided that such commercial publication is readily available to members of the public, or will be made available upon request, and payment of costs (if this method is utilized, information on the cost of copies and the address from which they may be obtained shall be published in the FEDERAL REGISTER); or

(iii) Furnishing internally reproduced copies upon request, at cost not to exceed the direct cost of duplication in accordance with subpart D of this part, provided that it is determined by an order published in the FEDERAL REGISTER, that the publication of the index by methods § 701.65(d) (3) (i) or (ii) would be unnecessary or impracticable. Such order shall state the cost of copies and the address from which they may be obtained. The Chief of Naval Operations (N09B30) is authorized to issue such an order in a proper case.

(4) *Public inspection of indexes.* In addition to publication by one of the foregoing methods, each index will be made available for public inspection and copying in accordance with § 701.65(e) at the locations where Department of the Navy records are available for public inspection.

(e) *Where records may be inspected.* Locations and times at which Department of the Navy records, and indexes thereof, are available for public inspection and copying are shown in § 701.32.

(f) *Cost.* Fees for copying services, if any, furnished at locations shown in § 701.32 shall be determined in accordance with subpart D of this part.

(g) *Records of the United States Navy-Marine Corps Court of Military Review.* The United States Navy-Marine Corps Court of Military Review is deemed to be ''a court of the United States'' within the meaning of 5 U.S.C. 551 and is therefore excluded from the requirements of 5 U.S.C. 552. Nevertheless, unpublished decisions of the United

States Navy-Marine Corps Court of Military Review, although not indexed, are available for public inspection at the location shown in § 701.32(c).

### § 701.66 Publication of proposed regulations for public comment.

(a) *Discussion*. The requirements of this section are not imposed by statute, but are the implementation of policies and procedures created administratively in 32 CFR part 336. In effect, the pertinent provisions of 32 CFR part 336 establish, within the Department of Defense and its components, procedures that are analogous to the public rulemaking procedures applicable to some functions of other Federal agencies under 5 U.S.C. 553. While the administrative policy of encouraging the maximum practicable public participation in the Department of the Navy rulemaking shall be diligently followed, determinations by the Department of the Navy as to whether a proposed regulatory requirement originated by it comes within the purview of this paragraph and the corresponding provisions of 32 CFR part 336, and as to whether inviting public comment is warranted, shall be conclusive and final.

(b) *Classes of documents affected*. Each proposed regulation or other document of a class described in § 701.64(a) (or a proposed revision of an adopted document of any of those classes) which would ''originate'' within the Department of the Navy a requirement of general applicability and future effect for implementing, interpreting, or prescribing law or policy, or practice and procedure requirements constituting authority for prospective actions having substantial and direct impact on the public, or a significant portion of the public, must be evaluated to determine whether inviting public comment prior to issuance is warranted. Documents that merely implement regulations previously issued by higher naval authorities or by the Department of Defense will not be deemed to ''originate'' requirements within the purview of this section. If a proposed document is within the purview of this section, publication to invite public comment will be warranted unless, upon evaluation, it is affirmatively determined both that a significant and legitimate interest of the Department of the Navy or the public will be served by omitting such publication for public comment, and that the document is subject to one or more of the following exceptions:

(1) It pertains to a military or foreign affairs function of the United States which has been determined under the criteria of an Executive Order or statute to require a security classification in the interests of national defense or foreign policy;

(2) It relates to naval management, naval military or civilian personnel, or public contracts (e.g. Navy Procurement Directives), including nonappropriated fund contracts;

(3) It involves interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(4) It is determined with regard to the document, for good cause, that inviting the public comment is impracticable, unnecessary, or contrary to the public interest.

(c) *Procedures*—(1) *Normal case*. Unless the official having cognizance of a proposed regulatory document determines under the criteria of § 701.66(b) that inviting public comment is not warranted, he or she shall cause it to be published in the FEDERAL REGISTER with an invitation for the public to submit comments in the form of written data, views, or arguments during a specified period of not less than 30 days following the date of publication. An opportunity for oral presentation normally will not be provided, but may be provided at the sole discretion of the official having cognizance of the proposed directive if he or she deems it to be in the best interest of the Department of the Navy or the public to do so. After careful consideration of all relevant matters presented within the period specified for public comment, the proposed document may be issued in final form. After issuance, the adopted document, and a preamble explaining the relationship of the adopted document to the proposed and the nature and effect of public comments, shall be published in the FEDERAL REGISTER for guidance of the public.

(2) *Where public comment is not warranted.* The official having cognizance of a proposed document within the purview of this paragraph shall, if he or she determines that inviting public comment concerning the document is not warranted under the criteria of § 701.66(b), incorporate that determination, and the basis therefor, in the document when it is issued or submitted to a higher authority for issuance. After issuance, such document shall be published in the FEDERAL REGISTER for the guidance of the public, if required under § 701.64(b).

### § 701.67 Petitions for issuance, revision, or cancellation of regulations affecting the public.

In accordance with the provisions of 32 CFR part 336, the Department of the Navy shall accord any interested person the right to petition in writing, for the issuance, revision, or cancellation of regulatory document that originates, or would originate, for the Department of the Navy, a policy, requirement, or procedure which is, or would be, within the purview of § 701.66. The official having cognizance of the particular regulatory document involved, or having cognizance of the subject matter of a proposed document, shall give full and prompt consideration to any such petition. Such official may, at his or her absolute discretion, grant the petitioner an opportunity to appear, at his or her own expense, for the purpose of supporting the petition, if this is deemed to be compatible with orderly conduct of public business. The petitioner shall be advised in writing of the disposition, and the reasons for the disposition, of any petition within the purview of this section.

## Subpart F—DON Privacy Program

SOURCE: 71 FR 27536, May 11, 2006, unless otherwise noted.

### § 701.100 Purpose.

Subparts F and G of this part implement the Privacy Act (5 U.S.C. 552a), and the DOD Directives 5400.11 and 5400.11–R series, DOD Privacy Program (see 32 CFR part 310) and provides DON policies and procedures to ensure that all DON military members and civilian/contractor employees are made fully aware of their rights and responsibilities under the provisions of the Privacy Act (PA); to balance the Government's need to maintain information with the obligation to protect individuals against unwarranted invasions of their privacy stemming from the DON's collection, maintenance, use, and disclosure of Protected Personal Information (PPI); and to require privacy management practices and procedures be employed to evaluate privacy risks in publicly accessible DON Web sites and unclassified non-national security information systems.

(a) *Scope.* Governs the collection, safeguarding, maintenance, use, access, amendment, and dissemination of PPI kept by DON in PA systems of records.

(b) *Guidance.* Provides guidance on how to respond to individuals who seek access to information in a PA system of records that is retrieved by their name and/or personal identifier.

(c) *Verify identity.* Establishes ways to verify the identity of individuals who request their records before the records are made available to them.

(d) *Online resources.* Directs the public to the Navy's PA Online Web site at *http://www.privacy.navy.mil* that defines the DON's PA Program, lists all Navy, Marine Corps, and Government-wide systems of records and provides guidance on how to gain access to those records.

(e) *Rules of conduct.* Governs the PA rules of conduct for personnel, who will be subject to either civil or criminal penalties for noncompliance with 5 U.S.C. 552a.

(f) *Privacy impact assessment (PIA) requirements.* Establishes requirements for conducting, reviewing, approving, and publishing PIAs.

### § 701.101 Privacy program terms and definitions.

(a) *Access.* Review or copying a record or parts thereof contained in a system of records by any individual.

(b) *Agency.* For the purposes of disclosing records subject to the PA between or among DOD components, DOD is considered a single agency. For all other purposes, DON is considered an agency within the meaning of PA.

(c) *Disclosure*. The transfer of any personal information from a system of records by any means of communication (such as oral, written, electronic, mechanical, or actual review), to any person, private entity, or Government agency, other than the subject of the record, the subject's designated agent or the subject's legal guardian.

(d) *Federal personnel*. Officers and employees of the U.S. Government, members of the uniformed services (including members of the reserve), individuals or survivors thereof, entitled to receive immediate or deferred retirement benefits under any retirement program of the U.S. Government (including survivor benefits).

(e) *Individual*. A living citizen of the U.S. or an alien lawfully admitted to the U.S. for permanent residence. The custodial parent of a minor or the legal guardian of any individual also may act on behalf of an individual. Members of the United States Armed Forces are ''individuals.'' Corporations, partnerships, sole proprietorships, professional groups, businesses, whether incorporated or unincorporated, and other commercial entities are not ''individuals.''

(f) *Individual access*. Access to information pertaining to the individual by the individual or his/her designated agent or legal guardian.

(g) *Information in identifiable form (IIF)*. Information in an Information Technology (IT) system or online collection that directly identifies an individual (e.g., name, address, social security number or other identifying code, telephone number, e-mail address, etc.) or by an agency intends to identify specific individuals in conjunction with other data elements (*i.e.*, indirect identification that may include a combination of gender, race, birth date, geographic indicator, and other descriptors).

(h) *Information system*. A discrete set of information resources organized for the collection, processing, maintenance, transmission, and dissemination of information.

(i) *Maintain*. Includes maintain, collect, use, or disseminate.

(j) *Member of the public*. Any individual or party acting in a private capacity.

(k) *Minor*. Under this subpart, a minor is an individual under 18 years of age, who is not a member of the U.S. Navy or Marine Corps, or married.

(l) *Official use*. Within the context of this subpart, this term is used when DON officials and employees have a demonstrated need for the use of any record or the information contained therein in the performance of their official duties.

(m) *Personal information*. Information about an individual that identifies, relates, or is unique to, or describes him or her (e.g., Social Security Number (SSN), age, military rank, civilian grade, marital status, race, salary, home/office phone numbers, etc.).

(n) *Privacy Act (PA) request*. A request from an individual for notification as to the existence of, access to, or amendment of records pertaining to that individual. These records must be maintained in a system of records.

(o) *Privacy Impact Assessment (PIA)*. An ongoing assessment to evaluate adequate practices in balancing privacy concerns with the security needs of an organization. The process is designed to guide owners and developers of information systems in assessing privacy through the early stages of development. The process consists of privacy training, gathering data from a project on privacy issues, identifying and resolving the privacy risks, and approval by a designated privacy representative.

(p) *Protected personal information (PPI)*. Any information or characteristics that may be used to distinguish or trace an individual's identity, such as their name, SSN, or biometric records.

(q) *Record*. Any item, collection, or grouping of information, whatever the storage media (e.g., paper, electronic, etc), about an individual that is maintained by a DON activity including, but not limited to, the individual's education, financial transactions, and medical, criminal, or employment history, and that contains the individual's name or other identifying particulars assigned to the individual, such as a finger or voice print or a photograph.

(r) *Review authority*. An official charged with the responsibility to rule

on administrative appeals of initial denials of requests for notification, access, or amendment of records. SECNAV has delegated review authority to the Assistant Secretary of the Navy (Manpower & Reserve Affairs) (ASN(M&RA)), General Counsel of the DON (GC), and the Judge Advocate General of the Navy (JAG). Additionally, the Office of Personnel Management (OPM) is the review authority for civilian official personnel folders or records contained in any other OPM record.

(s) *''Routine use'' disclosure*. A disclosure of a record made outside DOD for a purpose that is compatible with the purpose for which the record was collected and maintained by DOD. The ''routine use'' must have been included in the notice for the system of records published in the FEDERAL REGISTER.

(t) *Statistical record*. A record maintained only for statistical research, or reporting purposes, and not used in whole or in part in making any determination about a specific individual.

(u) *System manager*. An official who has overall responsibility for a system of records. He/she may serve at any level in DON. Systems managers are indicated in the published record systems notices. If more than one official is indicated as a system manager, initial responsibility resides with the manager at the appropriate level (*i.e.*, for local records, at the local activity).

(v) *System of records*. A group of records under the control of a DON activity from which information is retrieved by the individual's name or by some identifying number, symbol, or other identifying particular assigned to the individual. System notices for all PA systems of records must be published in the FEDERAL REGISTER and are also available for viewing or downloading from the Navy's Privacy Act Online Web site at *http://www.privacy.navy.mil*.

(w) *Web site*. A collection of information organized into a number of Web documents related to a common subject or set of subjects, including the ''home page'' and the linked subordinate information.

(x) *Working day*. All days excluding Saturday, Sunday, and legal holidays.

**§ 701.102 Online resources.**

(a) *Navy PA online Web site (http://www.privacy.navy.mil)*. This Web site supplements this subpart and subpart G. It provides a detailed understanding of the DON's PA Program. It contains information on Navy and Marine Corps systems of records notices; Government-wide systems of records notices that can be used by DON personnel; and identifies Navy and Marine Corps exempt systems of records notices. It includes: PA policy documents; sample training materials; DOD ''Blanket Routine Uses;'' a checklist for conducting staff assistance visits; a copy of PA statute; guidance on how to establish, delete, alter, or amend PA systems of records notices; and provides updates on the DON's PA Program.

(b) *DON Chief Information Officer (DON CIO) Web site (http://www.doncio.navy.mil)*. This Web site provides detailed guidance on PIAs.

(c) *DOD's PA Web site (http://www.defenselink.mil/privacy)*. This Web site is an excellent resource that contains a listing of all DOD and its components' PA systems of records notices, DOD PA directive and regulation, OMB Circulars, Defense Privacy Decision Memoranda, etc.

(d) *DON Freedom of Information Act (FOIA) Web site (http://www.foia.navy.mil)*. This Web site discusses the interface between PA and FOIA and provides detailed guidance on the DON's FOIA Program.

**§ 701.103 Applicability.**

(a) *DON activities*. Applies to all DON activities that collect, maintain, or disseminate PPI. Applies to DON activities and to contractors, vendors, and other entities that develop, procure, or use Information Technology (IT) systems under contract to DOD/DON, to collect, maintain, or disseminate IIF from or about members of the public.

(b) *Combatant commands*. Applies to the U.S. Joint Forces Command (USJFCOM) and U.S. Pacific Command (USPACOM), except for U.S. Forces Korea as prescribed by DOD Directive 5100.3.

(c) *U.S. citizens and legally admitted aliens*. Applies to living citizens of the U.S. or aliens lawfully admitted for

permanent legal residence. Requests for access to information in a PA system of records made by individuals who are not U.S. citizens or permanent residents will be processed under the provisions of the FOIA.

(d) *Federal contractors.* Applies to Federal contractors by contract or other legally binding action, whenever a DON contract provides for the operation, maintenance, or use of records contained in a PA system of records to accomplish a DON function.

(1) When a DON activity contracts for the operation or maintenance of a system of records or a portion of a system of records by a contractor, the record system or the portion of the record system affected are considered to be maintained by the DON activity and are subject to this subpart and subpart G of this part.

(2) The contractor and its employees are considered employees of the DON activity for purposes of the sanction provisions of the PA during the performance of the contract.

(3) The Defense Acquisition Regulatory (DAR) Council, which oversees the implementation of the Federal Acquisition Regulations (FAR) within DOD, is responsible for developing the specific policies and procedures for soliciting, awarding, and administering contracts that are subject to this subpart and 5 U.S.C. 552a.

(4) Consistent with the FAR regulations, contracts for the operation of a system of records shall identify specifically the record system and the work to be performed, and shall include in the solicitation and resulting contract the terms as prescribed by the FAR (see *http://www.privacy.navy.mil* (Admin Tools)).

(5) DON activities must furnish PA Program guidance to their personnel who solicit and award or administer Government contracts; inform prospective contractors of their responsibilities regarding the DON PA Program; and establish an internal system of contractor performance review to ensure compliance with the DON Privacy Program.

(6) This instruction does not apply to records of a contractor that are:

(i) Established and maintained solely to assist the contractor in making internal contractor management decisions, such as records maintained by the contractor for use in managing the contract;

(ii) Maintained as internal contractor employee records, even when used in conjunction with providing goods or services to a DON activity;

(iii) Maintained as training records by an educational organization contracted by a DON activity to provide training when the records of the contract students are similar to and commingled with training records of other students, such as admission forms, transcripts, and academic counseling and similar records;

(iv) Maintained by a consumer reporting agency to which records have been disclosed under 31 U.S.C. 3711; or

(7) DON activities shall establish contract surveillance programs to ensure contractors comply with the procedures established by the DAR Council.

(8) Disclosing records to a contractor for use in performing a contract let by a DON activity is considered a disclosure within DON (*i.e.*, based on an official need to know). The contractor is considered the agent of DON when receiving and maintaining the records for that activity.

(e) *Precedence.* In case of a conflict, this subpart and subpart G takes precedence over any DON directive that deals with the personal privacy and rights of individuals regarding their personal records, except for disclosure of PPI required by 5 U.S.C. 552 and implemented by Secretary of the Navy (SECNAVINST) 5720.42F.

### § 701.104 Responsibility and authority.

(a) *Delegation.* The Chief of Naval Operations (CNO) for administering and supervising the execution of 5 U.S.C. 552a, DOD Directive 5400.11 and DOD Regulation 5400.11–R. The Director, Navy Staff (DNS) will administer this program through the Head, DON PA/FOIA Policy Branch (DNS–36) who will serve as the Principal PA Program Manager for the DON.

(b) *CNO (DNS–36).* (1) Develops and implements DON policy on the provisions of the PA; serves as principal advisor on all DON PA matters; oversees the administration of the DON's PA

program; reviews and resolves PA complaints; maintains the DON's PA Online Web site; develops a Navy-wide PA training program and serves as training oversight manager; establishes, maintains, deletes, and approves Navy and joint Navy/Marine Corps PA systems of records notices; compiles reports that address the DON's PA Program to DOD and/or the Office of Management and Budget (OMB); conducts PA reviews as defined in OMB Circular A–130; publishes exempt systems of records in the CFR; and conducts staff assistance visits/program evaluations within DON to review compliance with 5 U.S.C. 552a, this subpart and subpart G of this part.

(2) Serves as PA Coordinator for the Secretary of the Navy (SECNAV), Office of the CNO (OPNAV) and the Naval Historical Center (NHC).

(3) Represents SECNAV on the Defense Privacy Board (DPO). Per DOD Directive 5400.11, the Board has oversight responsibility for implementation of the DOD Privacy Program.

(4) Represents SECNAV on the Defense Data Integrity Board. Per DOD Directive 5400.11, the Board has oversight responsibility for reviewing and approving all computer matching agreements between the DOD and other Federal, State, or local government agencies, as well as memoranda of understanding when the match is internal to DOD, to ensure that appropriate procedural and due process requirements have been established before engaging in computer matching activities.

(5) Provides input to the DPO on OMB's Federal Information Security Management Act (FISMA) Report.

(6) Coordinates on all PIAs prior to the PIA being submitted to DON CIO for review and final approval. Makes a determination as to whether the new IT system constitutes a PA system of records. If it does, determines whether an existing system covers the collection or whether a new systems notice will have to be written and approved. As necessary, assists the DON activity in creating and getting a new PA system of records notice approved.

(7) Oversees the administration of OPNAV's PA program.

(8) Chairs the DON PA Oversight Working Group.

(c) *Commandant of the Marine Corps (CMC).* (1) Administers and supervises the execution of this instruction within the Marine Corps and maintains and approves Marine Corps PA systems of records notices. The Commandant has designated CMC (ARSF) as the PA manager for the U.S. Marine Corps.

(2) Oversees the administration of the Marine Corps' PA program; reviews and resolves PA complaints; develops a Marine Corps privacy education, training, and awareness program; reviews and validates PIAs for Marine Corps information systems and submits the validation to CNO (DNS–36); establishes, maintains, deletes, and approves Marine Corps PA systems of records notices; and conducts staff assistance visits/program evaluations within the Marine Corps to review compliance with 5 U.S.C. 552a, this subpart and subpart G of this part.

(3) Serves as the PA Coordinator for all Headquarters, U.S. Marine Corps components, except for Marine Corps Systems Command and the Marine Corps Combat Development Command.

(4) Provides input to CNO (DNS–36) for inclusion FISMA Report.

(5) Serves on the DON PA Oversight Working Group.

(6) Coordinates on all PIAs prior to the PIA being submitted to DON CIO for review and final approval, making a determination as to whether the new IT system constitutes a PA system of records. If it does, determines whether an existing system covers the collection or whether a new systems notice will have to be written and approved. As necessary, assists the DON activity in creating and getting a new PA system of records notice approved.

(d) *DON CIO.* (1) Integrates protection of PPI into the overall DON major information system life cycle management process as defined in the E-Government Act of 2002 (Pub. L. 107–347).

(2) Provides guidance for effective assessment and utilization of privacy-related technologies.

(3) Provides guidance to DON officials on the conduct of PIAs (see their Web site at *http://www.doncio.navy.mil*) and oversees DON PIA policy and procedures to ensure PIAs are conducted

commensurate with the information system being assessed, the sensitivity of IIF in that system, and the risk of harm for unauthorized release of that information. Also, DON CIO reserves the right to request that a PIA be completed on any system that may have privacy risks.

(4) Reviews and approves all PIAs for the DON and submits the approved PIAs to DOD and OMB according to Federal and DOD guidance.

(5) Serves as the focal point in establishing and validating DON information systems privacy requirements and coordinating issues with other DOD Military Departments and Federal Agencies.

(6) Develops and coordinates privacy policy, procedures, education, training, and awareness practices regarding DON information systems.

(7) Compiles and prepares responses to either DOD or OMB regarding PIA issues.

(8) Develops and coordinates DON web privacy policy, education, training and an awareness program in accordance with DON Web privacy requirements including annual Web site privacy posting training with CNO (DNS–36).

(9) Provides guidance toward effective research and development of privacy-related technologies.

(10) Serves as the focal point in establishing and validating DON Web privacy requirements and coordinating issues with DOD, other Military Departments, and other Federal agencies.

(11) Provides guidance on the use of encryption software to protect privacy sensitive information.

(12) Implements DON IT privacy requirements and coordinates IT information system requirements that cross service boundaries with the Joint Staff.

(13) Provides recommended changes to CNO (DNS–36) on policy guidance set forth in this instruction regarding IT privacy policy and procedures that includes requirements/guidance for conducting PIAs.

(14) Provides input to CNO (DNS–36) for inclusion in the FISMA Report.

(15) Serves on the DON PA Oversight Working Group.

(e) *The Chief of Information (CHINFO) and U.S. Marine Corps Director of Public Affairs (DIRPA).* CHINFO and DIRPA, in accordance with DON CIO guidance on Department-wide Information Management (IM) and IT matters, are responsible for developing and administering Navy and Marine Corps Web site privacy policies and procedures respectively per SECNAVINST 5720.47B. Additionally, CHINFO and DIRPA:

(1) Maintains master World Wide Web (WWW) page to issue new service-specific Web privacy guidance. CHINFO will maintain a master WWW page to issue DON guidance and DIRPA will link to that page. All significant changes to this Web site and/or its location will be issued via Naval (ALNAV) message.

(2) Maintains overall cognizance for DON and U.S. Marine Corps Web sites and Web site content-related questions as they pertain to Web site privacy requirements.

(3) Ensures that public-facing Web sites have machine-readable privacy policies (*i.e.*, web privacy policies are P3P-enabled or automatically readable using some other tool).

(4) Provides input to CNO (DNS–36) for inclusion in the FISMA Report.

(5) Serves on the DON PA Oversight Working Group.

(f) *DON PA Oversight Working Group.* The DON PA Oversight Working Group is charged with reviewing and coordinating compliance with DON PA program initiatives. CNO (DNS–36) will chair this working group, hosting meetings as deemed appropriate to discuss best PA practices, PA issues, FISMA reporting and other reporting requirements, PA training initiatives, etc. At a minimum, membership shall consist of CNO (DNS–36), DON CIO, CMC (ARSF), CMC (C4I–IA), OJAG (Code 13), OGC (PA/FOIA), CMC (JAR), CHINFO, and CMC (PA).

(g) *DON activities.* Each DON activity is responsible for implementing and administering a PA program under this subpart and subpart G.

(h) *Navy Echelon 2 and 3 Commands and Marine Corps Major Subordinate Commands.* Each Navy Echelon 2 and 3 Command and Marine Corps Major Subordinate Command will designate a PA Coordinator to:

(1) Serve as principal point of contact on PA matters.

(2) Advise CNO (DNS–36) promptly of the need to establish a new Navy PA system of records; amend or alter an existing Navy system of records; or, delete a Navy system of records that is no longer needed.

(3) Advise CMC (ARSF) promptly of the need to establish a new Marine Corps PA system of records; amend or alter an existing Marine Corps system of records; or, delete a Marine Corps system of records that is no longer needed.

(4) Ensure no official files are maintained on individuals that are retrieved by name or other personal identifier without first ensuring that a system of records notice exists that permits such collection.

(5) Ensure that PA systems of records managers are properly trained on their responsibilities for protecting PPI being collected and maintained under the DON PA Program.

(6) Provide overview training to activity/command personnel on the provisions of this subpart and subpart G.

(7) Issue an implementing instruction which designates the activity's PA Coordinator, addresses PA records disposition, addresses PA processing procedures, identifies those PA systems of records being used by their activity; and provide training/guidance to those personnel involved with collecting, maintaining, disseminating information from a PA system of records.

(8) Review internal directives, forms, practices, and procedures, including those having PA implications and where Statements (PAS) are used or PPI is solicited.

(9) Maintain liaison with records management officials (e.g., maintenance and disposal procedures and standards, forms, and reports), as appropriate.

(10) Provide guidance on handling PA requests; scope of PA exemptions; and the fees, if any, that may be collected.

(11) Conduct staff assistance visits or program evaluations within their command and lower echelon commands to ensure compliance with the PA.

(12) Work closely with their PA systems managers to ensure they are properly trained with regard to collecting, maintaining, and disseminating information in a PA system of records notice.

(13) Process PA complaints.

(14) Ensure protocols are in place to avoid instances of loss of PPI. Should a loss occur, take immediate action to apprise affected individuals of how to ensure their identity has not been compromised.

(15) Work closely with their public affairs officer and/or web master to ensure that PPI is not placed on public Web sites or in public folders.

(16) Annually conduct reviews of their PA systems of records to ensure that they are necessary, accurate, and complete.

(17) Provide CNO (DNS–36) or CMC (ARSF) respectively, with a complete listing of all PA Coordinators under their jurisdiction. Such information should include activity name, complete mailing and E-Mail addresses, office code, name of PA Coordinator, and commercial, DSN, and FAX telephone numbers.

(18) Review and validate PIAs for their information systems and submit the validation to CNO (DNS–36) for Navy information systems or to HQMC (ARSF) for Marine Corps information systems.

(i) *DON employees/contractors.* DON employees/contractors are responsible for safeguarding the rights of others by:

(1) Ensuring that PPI contained in a system of records, to which they have access or are using to conduct official business, is protected so that the security and confidentiality of the information is preserved.

(2) Not disclosing any information contained in a system of records by any means of communication to any person or agency, except as authorized by this instruction or the specific PA systems of records notice.

(3) Not maintaining unpublished official files that would fall under the provisions of 5 U.S.C. 552a.

(4) Safeguarding the privacy of individuals and confidentiality of PPI contained in a system of records.

(5) Properly marking all documents containing PPI data (e.g., letters, E-Mails, message traffic, etc.) as ''FOR OFFICIAL USE ONLY—PRIVACY

SENSITIVE—Any misuse or unauthorized disclosure can result in both civil and criminal penalties.''

(6) Not maintaining privacy-sensitive information in public folders.

(7) Reporting any unauthorized disclosure of PPI from a system of records to the applicable Privacy Point of Contact (POC) for his/her activity.

(8) Reporting the maintenance of any unauthorized system of records to the applicable Privacy POC for his/her activity.

(j) *Denial authority*. Within DON, the head of the activity having cognizance over an exempt PA system of record is authorized to deny access to that information under the exemptions cited in the PA systems of records notice. The denial authority may also deny requests to amend a system of records or to deny notification that a record exists. As deemed appropriate, the head of the activity may further designate initial denial authority to an individual properly trained on the provisions of the PA and this subpart and subpart G of this part.

(k) *Release authority*. Within DON, officials having cognizance over a nonexempt PA system of record that is requested by a first party or his/her authorized representative are authorized to release records. A release authority may also grant requests for notification and amendment of systems of records. The PA systems manager, who is properly trained on the provisions of 5 U.S.C. 552a, DOD Directive 5400.11 and DOD 5400.11–R, may be delegated this responsibility.

(l) *Review authority*. (1) Assistant Secretary of the Navy (Manpower & Reserve Affairs) (ASN(M&RA)) is designated to act upon requests for administrative review of initial denials of requests for amendment of records related to fitness reports and performance evaluations of military personnel.

(2) Both the JAG and GC are designated to act upon requests for administrative review of initial denials of records for notification, access, or amendment of records under their cognizance.

(3) The authority of SECNAV, as the head of an agency, to request records subject to the PA from an agency external to DOD for civil or criminal law enforcement purposes, under (b)(7) of 5 U.S.C. 552a, is delegated to CMC; the Commander, Naval Criminal Investigative Service; JAG and GC.

(m) *System manager*. System managers are responsible for overseeing the collection, maintenance, use, and dissemination of information from a PA system of records and ensuring that all personnel who have access to those records are aware of their responsibilities for protecting PPI that is being collected or maintained. In this capacity, they shall:

(1) Establish appropriate administrative, technical, and physical safeguards to ensure the records in every system of records are protected from unauthorized alteration, destruction, or disclosure.

(2) Protect the records from reasonably anticipated threats or hazards that could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained.

(3) Work closely with their coordinator to ensure that all personnel who have access to a PA system of records are properly trained on their responsibilities under the PA. Training materials may be downloaded from *http://www.privacy.navy.mil*.

(4) Ensure that no illegal files are maintained.

NOTE: Official files on individuals that are retrieved by name and/or personal identifier must be approved and published in the FEDERAL REGISTER.

(5) Review annually each PA system of records notice under their cognizance to determine if the records are up-to-date and/or used in matching programs and whether they are in compliance with the OMB Guidelines. Such items as organization names, titles, addresses, etc., frequently change and should be reported to CNO (DNS–36) for updating and publication in the FEDERAL REGISTER.

(6) Work with IT personnel to identify any new information systems being developed that contain PPI. If a PA systems notice does not exist to allow for the collection, assist in creating a new systems notice that permits collection.

(7) Complete and maintain a PIA for those systems that collect, maintain or

disseminate IIF, according to DON PIA guidance found at *http://www.privacy.navy.mil* and *http://www.doncio.navy.mil*.

(8) Complete and maintain a disclosure accounting form for all disclosures made without the consent of the record subject, except those made within DOD or under FOIA. (See 701.111).

(9) Ensure that only those DOD/DON officials with a ''need to know'' in the official performance of their duties has access to information contained in a system of records.

(10) Ensure safeguards are in place to protect the privacy of individuals and confidentiality of PPI contained in a system of records.

(11) Ensure that records are maintained in accordance with the identified PA systems of records notice.

(12) Ensure that each newly proposed PA system of records notice is evaluated for need and relevancy and confirm that no existing PA system of records notice covers the proposed collection.

(13) Stop collecting any category or item of information about individuals that is no longer justified, and when feasible remove the information from existing records.

(14) Ensure that records are kept in accordance with retention and disposal requirements set forth in SECNAVINST 5720.47B.

(15) Take reasonable steps to ensure the accuracy, relevancy, timeliness, and completeness of a record before disclosing the record to anyone outside the Federal Government.

(16) Identify all systems of records that are maintained in whole or in part by contractor personnel, ensuring that they are properly trained and that they are routinely inspected for PA compliance.

### § 701.105 Policy.

DON recognizes that the privacy of an individual is a personal and fundamental right that shall be respected and protected and that PPI shall be collected, maintained, used, or disclosed to ensure that it is relevant and necessary to accomplish a lawful DON/DOD purpose required to be accomplished by statute or Executive Order (E.O.). Accordingly, it is DON policy that DON activities shall fully comply with 5 U.S.C. 552a, DOD Directive 5400.11 and DOD 5400.11–R to protect individuals from unwarranted invasions of privacy when information is collected, processed, maintained, or disseminated. To ensure compliance, DON activities shall follow the procedures listed in this section.

(a) *Collection, maintenance and use.* (1) Only maintain systems of records that have been approved and published in the FEDERAL REGISTER. (See *http://www.privacy.navy.mil* for a list of all DOD, Navy, Marine Corps, and component systems of records notices, as well as, links to Government-wide systems that the DON is eligible to use).

NOTE: CNO (DNS–36) can assist Navy activities in identifying existing systems that may meet their needs and HQMC (ARSF) can assist Marine Corps activities.

(2) Only collect, maintain, and use PPI needed to support a DON function or program as authorized by law or E.O. and disclose this information only as authorized by 5 U.S.C. 552a, this subpart and subpart G of this part. In assessing need, DON activities shall consider alternatives such as: truncating the SSN by only using the last four digits; using information that is not individually identifiable; using a sampling of certain data for certain individuals only. Additionally, they shall consider the length of time the information is needed and the cost of maintaining the information compared to the risks and adverse consequences of not maintaining the information.

(3) Only maintain PPI that is timely, accurate, complete, and relevant to the purpose for which it was collected.

(4) DON activities shall not maintain records describing how an individual exercises his/her rights guaranteed by the First Amendment (freedom of religion; freedom of political beliefs; freedom of speech; freedom of the press; the right to peaceful assemblage; and petition for redress of grievances), unless they are: expressly authorized by statute; authorized by the individual; within the scope of an authorized law enforcement activity; or are used for the maintenance of certain items of information relating to religious affiliation for members of the naval service who are chaplains.

NOTE: This should not be construed, however, as restricting or excluding solicitation of information that the individual is willing to have in his/her record concerning religious preference, particularly that required in emergency situations.

(b) *Disposal*. Dispose of records from systems of records to prevent inadvertent disclosure. To this end:

(1) Disposal methods are considered adequate if the records are rendered unrecognizable or beyond reconstruction (e.g., tearing, burning, melting, chemical decomposition, burying, pulping, pulverizing, shredding, or mutilation). Magnetic media may be cleared by completely erasing, overwriting, or degaussing the tape.

(2) DON activities may recycle PA data. Such recycling must be accomplished to ensure that PPI is not compromised. Accordingly, the transfer of large volumes of records in bulk to an authorized disposal activity is not considered a disclosure of records.

(3) When disposing of or destroying large quantities of records from a system of records, DON activities must ensure that the records are disposed of to preclude easy identification of specific records.

(c) *Individual access*. (1) Allow individuals to have access to and/or copies of all or portions of their records to which they are entitled. In the case of a legal guardian or custodial parent of a minor, they have the same rights as the individual he/she represents. A minor is defined as an individual under the age of 18. In the case of members of the Armed Forces under the age of 18, they are not considered to be minors for the purposes of the PA.

(2) Enter all PA first-party access requests into a tracking system and assign a case file number. (Files should comply with DON PA systems of records notice NM05211–1, PA Request Files and Tracking System at *http://www.privacy.navy.mil/notices*.)

(3) Allow individuals to seek amendment of their records when they can identify and provide proof that factual information contained therein is erroneous, untimely, incomplete, or irrelevant. While opinions are not subject to amendment, individuals who are denied access to amending their record may have a statement of disagreement added to the file.

(4) Allow individuals to appeal decisions that deny them access to or refusal to amend their records. If a request to amend their record is denied, allow the individual to file a written statement of disagreement.

(d) *Posting and use of PA sensitive information*. (1) Do not post PPI on an Internet site. Also, limit the posting and use of PA sensitive information on an Intranet Web site, letter, FAX, e-mail, etc.

(2) When posting or transmitting PPI, ensure the following legend is posted on the document: ''FOR OFFICIAL USE ONLY—PRIVACY ACT SENSITIVE: Any misuse or unauthorized disclosure of this information may result in both criminal and civil penalties.''

(e) *Safeguarding PPI*. DON activities shall establish appropriate administrative, technical and physical safeguards to ensure that the records in every system of records are protected from unauthorized alteration or disclosure and that their confidentiality is protected. Protect the records against reasonably anticipated threats of hazards that could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual about whom information is kept. At a minimum, DON activities shall:

(1) Tailor system safeguards to conform to the type of records in the system, the sensitivity of the PPI stored, the storage medium used, and the number of records maintained.

(2) Treat all unclassified records that contain PPI that normally would be withheld from the public under FOIA exemptions (b)(6) and (b)(7)(C) as if they were designated ''For Official Use Only'' and safeguard them from unauthorized disclosure.

(3) Ensure that privacy considerations are addressed in the reengineering of business processes and take proactive steps to ensure compliance with the PA and 5 U.S.C. 552a as they move from conducting routine business via paper to electronic media.

(4) Recognize the importance of protecting the privacy of its members, especially as it modernizes its collection systems. Privacy issues must be addressed when systems are being developed, and privacy protections must be

integrated into the development life cycle of automated systems. This applies also to contractors, vendors, and other entities that develop, procure, or use IT systems under contract to DOD/DON, to collect, maintain, or disseminate IIF from or about members of the public (see § 701.115).

(5) Ensure that adequate safeguards are implemented and enforced to prevent misuse, unauthorized disclosure, alteration, or destruction of PPI in records per 5 U.S.C. 552a, this subpart and subpart G of this part.

**§ 701.106 Collecting information about individuals.**

(a) *Collecting information directly from the individual.* To the greatest extent practicable, collect information for systems of records directly from the individual to whom the record pertains if the record may be used to make an adverse determination about the individual's rights, benefits, or privileges under a Federal program.

(b) *Collecting information about individuals from third persons.* It may not always be practical to collect all information about an individual directly. For example, when verifying information through other sources for security or employment suitability determinations; seeking other opinions, such as a supervisor's comments on past performance or other evaluations; obtaining the necessary information directly from the individual would be exceptionally difficult or would result in unreasonable costs or delays; or, the individual requests or consents to contacting another person to obtain the information.

(c) *Soliciting the SSN.* (1) It is unlawful for any Federal, State, or local government agency to deny an individual a right, benefit, or privilege provided by law because the individual refuses to provide his/her SSN. However, this prohibition does not apply if a Federal law requires that the SSN be provided, or the SSN is required by a law or regulation adopted before January 1, 1975, to verify the individual's identity for a system of records established and in use before that date.

(2) Before requesting an individual to provide the SSN, the individual must be advised whether providing the SSN is mandatory or voluntary; by what law or other authority the SSN is solicited; and what uses will be made of the SSN.

(3) The preceding advice relates only to the SSN. If other information about the individual is solicited for a system of records, a PAS also must be provided.

(4) The notice published in the FEDERAL REGISTER for each system of records containing SSNs solicited from individuals must indicate the authority for soliciting the SSNs and whether it is mandatory for the individuals to provide their SSN. E.O. 9397 requires Federal Agencies to use SSNs as numerical identifiers for individuals in most Federal records systems. However, it does not make it mandatory for individuals to provide their SSNs.

(5) When entering military service or civilian employment with the DON, individuals are asked to provide their SSNs. In many instances, this becomes the individual's numerical identifier and is used to establish personnel, financial, medical, and other official records (as authorized by E.O. 9397). The individuals must be given the notification described above. Once the individual has provided his/her SSN to establish a record, a notification is not required when the SSN is requested only for identification or to locate the records.

(6) DON activities are discouraged from collecting SSNs when another identifier would suffice. In those instances where activities wish to differentiate individuals, they may find it advantageous to only collect the last four digits of the individual's SSN, which is not considered to be privacy sensitive.

(7) If a DON activity requests an individual's SSN even though it is not required by Federal statute, or is not for a system of records in existence and operating prior to January 1, 1975, it must provide a PAS and make it clear that disclosure of the number is voluntary. Should the individual refuse to disclose his/her SSN, the activity must be prepared to identify the individual by alternate means.

(d) *Contents of a PAS.* (1) When an individual is requested to furnish PPI for possible inclusion in a system of

records, a PAS must be provided to the individual, regardless of the method used to collect the information (e.g., forms, personal or telephonic interview, etc). If the information requested will not be included in a system of records, a PAS is not required.

(2) The PAS shall include the following:

(i) The Federal law or E.O. that authorizes collection of information (*i.e.*, E.O. 9397 authorizes collection of SSNs);

(ii) Whether or not it is mandatory for the individual to provide the requested information. (Note: It is only mandatory when a Federal law or E.O. of the President specifically imposes a requirement to furnish the information and provides a penalty for failure to do so. If furnishing information is a condition precedent to granting a benefit or privilege voluntarily sought by the individual, then the individual may decline to provide the information and decline the benefit);

(iii) The principal purposes for collecting the information;

(iv) The routine uses that will be made of the information (e.g., to whom and why it will be disclosed outside DOD); and

(v) The possible effects on the individual if the requested information is not provided.

(3) The PAS must appear on the form used to collect the information or on a separate form that can be retained by the individual collecting the information. If the information is collected by a means other than a form completed by the individual, *i.e.*, solicited over the telephone, the PAS should be read to the individual and if requested by the individual, a copy sent to him/her. There is no requirement that the individual sign the PAS.

(e) *Format for a PAS.* When forms are used to collect information about individuals for a system of records, the PAS shall appear as follows (listed in the order of preference):

(1) Immediately below the title of the form;

(2) Elsewhere on the front page of the form (clearly indicating it is the PAS);

(3) On the back of the form with a notation of its location below the title of the form; or,

(4) On a separate form which the individual may keep.

(f) *Using forms issued by non-DOD activities.* Forms subject to the PA issued by other Federal agencies have a PAS attached or included. DON activities shall ensure that the statement prepared by the originating agency is adequate for the purpose for which the form will be used by the DON activity. If the PAS provided is inadequate, the DON activity concerned shall prepare a new statement or a supplement to the existing statement before using the form. Forms issued by agencies not subject to the PA (state, municipal, and local agencies) do not contain a PAS. Before using a form prepared by such agencies to collect PPI subject to this subpart and subpart G, an appropriate PAS must be added.

**§ 701.107 Record access.**

The access provisions of this subpart and subpart G of this part are intended for use by individuals about whom records are maintained in systems of records. Accordingly, only individuals seeking first party access to records retrieved by their name and/or personal identifier from a system of records have access under the provisions of 5 U.S.C. 552a, this subpart and subpart G of this part, unless they provide written authorization for their representative to act on their behalf. (See § 701.107(e) regarding access by custodial parents and legal guardians.)

(a) *How to request records.* Individuals shall address requests for access to records retrieved by their name and/or personal identifier to the PA systems manager or to the office designated in the paragraph entitled, ''Record Access Procedures.''

(1) DON activities may not require an individual to state a reason or justify the need to gain access under 5 U.S.C. 552a, this subpart and subpart G of this part.

(2) However, an individual must comply with the requirements of the PA and this instruction in order to seek access to records under the provisions of 5 U.S.C. 552a, this subpart and subpart G of this part. Specifically, individuals seeking access to records about themselves that are maintained in a PA system of records must sign their

request and provide specific identifying data to enable a search for the requested record. Failure to sign the request or to provide sufficient identifying data to locate the record will result in the request being returned for non-compliance with the ''Record Access Procedures'' cited in the PA system of records notice.

(b) *Authorized access.* (1) Individuals may authorize the release of all or part of their records to anyone they choose provided they submit a signed authorization to that DON activity. Such authorization must specifically state the records to which the individual may have access.

(2) Individuals may be accompanied by anyone they choose when seeking to review their records. In such instance, DON activities shall require the individual to provide a written authorization to allow the record to be discussed in front of the other person.

(c) *Failure to comply.* First party requesters will be granted access to their records under the provisions of the PA, unless:

(1) They did not properly identify the records being sought; did not sign their request; and/or failed to provide sufficient identifying data to locate the requested record(s);

(2) They are seeking access to information in a system of records that is exempt from disclosure in whole or in part under the provisions of 5 U.S.C. 552a;

(3) They are seeking access to information that was compiled in anticipation of a civil action or proceeding (*i.e.*, 5 U.S.C. 552a(d)(5) applies). The term ''civil action or proceeding'' includes quasi-judicial and pre-trial judicial proceedings, as well as formal litigation. However, this does not prohibit access to records compiled or used for purposes other than litigation or to records frequently subject to litigation. The information must have been compiled for the primary purpose of litigation to be withheld under 5 U.S.C. 552a(d)(5); or

(4) They are seeking access to information contained in the system that is currently and properly classified (see 5 U.S.C. 552a(k)(1)).

(d) *Blanket requests.* Many DON activities are unable to respond to ''blanket'' requests from individuals for access or copies of ''all records pertaining to them,'' because they do not have a centralized index that would allow them to query by name and personal identifier to identify ''all files.'' Accordingly, it is the requester's responsibility to identify the specific PA system of records notice for which they seek information. To assist the requester in identifying such systems, DON activities shall apprise the requester that a listing of all DON PA systems of records can be downloaded from *http://www.privacy.navy.mil* and that they should identify the specific records they are seeking and write directly to the PA systems manager listed in the notice, following the guidance set forth under the section entitled ''Record Access Procedures'' of the notice.

(e) *Access by custodial parents and legal guardians.* The custodial parent of any minor, or the legal guardian of any individual declared by a court of competent jurisdiction to be incompetent due to physical or mental incapacity or age, may obtain access to the record of the minor or incompetent individual under the provisions of the PA, if they are acting on behalf of/in the best interest of/for the benefit of the minor or incompetent. If the systems manager determines that they are not acting on behalf of/in the best interest of/for the benefit of the minor or incompetent, access will not be granted under the PA and the request will be processed under FOIA (5 U.S.C. 552). See 701.122 regarding access to medical records.

(f) *Access by a minor or incompetent.* The right of access of the parent or legal guardian is in addition to that of the minor or incompetent. Although a minor or incompetent has the same right of access as any other individual under this subpart and subpart G of this part, DON activities may wish to ascertain whether or not the individual is being coerced to obtain records for the benefit of another. If so, the activity may refuse to process the request under the provisions of PA.

(g) *Requests from members of Congress.* Requests received from a Member of Congress on behalf of a constituent shall be processed under the provisions of the PA and this subpart and subpart

G of this part if the requester is seeking access to records about the constituent contained in a non-exempt PA system of records (*i.e.*, first party request). Otherwise, the request will be processed under the provisions of the FOIA (see 5 U.S.C. 552) since the request is received from a third party (*i.e.*, not the record subject).

(1) The DOD ''Blanket Routine Uses'' enables DON activities to process requests from Members of Congress on behalf of their constituents without submitting a written authorization from the constituent granting authorization to act on their behalf.

(2) In those instances where the DON activity wishes to verify that a constituent is seeking assistance from a Member of Congress, an oral or written statement by a Congressional staff member is sufficient to confirm that the request was received from the individual to whom the record pertains.

(3) If the constituent inquiry is made on behalf of an individual other than the record subject (*i.e.*, a third party requester), advise the Member of Congress that a written consent from the record subject is required before information may be disclosed. Do not contact the record subject to obtain consent for the disclosure to the Member of Congress, unless specifically requested by the Member of Congress.

(4) Depending on the sensitivity of the information being requested, a DON activity may choose to provide the record directly to the constituent and notify the congressional office that this has been done without providing the record to the congressional member.

(h) *Release of PPI.* Release of PPI to individuals under the PA and/or this subpart or subpart G is not considered to be a public release of information.

(i) *Verification of identity.* (1) An individual shall provide reasonable verification of identity before obtaining access to records. In the case of seeking to review a record in person, identification of the individual can be verified by documents they normally carry (e.g., identification card, driver's license, or other license, permit/pass). DON activities shall not, however, deny access to an individual who is the subject of the record solely for refusing to divulge his/her SSN, unless it is the only means of retrieving the record or verifying identity.

(2) DON activities may not insist that a requester submit a notarized signature to request records. Instead, the requester shall be offered the alternative of submitting an unsworn declaration that states ''I declare under perjury or penalty under the laws of the United States of America that the foregoing is true and correct.''

(j) *Telephonic requests.* DON activities shall not honor telephonic requests nor unsigned E-Mail/FAX/letter requests for first party access to a PA system of records.

(k) *Denials.* (1) An individual may be denied access to a record pertaining to him/her only if the record was compiled in reasonable anticipation of civil action; is in a system of records that has been exempted from the access provisions of this subpart and subpart G of this part under one of the permitted exemptions; contains classified information that has been exempted from the access provision of this instruction under the blanket exemption for such material claimed for all DOD PA systems of records; is contained in a system of records for which access may be denied based on some other federal statute.

(2) Only deny the individual access to those portions of the records for which the denial of access serves some legitimate governmental purpose.

(3) Only a designated denial authority may deny access to information contained in an exempt PA system of records. The denial must be in writing and at a minimum include the name, title or position and signature of the designated denial authority; the date of the denial; the specific reason for the denial, including specific citation to the appropriate sections of the PA or other statutes, this instruction, or CFR authorizing the denial; notice to the individual of his/her right to appeal the denial through the component appeal procedure within 60 calendar days; and, the title or position and address of the PA appeals official for the DON.

(l) *Illegible or incomplete records.* DON activities may not deny an individual access to a record solely because the physical condition or format of the

record does not make it readily available (*i.e.*, when the record is in a deteriorated state or on magnetic tape). DON activities may either prepare an extract or recopy the document and mark it ''Best Copy Available.''

(m) *Personal notes.* (1) Certain documents under the physical control of a DON employee and used to assist him/her in performing official functions are not considered ''agency records'' within the meaning of this instruction. Uncirculated personal notes and records that are not disseminated or circulated to any person or organization (e.g., personal telephone lists or memory aids) that are retained or discarded at the author's discretion and over which the DON activity does not exercise direct control, are not considered ''agency records.'' However, if personnel are officially directed or encouraged, either in writing or orally, to maintain such records, they may become ''agency records,'' and may be subject this subpart and subpart G of this part.

(2) The personal uncirculated handwritten notes of unit leaders, office supervisors, or military supervisory personnel concerning subordinates are not systems of records within the meaning of this instruction. Such notes are an extension of the individual's memory. These notes, however, must be maintained and discarded at the discretion of the individual supervisor and not circulated to others. Any established requirement to maintain such notes (such as, written or oral directives, regulations, or command policy) make these notes ''agency records'' and they then must be made a part of a system of records. If the notes are circulated, they must be made a part of a system of records. Any action that gives personal notes the appearance of official agency records is prohibited, unless the notes have been incorporated into a system of records.

(n) *Compiled in anticipation of litigation.* An individual is not entitled to access information compiled in reasonable anticipation of a civil action or proceeding. Accordingly, deny access under 5 U.S.C. 552a(d)(5) and then process under FOIA (SECNAVINST 5740.42F) to determine releasibility.

**§ 701.108 Amendment of records.**

Amendments under this subpart and subpart G of this part are limited to correcting factual or historical matters (*i.e.*, dates and locations of service, participation in certain actions of activities, not matters of opinion (e.g., evaluations of work performance and assessments of promotion potential contained in employee evaluations, fitness reports, performance appraisals, or similar documents)) except when such matters of opinion are based solely on inaccurate facts and the accuracy of those facts has been thoroughly discredited.

(a) *Individual review and correction.* Individuals are encouraged to make periodic reviews of the information maintained about them in systems of records and to avail themselves of the amendment procedures established by 5 U.S.C. 552a, this subpart and subpart G of this part, and other regulations to update their records.

(b) *Eligibility.* An individual may request amendment of a record retrieved by his/her personal identifier from a system of records, unless the:

(1) System has been exempt from the amendment procedure under 5 U.S.C. 552a and/or

(2) Record is covered by another procedure for correction, such as by the Board for Correction of Naval Records.

(c) *Amendment requests.* Amendment requests shall be in writing, except for routine administrative changes, such as change of address.

(1) An amendment request must include: a description of the factual or historical information to be amended; the reason for the amendment; the type of amendment action sought (e.g., deletion, correction, or addition); and copies of available documentary evidence that support the request.

(2) The burden of proof rests with the individual. The individual must demonstrate the existence of specific evidence establishing the factual or historical inaccuracy, and in the case of matters of opinion, must specifically discredit the underlying facts. General allegations of error are inadequate.

(3) The individual may be required to provide identification to prevent the inadvertent or intentional amendment of another's record.

(d) *Limits on attacking evidence previously submitted.* (1) The amendment process is not intended to permit the alteration of evidence presented in the course of judicial or quasi-judicial proceedings. Any amendments or changes to these records normally are made through the specific procedures established for the amendment of such records.

(2) Nothing in the amendment process is intended or designed to permit a collateral attack upon what has already been the subject of a judicial or quasi-judicial determination. However, while the individual may not attack the accuracy of the judicial or quasi-judicial determination under this instruction, he/she may challenge the accuracy of the recording of that action.

(e) *Sufficiency of a request to amend.* DON activities shall consider the following factors when evaluating the sufficiency of a request to amend: the accuracy of the information itself and the relevance, timeliness, completeness, and necessity of the recorded information for accomplishing an assigned mission or purpose.

(f) *Time limits.* Within 10 working days of receiving an amendment request, the systems manager shall provide the individual a written acknowledgement of the request. If action on the amendment request is completed within the 10 working days and the individual is so informed, no separate acknowledgment is necessary. The acknowledgment must clearly identify the request and advise the individual when to expect notification of the completed action. Only under exceptional circumstances should more than 30 working days be required to complete the action on an amendment request.

(g) *Granting an amendment request in whole or in part.* A record must be accurate, relevant, timely, complete, and necessary. If the record in its present state does not meet each of the criteria, the requester's request to amend the record should be granted to the extent necessary to meet them.

(1) *Notify the requester.* To the extent the amendment request is granted, the systems manager shall notify the individual and make the appropriate amendment.

(2) *Notify previous recipients.* Notify all previous recipients of the information (as reflected in the disclosure accounting record) that the amendment has been made and provide each a copy of the amended record. Recipients who are no longer retaining the record need not be advised of the amendment. If it is known that other naval activities, DOD components, or Federal Agencies have been provided the information that now requires amendment, or if the individual requests that these agencies be notified, provide the notification of amendment even if those activities or agencies are not listed on the disclosure accounting form.

(h) *Denying an amendment request.* If an amendment request is denied in whole or in part, promptly notify the individual in writing and include the following information in the notification:

(1) Those sections of 5 U.S.C. 552a, this subpart or subpart G of this part upon which the denial is based;

(2) His/her right to appeal to the head of the activity for an independent review of the initial denial;

(3) The procedures for requesting an appeal, including the title and address of the official to whom the appeal should be sent; and

(4) Where the individual can receive assistance in filing the appeal.

(i) *Requests for amendment of OPM records.* The records in an OPM Government-wide system of records are only temporarily in the custody of DON activities. See the appropriate OPM Government-wide systems notice at *http://www.defenselink.mil/privacy/govwide* for guidance on how to seek an amendment of information. The custodian DON denial authority may deny a request, but all denials are subject to review by the Assistant Director for Workforce Information, Office of Merit Systems Oversight and Effectiveness, Office of Personnel Management, 1900 E Street, NW., Washington, DC 20415.

(j) *Individual's statement of disagreement.* (1) If the review authority refuses to amend the record as requested, the individual may submit a concise statement of disagreement listing the reasons for disagreeing with the refusal to amend.

(2) If possible, DON activities shall incorporate the statement of disagreement into the record. If that is not possible, annotate the record to reflect that the statement was filed and maintain the statement so that it can be readily obtained when the disputed information is used or disclosed.

(3) Furnish copies of the statement of disagreement to all individuals listed on the disclosure accounting form (except those no longer retaining the record), as well as to all other known holders of copies of the record.

(4) Whenever the disputed information is disclosed for any purpose, ensure that the statement of disagreement is also disclosed.

(k) *Statement of reasons.* (1) If the individual files a statement of disagreement, the DON activity may file a statement of reasons containing a concise summary of the activity's reasons for denying the amendment request.

(2) The statement of reasons shall contain only those reasons given to the individual by the appellate official and shall not contain any comments on the individual's statement of disagreement.

(3) At the discretion of the DON activity, the statement of reasons may be disclosed to those individuals, activities, and agencies that receive the statement of disagreement.

### § 701.109 Privacy Act (PA) appeals.

(a) *How to file an appeal.* Individuals wishing to appeal a denial of notification, access, or amendment of records shall follow these guidelines:

(1) The appeal must be received by the cognizant review authority (*i.e.*, ASN (M&RA), OJAG, OGC, or OPM) within 60 calendar days of the date of the response.

(2) The appeal must be in writing and requesters should provide a copy of the denial letter and a statement of their reasons for seeking review.

(b) *Time of receipt.* The time limits for responding to an appeal commence when the appeal reaches the office of the review authority having jurisdiction over the record. Misdirected appeals should be referred expeditiously to the proper review authority and the requester notified.

(c) *Review authorities.* ASN (M&RA), JAG, and GC are authorized to adjudicate appeals made to SECNAV. JAG and GC are further authorized to delegate this authority to a designated Assistant JAG or Deputy Assistant JAG and the Principal Deputy General Counsel or Deputy General Counsel, respectively, under such terms and conditions as they deem appropriate.

(1) If the record is from a civilian Official Personnel Folder or is contained on any other OPM forms, send the appeal to the Assistant Director for Workforce Information, Personnel Systems and Oversight Group, Office of Personnel Management, 1900 E Street, NW., Washington, DC 20415. Records in all systems of records maintained in accordance with the OPM Government-wide systems notices are only in the temporary custody of the DON.

(2) If the record pertains to the employment of a present or former Navy or Marine Corps civilian employee, such as Navy or Marine Corps civilian personnel records or an employee's grievance or appeal file, send it to the General Counsel of the Navy, 1000 Navy Pentagon, Washington, DC 20350–1000.

(3) If the record pertains to a present or former military member's fitness reports or performance evaluations, send it to the Assistant Secretary of the Navy (Manpower and Reserve Affairs), 1000 Navy Pentagon, Washington, DC 20350–1000.

(4) All other records dealing with present or former military members should be sent to the Office of the Judge Advocate General, 1322 Patterson Avenue SE., Suite 3000, Washington Navy Yard, DC 20374–5066.

(d) *Appeal procedures.* (1) If the appeal is granted, the review authority shall advise the individual that his/her appeal has been granted and provide access to the record being sought.

(2) If the appeal is denied totally or in part, the appellate authority shall advise the reason(s) for denying the appeal, citing the appropriate subsections of 5 U.S.C. 552a or this subpart and subpart G of this part; the date of the appeal determination; the name, title, and signature of the appellate authority; and a statement informing the requester of his/her right to seek judicial relief in the Federal District Court.

(e) *Final action, time limits and documentation*. (1) The written appeal notification granting or denying access is the final naval activity action on the initial request for access.

(2) All appeals shall be processed within 30 working days of receipt, unless the appellate authority finds that an adequate review cannot be completed within that period. If additional time is needed, notify the applicant in writing, explaining the reason for the delay and when the appeal will be completed.

(f) *Denial of appeal by activity's failure to act*. An individual may consider his/her appeal denied if the appellate authority fails to:

(1) Take final action on the appeal within 30 working days of receipt when no extension of time notice was given; or

(2) Take final action within the period established by the notice to the appellate authority of the need for an extension of time to complete action on the appeal.

**§701.110 Conditions of disclosure.**

The PA identifies 12 conditions of disclosure whereby records contained in a system of records may be disclosed by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains. These instances are identified as:

(a) *Official need to know*. Records pertaining to an individual may be disclosed without the consent of the individual to any DOD official who has need for the record in the performance of his/her assigned duties. Rank, position, or title alone does not authorize access to PPI about others. An official need must exist before disclosure can be made. For the purposes of disclosure, DOD is considered a single agency.

NOTE: No disclosure accounting required.

(b) *FOIA*. Records must be disclosed if their release is required by FOIA. 5 U.S.C. 552 and SECNAVINST 5720.42F require that records be made available to the public unless exempted from disclosure by one of the nine FOIA exemptions found in the Act. It follows, therefore, that if a record is not exempt from disclosure, it must be released. Note: No disclosure accounting required.

(c) *Routine use*. Each DON PA system of records notice identifies what records may be disclosed outside DOD without consent of the individual to whom the record pertains.

NOTE: Disclosure accounting is required.

(1) A routine use shall be compatible with and related to the purpose for which the record was compiled; identify the persons or organizations to whom the record may be released; identify specifically the uses to which the information may be put by the receiving agency; and, have been published previously in the FEDERAL REGISTER.

(2) A routine use shall be established for each user of the information outside the DOD who needs the information for an official purpose.

(3) A routine use may be established, discontinued, or amended without the consent of the individuals involved. However, new or changed routine uses must be published in the FEDERAL REGISTER for at least 30 days before actually disclosing the records.

(4) In addition to specific routine uses, the DOD has identified certain ''Blanket Routine Uses'' that apply to all systems, unless the systems notice states that they do not. (See §701.112 regarding Blanket Routine Uses.)

(d) *Bureau of Census*. Records may be disclosed to the Bureau of Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of Title 13.

NOTE: Disclosure accounting is required.

(e) *Statistical research and reporting*. Records may be disclosed for statistical research and reporting without the consent of the individual to whom they pertain. Before such disclosures, the recipient must provide advance written assurance that the records will be used as statistical research or reporting records; only to transferred in a form that is not individually identifiable; and will not be used, in whole or in part, to make any determination about rights, benefits, or entitlements of specific individuals.

NOTE: Disclosure accounting is required.

(f) *National Archives and Records Administration (NARA)*. Records may be

disclosed to NARA as a record that has sufficient historical or other value to warrant its continued preservation by the U.S. Government, or for evaluation by the Archivist of the U.S. or his designee to determine whether the record has such value.

NOTE: Disclosure accounting is required.

(1) Records may be disclosed to NARA to carry out records management inspections required by law.

(2) Records transferred to a Federal Records Center (FRC) operated by NARA for storage are not within this category. Those records continue to be maintained and controlled by the transferring DON activity. The FRC is considered to be the agency of the DON for this purpose.

(g) *Disclosures for law enforcement purposes.* Records may be disclosed without the consent of the individual whom they pertain to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the U.S. for a civil or criminal law enforcement activity provided the civil or criminal law enforcement activity is authorized by law; the head of the law enforcement activity or a designee has made a written request specifying the particular records desired and the law enforcement purpose (such as criminal investigations, enforcement of a civil law, or a similar purpose) for which the record is sought; and there is no Federal statute that prohibits the disclosure of the records to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought.

(1) Disclosure to foreign law enforcement agencies is not governed by the provisions of 5 U.S.C. 552a. To enable disclosure, a specific routine use must be published in the record system notice or another governing authority must exist.

(2) If a DON activity discloses a record outside the DOD for law enforcement purposes without the individual's consent and without an adequate written request, the disclosure must be under an established routine use, such as the ''Blanket Routine Use'' for law enforcement.

(3) Blanket requests from law enforcement activities for all records pertaining to an individual shall not be honored. The requesting agency must specify each record or portion desired and how each relates to the authorized law enforcement activity.

(4) When a record is released to a law enforcement activity under this routine use, DON activities shall maintain a disclosure accounting. This disclosure accounting shall not be made available to the individual to whom the record pertains if the law enforcement activity requests that the disclosure not be released.

(5) The Blanket Routine Use for law enforcement records applies to all DON PA systems of records notices. Only by including this routine use can a DON activity on its own initiative report indications of violations of law found in a system of records to a law enforcement activity without the consent of the individual to whom the record pertains.

(h) *Emergency disclosures.* Records may be disclosed without the written consent of the individual to whom they pertain if disclosure is made under compelling circumstances affecting the health or safety of any individual. The affected individual need not be the subject of the record disclosed.

NOTE: Disclosure accounting is required.

(1) When such a disclosure is made, notify the individual who is the subject of the record. Notification sent to the last known address of the individual reflected in the records is sufficient.

(2) In instances where information is requested by telephone, an attempt will be made to verify the inquirer's and medical facility's identities and the caller's telephone number.

(3) The specific data to be disclosed is at the discretion of the releasing authority. Emergency medical information may be released by telephone.

(i) *Disclosure to Congress.* (1) Records may be disclosed without the consent of the individual to whom they pertain to either house of the Congress or to any committee, joint committee or subcommittee of Congress if the release pertains to a matter within the jurisdiction of the committee. Note: Disclosure accounting is required.

(2) See § 701.107(g) regarding how to process constituent inquiry requests.

(j) *Government Accountability Office (GAO)*. Records may be disclosed to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the GAO.

NOTE: Disclosure accounting is required.

(k) *Court orders*. Records may be disclosed without the consent of the person to whom they pertain under a court order signed by a judge of a court of competent jurisdiction. Releases may also be made under the compulsory legal process of Federal and state bodies having authority to issue such process.

NOTE: Disclosure accounting is required.

(1) The court order must bear the signature of a Federal, state, or local judge. Orders signed by court clerks or attorneys are not deemed to be orders of a court of competent jurisdiction. A photocopy of the order will be sufficient evidence of the court's exercise of its authority of the minimal requirements of SECNAVINST 5820.8A, ''Release of Official Information for Litigation Purposes and Testimony by DON Personnel.''

(2) When a record is disclosed under this provision and the compulsory legal process becomes a matter of public record, make reasonable efforts to notify the individual to whom the record pertains. Notification sent to the last known address of the individual is sufficient. If the order has not yet become a matter of public record, seek to be advised as to when it will become public. Neither the identity nor the party to whom the disclosure was made nor the purpose of the disclosure shall be made available to the record subject unless the court order has become a matter of public record.

(l) *Disclosures to consumer reporting agencies*. Certain information may be disclosed to a consumer reporting agency in accordance with section 3711(f) of Title 31.

NOTE: Certain information (e.g., name, address, SSN, other information necessary to establish the identity of the individual; amount, status, and history of the claim; and the agency or program under which the claim arose, may be disclosed to consumer reporting agencies (*i.e.*, credit reference companies as defined by the Federal Claims Collection Act of 1966, 31 U.S.C. 952d).

NOTE: Disclosure accounting is required.

## § 701.111 Disclosure accounting.

Disclosure accounting allows the individual to determine what agencies or persons have been provided information from the record, enable DON activities to advise prior recipients of the record of any subsequent amendments or statements of dispute concerning the record, and provide an audit trail of DON's compliance with 5 U.S.C. 552a. Since the characteristics of various records maintained within the DON vary widely, no uniform method for keeping disclosure accountings is prescribed. The primary criteria are that the selected method be one which will enable an individual to ascertain what persons or agencies have received disclosures pertaining to him/her; provide a basis for informing recipients of subsequent amendments or statements or dispute concerning the record; and, provide a means to prove, if necessary, that the activity has complied with the requirements of 5 U.S.C. 552a, this subpart and subpart G of this part.

(a) *Record of disclosures made*. DON activities must keep an accurate record of all disclosures made from a record (including those made with the consent of the individual) except those made to DOD personnel for use in performing their official duties and those disclosures made under FOIA. Accordingly, each DON activity with respect to each system of records under its control must keep a record of the date of the disclosure, a description of the information disclosed, the purpose of the disclosure, and the name and address of the person or agency to whom the disclosure was made. OPNAV Form 5211/9, Disclosure Accounting Form, is downloadable from *http://www.privacy.navy.mil* and should be used whenever possible to account for disclosures.

NOTE: DON activities do not have to maintain a disclosure accounting for disclosures made under (b)(1), to those officers and employees of an agency which maintains the record who have a need for the record in the performance of their duties or under (b)(2)—which is required under FOIA.

(b) *Retention*. Disclosure accountings must be kept for five years after the

disclosure is made or for the life of the record, whichever is longer.

(c) *Right of access.* The record subject has the right of access to the disclosure accounting except when the disclosure was made at the request of a civil or criminal law enforcement agency or when the system of records has been exempted from the requirement to provide access to the disclosure accounting.

(d) *Correction.* A DON activity must inform any person or other agency about any correction or notation of dispute made by the agency in accordance with subsection (d) of 5 U.S.C. 552a of any record that has been disclosed to the person or agency if an accounting of the disclosure was made. The exception is for intra-agency ''need to know'' and FOIA disclosures.

(e) *Accurate accounting.* A DON activity that does not keep a running tabulation of every disclosure at the time it is made, must be able to reconstruct an accurate and complete accounting of disclosures to be able to respond to requests in a timely fashion.

### § 701.112 "Blanket routine uses."

In the interest of simplicity, economy, and to avoid redundancy, DOD has established ''DOD Blanket Routine Uses.'' These ''blanket routine uses'' are applicable to every PA system of records notice maintained within DOD, unless specifically stated within a particular systems notice. ''DOD Blanket Routine Uses'' are downloadable from *http://www.privacy.navy.mil* (Notices) and are published at the beginning of the Department of the Navy's FEDERAL REGISTER compilation of record systems notices.

### § 701.113 PA exemptions.

(a) *Exempt systems of records.* 5 U.S.C. 552a authorizes SECNAV to adopt rules designating eligible systems of records as exempt from certain requirements of the Act. This authorization has been delegated to CNO (DNS–36), who will be responsible for proposing an exemption rule. Exempt systems of records are identified at *http://www.privacy.navy.mil.*

(b) *Exemption rule.* No PA exemption may be established for a system of records until the system itself has been established by publishing a notice in the FEDERAL REGISTER. This allows interested persons an opportunity to comment.

(c) *Access.* A PA exemption may not be used to deny an individual access to information that he/she can obtain under 5 U.S.C. 552.

(d) *Exemption status.* An exempt system of records that is filed in a non-exempt system of records retains its exempt status.

(e) *Types of exemptions.* There are two types of exemptions permitted by 5 U.S.C. 552a, general and specific exemptions.

(1) General exemptions allow a system of records to be exempt from all but specifically identified provisions of 5 U.S.C. 552a. They are:

(i) ''(j)(1)''—this exemption is only available for use by CIA to protect access to their records.

(ii) ''(j)(2)''—this exemption protects criminal law enforcement records maintained by the DON. To be eligible, the system of records must be maintained by a DON activity that performs, as one of its principal functions, the enforcement of criminal laws. For example, the Naval Criminal Investigative Service and military police activities qualify for this exemption. Criminal law enforcement includes police efforts to detect, prevent, control, or reduce crime, or to apprehend criminals and the activities of prosecution, court, correctional, probation, pardon, or parole authorities.

(A) This exemption applies to information compiled for the purpose of identifying criminal offenders and alleged criminal offenders and identifying data and notations of arrests; the nature and disposition of criminal charges; and sentencing, confinement, release, parole and probation status; information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with the identifiable individual; and reports identifiable to an individual, compiled at any stage of the enforcement process, from arrest, apprehension, indictment, or preferral of charges through final release from the supervision that resulted from the commission of a crime.

(B) The exemption does not apply to investigative records maintained by a DON activity having no criminal law enforcement duties as one of its principle functions; or investigative records compiled by any element concerning an individual's suitability, eligibility; or, qualification for duty, employment, or access to classified information, regardless of the principle functions of the DON activity that compiled them.

(2) Specific exemptions permit certain categories of records to be exempted from specific provisions of 5 U.S.C. 552a. They are:

(i) ''(k)(1)'': Information which is properly classified under E.O. in the interest of national defense or foreign policy.

NOTE: All DOD systems of records that contain classified information automatically qualify for (k)(1) exemption, without establishing an exemption rule.

(ii) ''(k)(2)'': Investigatory material compiled for law enforcement purposes, other than material within the scope of exemption (j)(2). If an individual is denied any right, privilege, or benefit that he would otherwise be eligible, as a result of such material, such material shall be provided to such individual, except to the extent that the disclosure would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to 27 September 1975 under an implied promise that the identity of the source would be held in confidence.

(iii) ''(k)(3)'': Information maintained in connection with providing protective services to the President of the United States or other individuals pursuant to section 3056 of Title 18.

(iv) ''(k)(4)'': Information required by statute to be maintained and used solely as statistical records.

(v) ''(k)(5)'': Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to September 27, 1975, under an implied promise that the identity of the source would be held in confidence.

(vi) ''(k)(6)'': Testing and evaluation material used solely to determine individual qualifications for appointment or promotion in the Federal service the disclosure of which would compromise the objectivity or fairness of the testing or examination process.

(vii) ''(k)(7)'': Evaluation material used to determine potential for promotion in the armed services, but only to the extent that the disclosure of such material would reveal the identity of the source who furnished information to the government under an express promise that the identity of the source would be held in confidence, or, prior to September 27, 1975, under an implied promise that the identity of the source would be held in confidence.

(f) *Detailed analysis of PA exemptions.* A detailed analysis of each exemption can be found in the Department of Justice's (DOJ's) ''Freedom of Information Act Guide & Privacy Act Overview'' that appears on *http://www.privacy.navy.mil.*

### § 701.114 PA enforcement actions.

(a) *Administrative remedies.* Any individual who alleges that he/she has been affected adversely by a DON activity's violation of 5 U.S.C. 552a and this subpart may seek relief from SECNAV through administrative channels. It is recommended that the individual first address the issue through the PA coordinator having cognizance over the relevant records or supervisor (if a Government employee). If the complaint is not adequately addressed, the individual may contact CNO (DNS–36) or CMC (ARSF), for assistance.

(b) *Civil court actions.* After exhausting administrative remedies, an individual may file a civil suit in Federal court against a DON activity for the following acts:

(1) *Denial of an amendment request.* The activity head, or his/her designee wrongfully refuses the individual's request for review of the initial denial of an amendment or, after review, wrongfully refuses to amend the record.

(2) *Denial of access*. The activity wrongfully refuses to allow the individual to review the record or wrongfully denies his/her request for a copy of the record.

(3) *Failure to meet recordkeeping standards*. The activity fails to maintain an individual's record with the accuracy, relevance, timeliness, and completeness necessary to assure fairness in any determination about the individual's rights, benefits, or privileges and, in fact, makes an adverse determination based on the record.

(4) *Failure to comply with PA*. The activity fails to comply with any other provision of 5 U.S.C. 552a or any rule or regulation issued under 5 U.S.C. 552a and thereby causes the individual to be adversely affected.

(c) *Civil remedies*. In addition to specific remedial actions, 5 U.S.C. 552a provides for the payment of damages, court costs, and attorney fees in some cases.

(d) *Criminal penalties*. 5 U.S.C. 552a authorizes criminal penalties against individuals for violations of its provisions, each punishable by fines up to $5,000.

(1) *Wrongful disclosure*. Any member or employee of DON who, by virtue of his/her employment or position, has possession of or access to records and willfully makes a disclosure knowing that disclosure is in violation of 5 U.S.C. 552a, this subpart or subpart G.

(2) *Maintaining unauthorized records*. Any member or employee of DON who willfully maintains a system of records for which a notice has not been approved and published in the FEDERAL REGISTER.

(3) *Wrongful requesting or obtaining records*. Any person who knowingly and willfully requests or obtains any record concerning an individual from an agency under false pretenses.

(e) *Litigation notification*. Whenever a complaint citing the PA is filed in a U.S. District Court against the DON or any DON employee, the responsible DON activity shall promptly apprise CNO (DNS–36)) and provide a copy of all relevant documents. CNO (DNS–36) will in turn apprise the DPO, who will apprise the DOJ. When a court renders a formal opinion or judgment, copies of the judgment and/or opinion shall be promptly provided to CNO (DNS–36). CNO (DNS–36) will apprise the DPO.

**§ 701.115 Protected personal information (PPI).**

(a) *Access/disclosure*. Access to and disclosure of PPI such as SSN, date of birth, home address, home telephone number, etc., must be strictly limited to individuals with an official need to know. It is inappropriate to use PPI in group/bulk orders. Activities must take action to protect PPI from being widely disseminated. In particular, PPI shall not be posted on electronic bulletin boards because the PA strictly limits PPI access to those officers and employees of the agency with an official need to know.

(b) *Transmittal*. In those instances where transmittal of PPI is necessary, the originator must take every step to properly mark the correspondence so that the receiver of the information is apprised of the need to properly protect the information. For example, when transmitting PPI in a paper document, FAX, or E-Mail, it may be appropriate to mark it ''FOR OFFICIAL USE ONLY (FOUO)—PRIVACY SENSITIVE. Any misuse or unauthorized disclosure may result in both civil and criminal penalties.'' When sending a message that contains PPI, it should be marked FOUO. It is also advisable to inform the recipient that the message should not be posted on a bulletin board. In all cases, recipients of message traffic that contain PPI, whether marked FOUO or not, must review it prior to posting it on an electronic bulletin board.

(c) *Collection/maintenance*. The collection and maintenance of information retrieved by an individual's name and/or personal identifier should be performed in compliance with the appropriate PA systems of record notice (see *http://www.privacy.navy.mil*). If you need to collect and maintain information retrieved by an individual's name and/or personal identifier, you must have an approved PA systems notice to cover that collection. If you are unsure as to whether a systems notice exists or not, contact the undersigned for assistance.

(d) *Best practices.* PA Coordinators should work closely with command officials to conduct training, evaluate what PPI can be removed from routine message traffic, review Web site postings, review command electronic bulletin boards, etc., to ensure appropriate processes are in place to minimize the misuse and overuse of PPI information that could be used to commit identity theft. PA Coordinators should also ensure that their PA systems of records managers have a copy of the appropriate PA systems notice and understand PA rules. DON activities shall ensure that PPI (e.g., home address, date of birth, SSN, credit card or charge card account numbers, etc.) pertaining to a Service member, civilian employee (appropriated and non-appropriated fund), military retiree, family member, or another individual affiliated with the activity (*i.e.*, volunteer) is protected from unauthorized disclosures. To this end, DON activities shall:

(1) Notify their personnel of this policy. Address steps necessary to ensure that PPI is not compromised.

(2) Conduct and document privacy awareness training for activity personnel (e.g., military, civilian, contractor, volunteers, NAF employees, etc.) Training options include: ''All Hands'' awareness briefing; memo to staff; formal training; circulation of brief sheet on Best Practices, etc.

(3) Examine business practices to eliminate the unnecessary collection, transmittal and posting on internet/intranet of PPI. DON activities shall reevaluate the necessity and value of including an individual's SSN and other PPI in messages, e-mails, and correspondence in order to conduct official business. The overuse and misuse of SSNs should be discontinued to avoid the potential for identity theft. For example, there is no need to include an individual's SSN in a welcome aboard message. Such messages are routinely posted on command bulletin boards that are viewable by all. If a unique identifier is needed, truncate the SSN using only the last four digits.

(4) Mark all documents that contain PPI (e.g., letters, memos, emails, messages, documents FAXed, etc) FOUO. Consider using a header/footer that reads: ''FOR OFFICIAL USE ONLY—PRIVACY SENSITIVE: ANY MISUSE OR UNAUTHORIZED DISCLOSURE MAY RESULT IN BOTH CIVIL AND CRIMINAL PENALTIES.''

(5) Train DON military members/employees who maintain PPI on their laptop computers/BlackBerrys, who telecommute, work from home, or take work home, etc., to ensure information is properly safeguarded against loss/compromise. Should a loss occur, ensure they are aware of how, what, and where to report the loss.

(6) Review existing postings on activity Web sites and public folders to ensure that the PPI is removed to prevent identity theft.

(7) Remove PPI from documents prior to posting or circulating information to individuals without an ''official need to know.''

(8) Evaluate risks for potential compromise of PPI held in activity files, databases, etc., to ensure proper safeguards are in place to prevent unauthorized disclosures. Revise protocols as necessary.

(9) Ensure that PPI is not left out in the open or circulated to individuals not having an official need to know.

(10) Ensure that PA systems of records are properly safeguarded and that PPI is properly destroyed (*http://www.privacy.navy.mil/noticenumber/noticeindex.asp*).

(11) Organizations that are moving or being disestablished need to ensure they do not dispose of documents containing PPI in containers that may be subject to public access/compromise.

(12) DON activities shall build a Privacy Team to identify ways to preclude inadvertent releases of PPI.

(e) *Unauthorized disclosure.* In the event an unauthorized disclosure of PPI is made, DON activities shall:

(1) Take immediate action to prohibit further damage/disclosure.

(2) Within 10 days, the DON activity shall notify all affected individuals by letter, including the specific data involved and the circumstances surrounding the incident. If the DON activity is unable to readily identify the affected individuals, a generalized notice should be sent to the potentially affected population. As part of any notification process, individuals shall be

informed to visit the Federal Trade Commission's (FTC's) Web site at *http://www.consumer.gov/idtheft* for guidance on protective actions the individual can take. A synopsis of the disclosure made, number of individuals affected, actions to be taken, should be e-mailed to CNO (DNS–36) with ''Identity Theft Notification'' in the subject line.

(3) If the DON activity is unable to comply with the notification requirements set forth in paragraph (e)(2) of this section, the activity shall immediately inform CNO (DNS–36) as to the reasons why. CNO (DNS–36) will, in turn, notify the Secretary of Defense.

(4) DON activities shall identify ways to preclude future incidents.

### § 701.116 PA systems of records notices overview.

(a) *Scope*. A ''system of records notice'' consists of ''records'' that are routinely retrieved by the name, or some other personal identifier, of an individual and under the control of the DON.

(b) *Retrieval practices*. How a record is retrieved determines whether or not it qualifies to be a system of records. For example, records must be retrieved by a personal identifier (name, SSN, date of birth, etc.) to qualify as a system of records. Accordingly, a record that contains information about an individual but IS NOT RETRIEVED by a personal identifier does not qualify as a system of records under the provisions of the PA. (NOTE: The ''ability to retrieve'' is not sufficient to warrant the establishment of a PA system of records. The requirement is retrieval by a name or personal identifier.) Should a business practice change, DON activities shall immediately contact CNO (DNS–36) to discuss the pending change, so that the systems notice can be changed or deleted as appropriate.

(c) *Recordkeeping standards*. A record maintained in a system of records subject to this instruction must meet the following criteria:

(1) *Be accurate*. All information in the record must be factually correct.

(2) *Be relevant*. All information contained in the record must be related to the individual who is the record subject and must be related to a lawful purpose or mission of the DON activity maintaining the record.

(3) *Be timely*. All information in the record must be reviewed periodically to ensure that it has not changed due to time or later events.

(4) *Be complete*. It must be able to stand alone in accomplishing the purpose for which it is maintained.

(5) *Be necessary*. All information in the record must be needed to accomplish a mission or purpose established by Federal Law or E.0. of the President.

(d) *Approval*. CNO (DNS–36) is the approval authority for Navy PA systems of records actions. CMC (ARSF) is the approval authority for Marine Corps PA systems of records actions. Activities wishing to create, alter, amend, or delete systems should contact CNO (DNS–36) or CMC (ARSF), respectively. Those officials will assist in electronically preparing and coordinating the documents for DOD/Congressional approval, as electronic processing is both time and cost efficient.

(e) *Publication in the* FEDERAL REGISTER. Per DOD 5400.11–R, the DPO has responsibility for submitting all rulemaking and changes to PA system of records notices for publication in the FEDERAL REGISTER and CFR.

### § 701.117 Changes to PA systems of records.

CNO (DNS–36) is the approval authority for Navy/DON PA systems of records actions. CMC (ARSF) is the approval authority for Marine Corps PA systems of records actions. DON activities wishing to create, alter, amend, or delete systems should contact CNO (DNS–36) or CMC (ARSF), who will assist in electronically preparing the documents for coordination and DOD/Congressional approval.

(a) *Creating a new system of records*. (1) A new system of records is one for which no existing system notice has been published in the FEDERAL REGISTER. DON activities wishing to establish a new PA system of records notice shall contact CNO (DNS–36) (regarding Navy system of records) or CMC (ARSF) (regarding Marine Corps system of records.) These officials will assist in the preparation and approval of the notice. Once approval is obtained

from DOD, the systems notice will be published in the FEDERAL REGISTER for comment by the public. In the case of an exempt system of records, it will also be published at 32 CFR part 701. A listing of all DON PA systems of records notices is available at *http://www.privacy.navy.mil*.

(2) A DON activity may not begin collecting or maintaining PPI about individuals that is retrieved by their name and/or personal identifier until a PA system of records notice has been approved and published in the FEDERAL REGISTER. Failure to comply with this mandate could result in both criminal and civil penalties.

(3) In those cases where a system of records has been cancelled or deleted and it is later determined that it should be reinstated or reused, a new system notice must be prepared.

(4) DON activities wishing to create a new PA system of records must conduct a risk analysis of the proposed system to consider the sensitivity and use of the records; present and projected threats and vulnerabilities; and projected cost effectiveness of safeguards. (See § 701.118 regarding PIAs.)

(b) *Altering a system of records notice*. A systems manager shall contact CNO (DNS–36)/CMC (ARSF) to alter a PA system of records notice when there has been:

(1) A significant increase or change in the number or types of individuals about who records are maintained. For example, a decision to expand a system of records that originally covered personnel assigned to only one activity to cover personnel at several installations would constitute an altered system. An increase or decrease in the number of individuals covered due to normal growth or decrease is not an alteration.

(2) A change that expands the types or categories of information maintained.

(3) A change that alters the purpose for which the information is used. In order to be an alteration, the change must be one that is not reasonably inferred from any of the existing purposes.

(4) A change that adds a new routine use.

(5) A change to equipment configuration (either hardware or software) that creates substantially greater use of records in the system. For example, placing interactive computer terminals at regional offices when the system was formerly used only at the headquarters would be an alteration.

(6) A change in the manner in which records are organized or in the method by which records are retrieved.

(7) A combining of record systems due to reorganization.

(c) *Amending a system of records notice*. DON activities should apprise CNO (DNS–36) or CMC (ARSF) respectively when a minor change has been made to a system of records.

(d) *Deleting a system of records notice*. When a system of records is discontinued, incorporated into another system, or determined to be no longer subject to this instruction, a deletion notice must be published in the FEDERAL REGISTER. The deletion notice shall include the system identification number, system name, and the reason for deleting it. If a system is deleted through incorporation into or merger with another system, identify the successor system in the deletion notice. Systems managers who determine that a systems notice is no longer needed should contact CNO (DNS–36)/CMC (ARSF) who will prepare the deletion notice and submit it electronically to DOD for publication in the FEDERAL REGISTER.

(e) *Numbering a system of records notice*. Systems of records notices are identified with an ''N'' for a Navy system; ''M'' for a Marine Corps system; or an ''NM'' to identify a DON-wide system, followed by the subject matter Standard Subject Identification Code (SSIC).

(f) *Detailed information*. Detailed information on how to write, amend, alter, or delete a PA system of records notice is contained at *http://www.privacy.navy.mil*.

### § 701.118 Privacy, IT, and PIAs.

(a) *Development*. Privacy must be considered when requirements are being analyzed and decisions are being made about data usage and storage design. This applies to all of the development methodologies and system life cycles used in the DON.

(b) *E-Government Act of 2002*. The E-Government Act of 2002 (Pub. L. 107–347) directs agencies to conduct reviews of how privacy issues are considered when purchasing or creating new IT systems or when initiating new electronic collections of IIF. See DOD Memo of 28 Oct 05, subject ''DOD PIA Guidance'' regarding DOD PIA Guidance.

(c) *Purpose*. To ensure IIF is only acquired and maintained when necessary and the supporting IT that is being developed and used protects and preserves the privacy of the American public and to provide a means to assure compliance with applicable laws and regulations governing employee privacy. A PIA should be prepared before developing or procuring a general support system or major application that collects, maintains, or disseminates IIF from or about DON civilian or military personnel.

(d) *Scope*. The PIA incorporates privacy into the development life cycle so that all system development initiatives can appropriately consider privacy issues from the earliest stages of design. During the early stages of the development of a system, both the system owner and system developer shall work together to identify, evaluate, and resolve any privacy risks. Accordingly,

(1) System owners must address what data is to be used, how the data is to be used, and who will use the data.

(2) System developers must address whether the implementation of the owner's requirements presents any threats to privacy.

(e) *Requirements*. Before developing, modifying or establishing an automated system of records that collects, maintains, and/or disseminates IIF, DON activities shall conduct a PIA to effectively address privacy factors. Guidance is provided at *http://www.doncio.navy.mil*.

(f) *Coverage*. E-Government Act of 2002 (Pub. L. 107–347) mandates the preparation of a PIA either before developing or procuring IT systems that collect, maintain, or disseminate IIF from or about members of the public or initiating a new electronic collection of IIF for 10 or more persons of the public. (NOTE: The public DOES NOT include DON civilian or military personnel, but DOES cover family members of such personnel, retirees and their family members, and DON contractors.) A PIA should be prepared before developing, modifying, or procuring IT systems that collect, maintain, or disseminate IIF from or about members of the public or initiating a new electronic collection of IIF for 10 or more members of the public. A PIA shall also be prepared before developing, modifying or procuring a general support system or major application that collects, maintains, or disseminates IIF from or about DON civilian and military personnel.

(g) *PIA not required*. (1) Legacy systems do not require completion of a PIA. However, DON CIO may request a PIA if the automation or upgrading of these systems puts the data at risk.

(2) Current operational systems do not require completion of a PIA. However, if privacy is a concern for a system the DON CIO can request that a PIA be completed. If a potential problem is identified concerning a currently operational system, the DON will use all reasonable efforts to remedy the problem.

### § 701.119 Privacy and the web.

DON activities shall consult SECNAVINST 5720.47B for guidance on what may be posted on a Navy Web site.

### § 701.120 Processing requests that cite or imply PA, Freedom of Information (FOIA), or PA/FOIA.

Individuals do not always know what Act(s) to cite when requesting information. Nonetheless, it is DON policy to ensure that they receive the maximum access to information they are requesting. Accordingly, processing guidance is as follows:

(a) *Cite/imply PA*. (1) Individuals who cite to the PA and/or seek access to records about themselves that are contained in a PA system of records that is retrieved by their name and personal identifier, will have their request processed under the provisions of the PA.

(2) If there is no ''Exemption Claimed for this System,'' then the record will be released to the requester unless: it contains classified information ((k)(1)

applies); was compiled in anticipation of litigation ((d)(5) applies); or contains information about another person. Although there is no ''privacy'' exemption under the PA, delete any information about other persons and explain in the response letter that ''information not about you'' was deleted from the response. There is no PA exemption to claim and no appeal rights to be given.

(b) *Cite/imply FOIA.* (1) Individuals who cite/imply FOIA when seeking access to records about themselves will have their request processed under PA, if the records they seek are contained in a PA system of records that is retrieved by their name and personal identifier. However, if the system of records notice contains an exemption rule, the release of information will be adjudicated using both PA and FOIA, ensuring that the individual receives the maximum amount of information allowable under the Acts.

(2) Individuals who cite/imply FOIA and seek access to records about themselves that are not contained in a PA system of records that is retrieved by their name and personal identifier will have their request processed under FOIA.

(3) Individuals who cite to the FOIA, but do not seek access to records about themselves, will have their request processed under FOIA.

(c) *Cite to PA and FOIA.* Individuals who cite to both PA and FOIA and seek access to records contained in a PA system of record retrieved by their name and personal identifier, will have their request as follows:

(1) If the system of records does not cite to an exemption rule, does not contain classified information, or was not compiled in anticipation of litigation, the entire file is considered releasable under the PA. However, if the file contains information about another person, that information shall be withheld and the requester apprised that information about another individual has been deleted, since the information is not about them. Since no PA exemption exists for protecting privacy, no exemption rule can be cited and appeal rights do not have to be given.

(2) If the system of records does cite to a PA exemption rule, claim the exemption and process the request under the provisions of the FOIA, ensuring the requester receives the maximum release of information allowed under the Acts.

(d) *Processing time limits.* DON activities shall normally acknowledge receipt of PA requests within 10 working days and respond within 30 working days.

### § 701.121 Processing "routine use" disclosures.

(a) ''*Routine use*'' *disclosure.* Individuals or organizations may seek a ''routine use'' disclosure of information from a DON PA system of records if the system provides for such a disclosure.

(1) The request must be in writing and state that it is being made under a ''routine use'' established by a specific PA system of records notice. For example: ''Under the ''routine use'' provisions of PA systems notice N05880–1, Security Incident System, that allows release of information to individuals involved in base incidents, their insurance companies, and/or attorneys for the purpose of adjudicating a claim, I am seeking access to a copy of my vehicle accident report to submit a claim to my insurance company. Information needed to locate this record is as follows * * *.''

(2) The individual is provided information needed to adjudicate the claim. A release authority may sign the response letter since a release of responsive information is being disclosed under a ''routine use,'' there is no ''denial'' of information (*i.e.*, PA/FOIA exemptions do not apply), and no appeal rights cited.

(3) DON activities shall retain a copy of the request and maintain a disclosure accounting of the information released. (See § 701.111.)

(b) *Failure to cite to a ''routine use.''* Individuals or organizations that seek access to information contained in a DON PA system of records under PA/FOIA, but who have access under a ''routine use'' cited in the systems notice, shall be apprised of the ''routine use'' access and offered the opportunity to resubmit a ''routine use'' request, rather than having information denied under PA/FOIA. DON activities shall not make a ''routine use'' disclosure

without having a ''routine use'' request.

(c) *Frequent ''routine use'' requests.* DON activities (e.g., security and military police offices) that routinely receive requests for information for which a ''routine use'' has been established should offer a ''routine use'' request form. This will eliminate the unnecessary burden of processing requests under PA/FOIA when the limited information being sought is available under a ''routine use.''

**§ 701.122 Medical records.**

(a) *Health Information Portability and Accountability Act (HIPAA).* (1) DOD Directive 6025.18 establishes policies and assigns responsibilities for implementation of the standards for privacy of individually identifiable health information established by HIPAA.

(2) DOD Directive 6025.18–R prescribes the uses and disclosures of protected health information.

(3) Detailed guidance on HIPAA compliance is available from the Bureau of Medicine and Surgery's Web site at *http://navymedicine.med.navy.mil* and from DOD at *http://www.tricare.osd.mil/hipaa/.*

(4) In addition to responsibilities to comply with this subpart and subpart G of this part, DOD Directive 6025.18 and DOD 6025.18–R must also be complied with to the extent applicable. Although nothing in this subpart and subpart G violates DOD Directive 6025.18, compliance with this subpart and subpart G in connection with protected health information does not necessarily satisfy all requirements of DOD 6025.18–R.

(b) *Disclosure.* DON activities shall disclose medical records to the individual to whom they pertain, even if a minor, unless a judgment is made that access to such records could have an adverse effect on the mental or physical health of the individual. Normally, this determination shall be made in consultation with a medical practitioner.

(1) Deny the individual access to his/her medical and psychological records if that access could have an adverse affect on the mental or physical health of the individual. This determination normally should be made in consultation with a medical practitioner. If it is medically indicated that access could have an adverse mental or physical effect on the individual, provide the record to a medical practitioner named by the individual, along with an explanation of why access without medical supervision could be harmful to the individual. In any case, do not require the named medical practitioner to request the record for the individual.

(2) If, however, the individual refuses or fails to designate a medical practitioner, access will be refused. The refusal is not considered a denial for reporting purposes under the PA.

(c) *Access to a minor's medical records.* DON activities may grant access to a minor's medical records to his/her custodial parents or legal guardians, observing the following procedures:

(1) In the United States, the laws of the State where the records are located may afford special protection to certain medical records (e.g., drug and alcohol abuse treatment and psychiatric records.) Even if the records are maintained by a military medical facility, these statutes may apply.

(2) For installations located outside the United States, the custodial parent or legal guardian of a minor shall be denied access if all of the following conditions are met: the minor at the time of the treatment or consultation was 15, 16, or 17 years old; the treatment or consultation was within a program authorized by law or regulation to provide confidentiality to the minor; the minor indicated a desire that the treatment or consultation record be handled in confidence and not disclosed to a parent or guardian; and the custodial parent or legal guardian does not have the written authorization of the minor or a valid court order granting access.

(3) All members of the military services and all married persons are not considered minors regardless of age, and the parents of these individuals do not have access to their medical records without the written consent of the individual to whom the record pertains.

### § 701.123 PA fees.

The PA fee schedule is only applicable to first party requesters who are seeking access to records about themselves that are contained in a PA system of record. DON activities receiving requests under PA, FOIA, or PA/FOIA shall only charge fees that are applicable under the Act(s) in which the request is being processed.

(a) *PA costs.* PA fees shall include only the direct cost of reproducing the requested record. There are no fees for search, review, or any administrative costs associated with the processing of the PA request. The cost for reproduction of documents/microfiche will be at the same rate as that charged under the FOIA schedule (see SECNAVINST 5720.42F).

(b) *Fee waiver.* A requester is entitled to the first 100 pages of duplication for free.

(1) DON activities shall waive fees automatically if the direct cost for reproduction of the remaining pages is less than the minimum fee waiver threshold addressed under FOIA fees (see SECNAVINST 5720.42F).

(2) However, DON activities should not waive fees when it is determined that a requester is seeking an extension or duplication of a previous request for which he/she was already granted a waiver.

(3) Decisions to waive or reduce fees that exceed the minimum fee waiver threshold are made on a case-to-case basis.

(c) *PA fee deposits.* Checks or money orders shall be made payable to the Treasurer of the United States. DON activities will forward any remittances to the Treasury Department pursuant to the Miscellaneous Receipts Act.

### § 701.124 PA self assessments/inspections.

(a) *Self assessments.* DON activities are encouraged to conduct annual self-assessments of their PA program. This serves to identify strengths and weaknesses and to determine training needs of personnel who work with privacy records/information. A PA self-assessment evaluation form is provided at *http://www.privacy.navy.mil* (Administrative Tools) for use in measuring compliance with the PA.

(b) *Inspections.* During internal inspections, DON inspectors shall be alert for compliance with this instruction and for managerial, administrative, and operational problems associated with the implementation of the DON's PA program.

(1) DON inspectors shall document their findings in official reports furnished to the responsible DON officials. These reports, when appropriate, shall reflect overall assets of the activity's PA program inspected, or portion thereof, identify deficiencies, irregularities, and significant problems. Also document remedial actions taken to correct problems identified.

(2) Inspection reports and follow-up reports shall be maintained in accordance with established records disposition standards (see SECNAVINST 5210.8D). These reports shall be made available to PA program officials and to CNO (DNS–36)/CMC (ARSF) respectively.

(c) *Retention of reports.* Retain staff visit reports and follow-up reports per established records disposition standards contained in SECNAVINST 5210.8D. Retain self-assessment reports until the next self-assessment is completed. Make these reports available, upon request, to CNO (DNS–36) or CMC (ARSF).

### § 701.125 Computer matching program.

The DPO has responsibility for coordinating the approval of DOD's participation in Computer Matching agreements with other Federal, state, and local agencies.

(a) *Purpose.* To establish or verify initial or continuing eligibility for Federal benefit programs; verify compliance with the requirements, either statutory or regulatory, of such programs; or recoup payments or delinquent debts under such Federal benefit programs.

(b) *Record comparison.* The record comparison must be a computerized one between two Federal Agencies or one Federal Agency and a state agency. Manual comparisons are not covered.

(c) *Types of programs not covered.* (1) State programs and programs using records about subjects who are not ''individuals'' as defined in § 701.101(e) are not covered.

(2) Statistical matches whose purpose is solely to produce aggregate data stripped of personal identifiers.

(3) Statistical matches whose purpose is in support of any research or statistical project.

(4) Law enforcement investigative matches whose purpose is to gather evidence against a named person or persons in an existing investigation.

(5) Tax administration matches.

(6) Routine administrative matches using Federal personnel records.

(7) Internal matches using only records from DOD systems of records.

(8) Background investigation and foreign counterintelligence matches done in the course of performing a background check for security clearances of Federal personnel or Federal contractor personnel or foreign counterintelligence.

(d) *Categories of individuals covered.* Applicants for Federal benefit programs (*i.e.*, individuals initially applying for benefits); program beneficiaries (*i.e.*, individuals currently receiving or formerly receiving benefits); and providers of services to support such programs (*i.e.*, those deriving income from them such as health care providers).

(e) *Features of a computer matching program.* A computer matching program entails not only the actual computerized comparison, but also preparing and executing a written agreement between the participants, securing approval of the Defense Data Integrity Board, publishing a matching notice in the FEDERAL REGISTER before the match begins, ensuring that investigation and due process are completed, and taking ultimate action, if any.

(f) *Approval/denial of agreements.* The Executive Secretary, Defense Data Integrity Board, receives and processes for review all requests for computer matching agreements involving DOD activities. Members of the Defense Data Integrity Board are provided with a copy of the proposed computer matching agreement that details the costs associated with the match, length of agreement, and the number of computer matches expected, for their approval/disapproval.

(g) *Questions.* CNO (DNS–36) represents the DON on the Defense Data Integrity Board. Questions from DON personnel should be directed to CNO (DNS–36).

## Subpart G—Privacy Act Exemptions

SOURCE: 71 FR 27536, May 11, 2006, unless otherwise noted.

### § 701.126 Purpose.

Subparts F and G of this part contain rules promulgated by the Secretary of the Navy, pursuant to 5 U.S.C. 552a (j) and (k), and subpart F, § 701.113, to exempt certain systems of DON records from specified provisions of 5 U.S.C. 552a.

### § 701.127 Exemption for classified records.

All systems of records maintained by the DON shall be exempt from the requirements of the access provision of the Privacy Act (5 U.S.C. 552a(d)) under the (k)(1) exemption, to the extent that the system contains information properly classified under E.O. 12,958 and that is required by that E.O. to be kept secret in the interest of national defense or foreign policy. This exemption is applicable to parts of all systems of records including those not otherwise specifically designated for exemptions herein that contain isolated items of properly classified information.

### § 701.128 Exemptions for specific Navy record systems.

(a) *System identifier and name:*

(1) *N01070–9, White House Support Program.*

(2) *Exemption:* (i) Information specifically authorized to be classified under E.O. 12,958, as implemented by DOD 5200.1–R, may be exempt pursuant to 5 U.S.C. 552a(k)(1).

(ii) Investigatory material compiled for law enforcement purposes may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of such information, the individual will be provided access to such information except to the extent that disclosure would reveal the identity of a confidential source.

(iii) Records maintained in connection with providing protective services to the President and other individuals under 18 U.S.C. 3506, may be exempt pursuant to 5 U.S.C. 552a(k)(3).

(iv) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(v) Portions of this system of records are exempt from the following subsections of the Privacy Act: (c)(3), (d), (e)(1), (e)(4) (G) through (I), and (f).

(3) *Authority:* 5 U.S.C. 552a(k)(1), (k)(2), (k)(3), and (k)(5).

(4) *Reasons:* Exempted portions of this system contain information that has been properly classified under E.O. 12,958, and which is required to be kept secret in the interest of national defense or foreign policy. Exempted portions of this system may also contain information considered relevant and necessary to make a determination as to qualifications, eligibility, or suitability for access to classified information, and which was obtained by providing an express or implied promise to the source that his or her identity would not be revealed to the subject of the record. Exempted portions of this system may also contain information collected and maintained in connection with providing protective services to the President and other individuals protected pursuant to 18 U.S.C. 3056. Exempted portions of this system may also contain investigative records compiled for law enforcement purposes, the disclosure of which could reveal the identity of sources who provide information under an express or implied promise of confidentiality, compromise investigative techniques and procedures, jeopardize the life or physical safety of law-enforcement personnel, or otherwise interfere with enforcement proceedings or adjudications.

(b) *System identifier and name:*

(1) *N01131–1, Officer Selection and Appointment System.*

(2) *Exemption:* (i) Information specifically authorized to be classified under E.O. 12,958, as implemented by DOD 5200.1–R, may be exempt pursuant to 5 U.S.C. 552a(k)(1).

(ii) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(iii) Testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service may be exempt pursuant to 5 U.S.C. 552a(k)(6), if the disclosure would compromise the objectivity or fairness of the test or examination process.

(iv) Evaluation material used to determine potential for promotion in the Military Services may be exempt pursuant to 5 U.S.C. 552a(k)(7), but only to the extent that the disclosure of such material would reveal the identity of a confidential source.

(v) Portions of this system of records are exempt from the following subsections of the Privacy Act: (c)(3), (d), (e)(1), (e)(4)(G) through (I), and (f).

(3) *Authority:* 5 U.S.C. 552a(k)(1), (k)(5), (k)(6), and (k)(7).

(4) *Reasons:* Granting individuals access to portions of this system of records could result in the disclosure of classified material, or the identification of sources who provided information to the government under an express or implied promise of confidentiality. Material will be screened to permit access to unclassified material and to information that does not disclose the identity of a confidential source.

(c) *System identifier and name:*

(1) *N01133–2, Recruiting Enlisted Selection System.*

(2) *Exemption:* (i) Information specifically authorized to be classified under E.O. 12,958, as implemented by DOD 5200.1–R, may be exempt pursuant to 5 U.S.C. 552a(k)(1).

(ii) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or

access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(iii) Testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service may be exempt pursuant to 5 U.S.C. 552a(k)(6), if the disclosure would compromise the objectivity or fairness of the test or examination process.

(iv) Evaluation material used to determine potential for promotion in the Military Services may be exempt pursuant to 5 U.S.C. 552a(k)(7), but only to the extent that the disclosure of such material would reveal the identity of a confidential source.

(v) Portions of this system of records are exempt from the following subsections of the Privacy Act: (c)(3), (d), (e)(1), (e)(4)(G) through (I), and (f).

(3) *Authority:* 5 U.S.C. 552a(k)(1), (k)(5), (k)(6), and (k)(7).

(4) *Reasons:* Granting individuals access to portions of this system of records could result in the disclosure of classified material, or the identification of sources who provided information to the government under an express or implied promise of confidentiality. Material will be screened to permit access to unclassified material and to information that does not disclose the identity of a confidential source.

(d) *System identifier and name:*

(1) *N01640–1, Individual Correctional Records.*

(2) *Exemption:* (i) Parts of this system may be exempt pursuant to 5 U.S.C. 552a(j)(2) if the information is compiled and maintained by a component of the agency which performs as its principle function any activity pertaining to the enforcement of criminal laws.

(ii) Portions of this system of records are exempt from the following subsections of the Privacy Act: (c)(3), (c)(4), (d), (e)(2), (e)(3), (e)(4)(G) through (I), (e)(5), (e)(8), (f), and (g).

(3) *Authority:* 5 U.S.C. 552a(j)(2).

(4) *Reason:* (i) Granting individuals access to portions of these records pertaining to or consisting of, but not limited to, disciplinary reports, criminal investigations, and related statements of witnesses, and such other related matter in conjunction with the enforcement of criminal laws, could interfere with the orderly investigations, with the orderly administration of justice, and possibly enable suspects to avoid detection or apprehension. Disclosure of this information could result in the concealment, destruction, or fabrication of evidence, and jeopardize the safety and well-being of informants, witnesses and their families, and law enforcement personnel and their families. Disclosure of this information could also reveal and render ineffectual investigative techniques, sources, and methods used by these components and could result in the invasion of the privacy of individuals only incidentally related to an investigation. The exemption of the individual's right of access to portions of these records, and the reasons therefore, necessitate the exemption of this system of records from the requirement of the other cited provisions.

(ii) [Reserved]

(e) *System identifier and name:*

(1) *N01754–3, Navy Child Development Services Program.*

(2) *Exemption:* (i) Investigatory material compiled for law enforcement purposes may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of such information, the individual will be provided access to such information except to the extent that disclosure would reveal the identity of a confidential source.

(ii) Portions of this system of records are exempt from the following subsections of the Privacy Act: (c)(3) and (d).

(3) *Authority:* 5 U.S.C. 552a(k)(2).

(4) *Reasons:* (i) Exemption is needed in order to encourage persons having knowledge of abusive or neglectful acts toward children to report such information, and to protect such sources from embarrassment or recrimination, as well as to protect their right to privacy. It is essential that the identities of all individuals who furnish information under an express promise of confidentiality be protected. Additionally,

granting individuals access to information relating to criminal and civil law enforcement, as well as the release of certain disclosure accountings, could interfere with ongoing investigations and the orderly administration of justice, in that it could result in the concealment, alteration, destruction, or fabrication of information; could hamper the identification of offenders and the disposition of charges; and could jeopardize the safety and well being of parents and their children.

(ii) [Reserved]

(f) *System identifier and name:*

(1) N03834–1, Special Intelligence Personnel Access File.

(2) *Exemption:* (i) Information specifically authorized to be classified under E.O. 12,958, as implemented by DOD 5200.1–R, may be exempt pursuant to 5 U.S.C. 552a(k)(1).

(ii) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(iii) Portions of this system of records are exempt from the following subsections of the Privacy Act: (c)(3), (d), (e)(1), (e)(4) (G) through (I), and (f).

(3) *Authority:* 5 U.S.C. 552a(k)(1) and (k)(5).

(4) *Reasons:* (i) Exempted portions of this system contain information that has been properly classified under E.O. 12356, and that is required to be kept secret in the interest of national defense or foreign policy.

(ii) Exempted portions of this system also contain information considered relevant and necessary to make a determination as to qualifications, eligibility, or suitability for access to classified information and was obtained by providing an express or implied assurance to the source that his or her identity would not be revealed to the subject of the record.

(g) *System identifier and name:*

(1) *N04060–1, Navy and Marine Corps Exchange Sales and Security Files.*

(2) *Exemption:* (i) Investigatory material compiled for law enforcement purposes may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of such information, the individual will be provided access to such information except to the extent that disclosure would reveal the identity of a confidential source.

(ii) Portions of this system of records are exempt from the following subsections of the Privacy Act: (c)(3), (d), (e)(4)(G) through (I), and (f).

(3) *Authority:* 5 U.S.C. 552a(k)(2).

(4) *Reasons:* Granting individuals access to information collected and maintained by these activities relating to the enforcement of criminal laws could interfere with orderly investigations, with orderly administration of justice, and possibly enable suspects to avoid detection or apprehension. Disclosure of this information could result in the concealment, destruction, or fabrication of evidence, and could also reveal and render ineffectual investigative techniques, sources, and methods used by these activities.

(h) [Reserved]

(i) *System identifier and name:*

(1) *N05041–1, Inspector General (IG) Records.*

(2) *Exemption:* (i) Information specifically authorized to be classified under E.O. 12,958, as implemented by DOD 5200.1–R, may be exempt pursuant to 5 U.S.C. 552a(k)(1).

(ii) Investigatory material compiled for law enforcement purposes may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of such information, the individual will be provided access to such information except to the extent that disclosure would reveal the identity of a confidential source.

(iii) Portions of this system of records may be exempt from the provisions of 5 U.S.C. 552a(c)(3); (d); (e)(1); (e)(4)(G), (H), and (I); and (f).

(3) *Authority:* 5 U.S.C. 552a(k)(1) and (k)(2).

(4) *Reasons:* (i) From subsection (c)(3) because the release of the disclosure accounting would permit individuals to obtain valuable information concerning the nature of the investigation and would present a serious impediment to the orderly conduct of any investigative activities. Such accounting could result in the release of properly classified information which would compromise the national defense or disrupt foreign policy.

(ii) From subsections (d) and (f) because access to the records would inform individuals of the existence and nature of the investigation; provide information that might result in the concealment, destruction, or fabrication of evidence; possibly jeopardize the safety and well-being of informants, witnesses and their families; likely reveal and render ineffectual investigatory techniques and methods and sources of information; and possibly result in the invasion of the personal privacy of third parties. Access could result in the release of properly classified information which could compromise the national defense or disrupt foreign policy. Amendment of the records would interfere with the ongoing investigation and impose an impossible administrative burden by requiring investigations to be continually reinvestigated.

(iii) From subsection (e)(1) because in the course of the investigation it is not always possible, at least in the early stages of the inquiry, to determine relevance and or necessity as such determinations may only occur after the information has been evaluated. Information may be obtained concerning the actual or potential violation of laws or regulations other than those relating to the ongoing investigation. Such information should be retained as it can aid in establishing patterns of improper activity and can provide valuable leads in the conduct of other investigations.

(iv) From subsection (e)(4)(G) and (H) because this system of records is exempt from individual access pursuant to subsections (k)(1) and (k)(2) of the Privacy Act of 1974.

(v) From subsection (e)(4)(I) because it is necessary to protect the confidentiality of sources and to protect the privacy and physical safety of witnesses. Although the system is exempt from this requirement, the DON has published a notice in broad, generic terms in the belief that this is all that subsection (e)(4)(I) of the Act requires.

(j) *System identifier and name:*

(1) *N05300–3, Faculty Professional Files.*

(2) *Exemptions:* (i) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(ii) Portions of this system of records are exempt from the following subsections of the Privacy Act: (c)(3), (d), (e)(4)(G) and (H), and (f).

(3) *Authority:* 5 U.S.C. 552a(k)(5).

(4) *Reasons:* Exempted portions of this system contain information considered relevant and necessary to make a release determination as to qualifications, eligibility, or suitability for Federal employment, and was obtained by providing an express or implied promise to the source that his or her identity would not be revealed to the subject of the record.

(k) *System identifier and name:*

(1) *N05354–1, Equal Opportunity Information Management System.*

(2) *Exemptions:* (i) Information specifically authorized to be classified under E.O. 12,958, as implemented by DOD 5200.1–R, may be exempt pursuant to 5 U.S.C. 552a(k)(1).

(ii) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(iii) Portions of this system of records are exempt from the following subsections of the Privacy Act: (c)(3), (d), (e)(4)(G) through (I), and (f).

(3) *Authority:* 5 U.S.C. 552a(k)(1) and (k)(5).

(4) *Reasons:* Granting access to information in this system of records could result in the disclosure of classified

material, or reveal the identity of a source who furnished information to the Government under an express or implied promise of confidentiality. Material will be screened to permit access to unclassified material and to information that will not disclose the identity of a confidential source.

(l) *System identifier and name:*

(1) *N05520–1, Personnel Security Eligibility Information System.*

(2) *Exemptions:* (i) Information specifically authorized to be classified under E.O. 12,958, as implemented by DOD 5200.1–R, may be exempt pursuant to 5 U.S.C. 552a(k)(1).

(ii) Investigatory material compiled for law enforcement purposes may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of such information, the individual will be provided access to such information except to the extent that disclosure would reveal the identity of a confidential source.

(iii) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(iv) Evaluation material used to determine potential for promotion in the Military Services may be exempt pursuant to 5 U.S.C. 552a(k)(7), but only to the extent that the disclosure of such material would reveal the identity of a confidential source.

(v) Portions of this system of records are exempt from the following subsections of the Privacy Act: (c)(3), (d), (e)(4)(G) and (I), and (f).

(3) *Authority:* 5 U.S.C. 552a(k)(1), (k)(2), (k)(5), and (k)(7).

(4) *Reasons:* Granting individuals access to information collected and maintained in this system of records could interfere with orderly investigations; result in the disclosure of classified material; jeopardize the safety of informants, witnesses, and their families; disclose investigative techniques; and result in the invasion of privacy of individuals only incidentally related to an investigation. Material will be screened to permit access to unclassified information that will not disclose the identity of sources who provide the information to the Government under an express or implied promise of confidentiality.

(m) *System identifier and name:*

(1) *N05520–4, NCIS Investigative Files System.*

(2) *Exemptions:* (i) Parts of this system may be exempt pursuant to 5 U.S.C. 552a(j)(2) if the information is compiled and maintained by a component of the agency which performs as its principal function any activity pertaining to the enforcement of criminal laws.

(ii) Portions of this system of records are exempt from the following subsections of the Privacy Act: (c)(3), (c)(4), (d), (e)(2), (e)(3), (e)(4)(G) through (I), (e)(5), (e)(8), (f), and (g).

(3) *Authority:* 5 U.S.C. 552a(j)(2).

(4) *Reasons:* (i) Granting individuals access to information collected and maintained by this activity relating to the enforcement of criminal laws could interfere with the orderly investigations, with the orderly administration of justice, and possibly enable suspects to avoid detection or apprehension. Disclosure of this information could result in the concealment, destruction, or fabrication of evidence, and jeopardize the safety and well-being of informants, witnesses and their families, and law enforcement personnel and their families. Disclosure of this information could also reveal and render ineffectual investigative techniques, sources, and methods used by these components and could result in the invasion of the privacy of individuals only incidentally related to an investigation. The exemption of the individual's right of access to portions of these records, and the reasons therefore, necessitate the exemption of this system of records from the requirement of the other cited provisions.

(ii) [Reserved]

(5) *Exemptions:* (i) Information specifically authorized to be classified under E.O. 12,958, as implemented by

DOD 5200.1–R, may be exempt pursuant to 5 U.S.C. 552a(k)(1).

(ii) Records maintained in connection with providing protective services to the President and other individuals under 18 U.S.C. 3506, may be exempt pursuant to 5 U.S.C. 552a(k)(3).

(iii) Records maintained solely for statistical research or program evaluation purposes and which are not used to make decisions on the rights, benefits, or entitlement of an individual except for census records which may be disclosed under 13 U.S.C. 8, may be exempt pursuant to 5 U.S.C. 552a(k)(4).

(iv) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(v) Testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service may be exempt pursuant to 5 U.S.C. 552a(k)(6), if the disclosure would compromise the objectivity or fairness of the test or examination process.

(vi) Portions of this system of records are exempt from the following subsections of the Privacy Act: (c)(3), (d), (e)(1), (e)(4)(G) through (I), and (f).

(6) *Authority:* 5 U.S.C. 552a(k)(1), (k)(3), (k)(4), (k)(5) and (k)(6).

(7) *Reasons:* (i) The release of disclosure accountings would permit the subject of an investigation to obtain valuable information concerning the nature of that investigation, and the information contained, or the identity of witnesses or informants, would therefore present a serious impediment to law enforcement. In addition, disclosure of the accounting would amount to notice to the individual of the existence of a record.

(ii) Access to the records contained in this system would inform the subject of the existence of material compiled for law enforcement purposes, the premature release of which could prevent the successful completion of investigation, and lead to the improper influencing of witnesses, the destruction of records, or the fabrication of testimony. Exempt portions of this system also contain information that has been properly classified under E.O. 12,958, and that is required to be kept secret in the interest of national defense or foreign policy.

(iii) Exempt portions of this system also contain information considered relevant and necessary to make a determination as to qualifications, eligibility, or suitability for Federal civilian employment, military service, Federal contracts, or access to classified information, and was obtained by providing an express or implied assurance to the source that his or her identity would not be revealed to the subject of the record.

(iv) The notice of this system of records published in the FEDERAL REGISTER sets forth the basic statutory or related authority for maintenance of the system.

(v) The categories of sources of records in this system have been published in the FEDERAL REGISTER in broad generic terms. The identity of specific sources, however, must be withheld in order to protect the confidentiality of the source, of criminal and other law enforcement information. This exemption is further necessary to protect the privacy and physical safety of witnesses and informants.

(vi) This system of records is exempted from procedures for notice to an individual as to the existence of records pertaining to him/her dealing with an actual or potential civil or regulatory investigation, because such notice to an individual would be detrimental to the successful conduct and/or completion of an investigation, pending or future. Mere notice of the fact of an investigation could inform the subject or others that their activities are under, or may become the subject of, an investigation. This could enable the subjects to avoid detection, to influence witnesses improperly, to destroy records, or to fabricate testimony.

(vii) Exempt portions of this system containing screening board reports.

(viii) Screening board reports set forth the results of oral examination of applicants for a position as a special agent with the Naval Investigation Service Command. Disclosure of these

records would reveal the areas pursued in the course of the examination and thus adversely affect the result of the selection process. Equally important, the records contain the candid views of the members composing the board. Release of the records could affect the willingness of the members to provide candid opinions and thus diminish the effectiveness of a program which is essential to maintaining the high standards of the Special Agent Corps., *i.e.*, those records constituting examination material used solely to determine individual qualifications for appointment in the Federal Service.

(n) *System identifier and name:*

(1) *N05520–5, Personnel Security Program Management Records System.*

(2) *Exemptions:* (i) Information specifically authorized to be classified under E.O. 12,958, as implemented by DOD 5200.1–R, may be exempt pursuant to 5 U.S.C. 552a(k)(1).

(ii) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(iii) Portions of this system of records are exempt from the following subsections of 5 U.S.C. 552a: (d)(1–5).

(3) *Authority:* 5 U.S.C. 552a(k)(1) and (k)(5).

(4) *Reasons:* (i) Granting individuals access to information collected and maintained in this system of records could result in the disclosure of classified material; and jeopardize the safety of informants, and their families. Further, the integrity of the system must be ensured so that complete and accurate records of all adjudications are maintained. Amendment could cause alteration of the record of adjudication.

(ii) [Reserved]

(o) *System identifier and name:*

(1) *N05580–1, Security Incident System.*

(2) *Exemption:* (i) Parts of this system may be exempt pursuant to 5 U.S.C. 552a(j)(2) if the information is compiled and maintained by a component of the agency which performs as its principal function any activity pertaining to the enforcement of criminal laws.

(ii) Portions of this system of records are exempt from the following subsections of the Privacy Act: (c)(3), (c)(4), (d), (e)(2), and (e)(4)(G) through (I), (e)(5), (e)(8), (f) and (g).

(3) *Authority:* 5 U.S.C. 552a(j)(2).

(4) *Reasons:* (i) Granting individuals access to information collected and maintained by this component relating to the enforcement of criminal laws could interfere with orderly administration of justice, and possibly enable suspects to avoid detection or apprehension. Disclosure of this information could result in concealment, destruction, or fabrication of evidence, and jeopardize the safety and well being of informants, witnesses and their families, and of law enforcement personnel and their families. Disclosure of this information could also reveal and render ineffectual investigative techniques, sources, and methods used by this component, and could result in the invasion of privacy of individuals only incidentally related to an investigation. The exemption of the individual's right of access to his or her records, and the reason therefore, necessitate the exemption of this system of records from the requirements of other cited provisions.

(ii) [Reserved]

(p) [Reserved]

(q) *System identifier and name:*

(1) *N05800–1, Legal Office Litigation/Correspondence Files.*

*Exemptions:* (i) Information specifically authorized to be classified under E.O. 12,958, as implemented by DOD 5200.1–R, may be exempt pursuant to 5 U.S.C. 552a(k)(1).

(ii) Investigatory material compiled for law enforcement purposes may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of such information, the individual will be provided access to such information except to the extent that disclosure would reveal the identity of a confidential source.

(iii) Investigatory material compiled solely for the purpose of determining

suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(iv) Testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service may be exempt pursuant to 5 U.S.C. 552a(k)(6), if the disclosure would compromise the objectivity or fairness of the test or examination process.

(v) Evaluation material used to determine potential for promotion in the Military Services may be exempt pursuant to 5 U.S.C. 552a(k)(7), but only to the extent that the disclosure of such material would reveal the identity of a confidential source.

(vi) Portions of this system of records are exempt from the following subsections of the Privacy Act: (d), (e)(1), and (f)(2), (3), and (4).

(3) *Authority:* 5 U.S.C. 552a(k)(1), (k)(2), (k)(5), (k)(6), and (k)(7).

(4) *Reasons:* (i) Subsection (d) because granting individuals access to information relating to the preparation and conduct of litigation would impair the development and implementation of legal strategy. Accordingly, such records are exempt under the attorney-client privilege. Disclosure might also compromise on-going investigations and reveal confidential informants. Additionally, granting access to the record subject would seriously impair the Navy's ability to negotiate settlements or pursue other civil remedies. Amendment is inappropriate because the litigation files contain official records including transcripts, court orders, investigatory materials, evidentiary materials such as exhibits, decisional memorandum and other case-related papers. Administrative due process could not be achieved by the ''ex parte'' correction of such materials.

(ii) Subsection (e)(1) because it is not possible in all instances to determine relevancy or necessity of specific information in the early stages of case development. What appeared relevant and necessary when collected, ultimately may be deemed unnecessary upon assessment in the context of devising legal strategy. Information collected during civil litigation investigations which is not used during subject case is often retained to provide leads in other cases or to establish patterns of activity.

(iii) Subsections (f)(2), (3), and (4) because this record system is exempt from the individual access provisions of subsection (d).

(r) *System identifier and name:*

(1) *N01000–5, Naval Clemency and Parole Board Files.*

(2) *Exemption:* (i) Parts of this system may be exempt pursuant to 5 U.S.C. 552a(j)(2) if the information is compiled and maintained by a component of the agency which performs as its principal function any activity pertaining to the enforcement of criminal laws.

(ii) Portions of this system of records are exempt from the following subsections of the Privacy Act: (c)(4), (d), (e)(4)(G), and (f).

(3) *Authority:* 5 U.S.C. 552a(j)(2).

(4) *Reasons:* (i) Granting individuals access to records maintained by this Board could interfere with internal processes by which Board personnel are able to formulate decisions and policies with regard to clemency and parole in cases involving naval prisoners and other persons under the jurisdiction of the Board. Material will be screened to permit access to all material except such records or documents as reflecting items of opinion, conclusion, or recommendation expressed by individual board members or by the board as a whole.

(ii) The exemption of the individual's right to access to portions of these records, and the reasons therefore, necessitate the partial exemption of this system of records from the requirements of the other cited provisions.

(s) *System identifier and name:*

(1) *N01752–1, Family Advocacy Program System.*

(2) *Exemptions:* (i) Investigatory material compiled for law enforcement purposes may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result

of the maintenance of such information, the individual will be provided access to such information except to the extent that disclosure would reveal the identity of a confidential source.

(ii) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(iii) Portions of this system of records are exempt from the following subsections of the Privacy Act: (c)(3) and (d).

(3) *Authority:* 5 U.S.C. 552a(k)(2) and (k)(5).

(4) *Reasons:* (i) Exemption is needed in order to encourage persons having knowledge of abusive or neglectful acts toward children to report such information, and to protect such sources from embarrassment or recriminations, as well as to protect their right to privacy. It is essential that the identities of all individuals who furnish information under an express promise of confidentiality be protected. Additionally, granting individuals access to information relating to criminal and civil law enforcement, as well as the release of certain disclosure accounting, could interfere with ongoing investigations and the orderly administration of justice, in that it could result in the concealment, alteration, destruction, or fabrication of information; could hamper the identification of offenders or alleged offenders and the disposition of charges; and could jeopardize the safety and well being of parents and their children.

(ii) Exempted portions of this system also contain information considered relevant and necessary to make a determination as to qualifications, eligibility, or suitability for Federal employment and Federal contracts, and that was obtained by providing an express or implied promise to the source that his or her identity would not be revealed to the subject of the record.

(t) *System identifier and name:*

(1) *N12930–1, Human Resources Group Personnel Records.*

(2) *Exemptions:* (i) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(ii) Testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service may be exempt pursuant to 5 U.S.C. 552a(k)(6), if the disclosure would compromise the objectivity or fairness of the test or examination process.

(iii) Portions of this system of records are exempt from the following subsections of the Privacy Act: (d), (e)(4)(G) and (H), and (f).

(3) *Authority:* 5 U.S.C. 552a(k)(5) and (k)(6).

(4) *Reasons:* (i) Exempted portions of this system contain information considered relevant and necessary to make a determination as to qualifications, eligibility, or suitability for Federal employment, and was obtained by providing express or implied promise to the source that his or her identity would not be revealed to the subject of the record.

(ii) Exempted portions of this system also contain test or examination material used solely to determine individual qualifications for appointment or promotion in the Federal Service, the disclosure of which would comprise the objectivity or fairness of the testing or examination process.

(u) *System identifier and name:*

(1) *N05813–4, Trial/Government Counsel Files.*

(2) *Exemption.* Parts of this system may be exempt pursuant to 5 U.S.C. 552a(j)(2) if the information is compiled and maintained by a component of the agency which performs as its principle function any activity pertaining to the enforcement of criminal laws. Portions of this system of records that may be exempt pursuant to subsection 5 U.S.C. 552a(j)(2) are (c)(3), (c)(4), (d), (e)(1), (e)(2), (e)(3), (e)(5), (e)(4)(G), (H), and (I), (e)(8), (f), and (g).

(3) *Exemption.* Information specifically authorized to be classified under

E.O. 12,958, as implemented by DOD 5200.1–R, may be exempt pursuant to 5 U.S.C. 552a(k)(1).

(4) *Exemption.* Investigatory material compiled for law enforcement purposes may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of such information, the individual will be provided access to such information except to the extent that disclosure would reveal the identity of a confidential source. Portions of this system of records that may be exempt pursuant to subsections 5 U.S.C. 552a(k)(1) and (k)(2) are (c)(3), (d), (e)(1), (e)(4)(G), (H), and (I), and (f).

(4) *Authority:* 5 U.S.C. 552a(j)(2), (k)(1), and (k)(2).

(5) *Reasons:* (i) From subsection (c)(3) because release of accounting of disclosure could place the subject of an investigation on notice that he/she is under investigation and provide him/her with significant information concerning the nature of the investigation, resulting in a serious impediment to law enforcement investigations.

(ii) From subsections (c)(4), (d), (e)(4)(G), and (e)(4)(H) because granting individuals access to information collected and maintained for purposes relating to the enforcement of laws could interfere with proper investigations and orderly administration of justice. Granting individuals access to information relating to the preparation and conduct of criminal prosecution would impair the development and implementation of legal strategy. Amendment is inappropriate because the trial/Government counsel files contain official records including transcripts, court orders, and investigatory materials such as exhibits, decisional memorandum and other case-related papers. Disclosure of this information could result in the concealment, alteration or destruction of evidence, the identification of offenders or alleged offenders, nature and disposition of charges; and jeopardize the safety and well-being of informants, witnesses and their families, and law enforcement personnel and their families. Disclosure of this information could also reveal and render ineffective investigation techniques, sources, and methods used by law enforcement personnel, and could result in the invasion of privacy of individuals only incidentally related to an investigation.

(iii) From subsection (e)(1) because it is not always possible in all instances to determine relevancy or necessity of specific information in the early stages of case development. Information collected during criminal investigations and prosecutions and not used during the subject case is often retained to provide leads in other cases.

(iv) From subsection (e)(2) because in criminal or other law enforcement investigations, the requirement that information be collected to the greatest extent practicable from the subject individual would alert the subject as to the nature or existence of an investigation, presenting a serious impediment to law enforcement investigations.

(v) From subsection (e)(3) because compliance would constitute a serious impediment to law enforcement in that it could compromise the existence of a confidential investigation or reveal the identity of witnesses or confidential informants.

(vi) From subsection (e)(4)(I) because the identity of specific sources must be withheld in order to protect the confidentiality of the sources of criminal and other law enforcement information. This exemption is further necessary to protect the privacy and physical safety of witnesses and informants.

(vii) From subsection (e)(5) because in the collection of information for law enforcement purposes it is impossible to determine in advance what information is accurate, relevant, timely, and complete. With the passage of time, seemingly irrelevant or untimely information may acquire new significance as further investigation brings new details to light and the accuracy of such information can only be determined in a court of law. The restrictions of subsection (e)(5) would restrict the ability of trained investigators and intelligence analysts to exercise their judgment in reporting on investigations and impede the development of intelligence necessary for effective law enforcement.

(viii) From subsection (e)(8) because compliance would provide an impediment to law enforcement by interfering with the ability to issue warrants or subpoenas and by revealing investigative techniques, procedures, or evidence.

(ix) From subsection (f) and (g) because this record system is exempt from the individual access provisions of subsection (d).

(x) Consistent with the legislative purpose of the Privacy Act of 1974, the DON will grant access to nonexempt material in the records being maintained. Disclosure will be governed by the DON's Privacy Regulation, but will be limited to the extent that the identity of confidential sources will not be compromised; subjects of an investigation of an actual or potential criminal violation will not be alerted to the investigation; the physical safety of witnesses, informants and law enforcement personnel will not be endangered, the privacy of third parties will not be violated; and that the disclosure would not otherwise impede effective law enforcement. Whenever possible, information of the above nature will be deleted from the requested documents and the balance made available. The controlling principle behind this limited access is to allow disclosures except those indicated above. The decisions to release information from these systems will be made on a case-by-case basis.

(v) *System identifier and name:*

(1) *NM05211–1, Privacy Act Request Files and Tracking System.*

(2) *Exemption:* During the processing of a Privacy Act request (which may include access requests, amendment requests, and requests for review for initial denials of such requests), exempt materials from other systems of records may in turn become part of the case record in this system. To the extent that copies of exempt records from those ''other'' systems of records are entered into this system, the DON hereby claims the same exemptions for the records from those ''other'' systems that are entered into this system, as claimed for the original primary system of which they are a part.

(3) *Authority:* 5 U.S.C. 552a(j)(2), (k)(1), (k)(2), (k)(3), (k)(4), (k)(5), (k)(6), and (k)(7).

(4) Records are only exempt from pertinent provisions of 5 U.S.C. 552a to the extent such provisions have been identified and an exemption claimed for the original record and the purposes underlying the exemption for the original record still pertain to the record which is now contained in this system of records. In general, the exemptions were claimed in order to protect properly classified information relating to national defense and foreign policy, to avoid interference during the conduct of criminal, civil, or administrative actions or investigations, to ensure protective services provided the President and others are not compromised, to protect the identity of confidential sources incident to Federal employment, military service, contract, and security clearance determinations, and to preserve the confidentiality and integrity of Federal evaluation materials. The exemption rule for the original records will identify the specific reasons why the records are exempt from specific provisions of 5 U.S.C. 552a.

(w) *System identifier and name:*

(1) *NM05720–1, FOIA Request/Appeal Files and Tracking System.*

(2) *Exemption:* During the processing of a Freedom of Information Act request, exempt materials from other systems of records may in turn become part of the case record in this system. To the extent that copies of exempt records from those 'other' systems of records are entered into this system, the DON hereby claims the same exemptions for the records from those 'other' systems that are entered into this system, as claimed for the original primary system of which they are a part.

(3) *Authority:* 5 U.S.C. 552a(j)(2), (k)(1), (k)(2), (k)(3), (k)(4), (k)(5), (k)(6), and (k)(7).

(4) Records are only exempt from pertinent provisions of 5 U.S.C. 552a to the extent such provisions have been identified and an exemption claimed for the original record and the purposes underlying the exemption for the original record still pertain to the record which is now contained in this system of records. In general, the exemptions were claimed in order to protect properly classified information relating to

national defense and foreign policy, to avoid interference during the conduct of criminal, civil, or administrative actions or investigations, to ensure protective services provided the President and others are not compromised, to protect the identity of confidential sources incident to Federal employment, military service, contract, and security clearance determinations, and to preserve the confidentiality and integrity of Federal evaluation materials. The exemption rule for the original records will identify the specific reasons why the records are exempt from specific provisions of 5 U.S.C. 552a.

(x) *System identifier and name:* N05800–2, Professional Responsibility Files.

(1) *Exemptions:* Investigatory material compiled for law enforcement purposes, may be exempt pursuant to 5 U.S.C. 552(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or which he would otherwise be eligible, as a result of maintenance of the information, the individual will be provided access to the information except to the extent that disclosure would reveal the identity of a confidential source. Any portion of this record system which falls within the provisions of 5 U.S.C. 552a(k)(2) may be exempt from the following subsections of 5 U.S.C. 552a: (c)(3), (d)(1) through (5), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I).

(2) *Authority:* 5 U.S.C. 552a(k)(2).

(3) The reason for asserting this exemption (k)(2) is to ensure the integrity of the litigation process.

(y) *System identifier and name:* NM03800–1, Naval Global Maritime, Foreign, Counterterrorism and Counter Intelligence Operation Records.

(1) *Exemptions:* Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5) but only to the extent that such material would reveal the identity of a confidential source. An exemption rule for this system has been promulgated in accordance with the requirements of 5 U.S.C. 553(b)(1), (2) and (3)(c) and (e) and is published at 32 CFR part 701.

(2) *Authority:* 5 U.S.C. 552a(k)(5).

(3) The reason for asserting this exemption is ensure the integrity of the security and investigative material complied for law enforcement purposes by the Department of the Navy and the Department of Defense.

[71 FR 27536, May 11, 2006, as amended at 75 FR 61619, Oct. 6, 2010; 76 FR 22617, Apr. 22, 2011; 77 FR 56772, Sept. 14, 2012; 78 FR 69553, Nov. 20, 2013]

### § 701.129 Exemptions for specific Marine Corps record systems.

(a) [Reserved]

(b) *System identifier and name:*

(1) *MIN00001, Personnel and Security Eligibility and Access Information System.*

(2) *Exemption:*

(i) Investigatory material compiled for law enforcement purposes may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of such information, the individual will be provided access to such information except to the extent that disclosure would reveal the identity of a confidential source.

(ii) Records maintained in connection with providing protective services to the President and other individuals under 18 U.S.C. 3506, may be exempt pursuant to 5 U.S.C. 552a(k)(3).

(iii) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(iv) Portions of this system of records are exempt for the following subsections of the Privacy Act: (c)(3), (d), (e)(1), (e)(4)(G) through (I), and (f).

(3) *Authority:* 5 U.S.C. 552a(k)(2), (k)(3), and (k)(5), as applicable.

(4) *Reasons:* (i) Exempt portions of this system contain information that has been properly classified under E.O. 12,958, and that is required to be kept

secret in the interest of national defense or foreign policy.

(ii) Exempt portions of this system also contain information considered relevant and necessary to make a determination as to qualifications, eligibility, or suitability for Federal civilian employment, military service, Federal contracts, or access to classified, compartmented, or otherwise sensitive information, and was obtained by providing an expressed or implied assurance to the source that his or her identity would not be revealed to the subject of the record.

(iii) Exempt portions of this system further contain information that identifies sources whose confidentiality must be protected to ensure that the privacy and physical safety of these witnesses and informants are protected.

[71 FR 27536, May 11, 2006, as amended at 72 FR 64538, Nov. 16, 2007]

# PART 705—PUBLIC AFFAIRS REGULATIONS

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AUTHORITY: 5 U.S.C. 301; 10 U.S.C. 5031.

SOURCE: 41 FR 29101, July 15, 1976, unless otherwise noted.

## § 705.1 Purpose.

The regulations and rules in this part prescribe policies and procedures for the Department of the Navy pertaining to public affairs practices.

## § 705.2 Chief of Information and the Office of Information (CHINFO).

(a) The Chief of Information is the direct representative of the Secretary of the Navy and of the Chief of Naval Operations in all public affairs and internal relations matters. As such, the Chief of Information has the authority to implement public affairs and internal relations policies and to coordinate Navy and Marine Corps public affairs and internal relations activities of mutual interest.

(b) The Chief of Information will keep Navy commands informed of Department of Defense policies and requirements. No command within the Department of the Navy, except Headquarters, Marine Corps, will deal directly with the Office of the Assistant Secretary of Defense (Public Affairs) on public affairs matters unless authorized to do so by the Chief of Information.

(c) The Chief of Information will be consulted on all Navy public affairs and internal relations matters and informed of all operations and proposed plans and policies which have national or international (and in the case of

audio-visual material, regional) public affairs aspects.

(d) The Chief of Information heads the Navy Office of Information, the Navy Internal Relations Activity (NIRA), the Office of Information Branch Offices (NAVINFOs), the Navy Public Affairs Center (NAVPACENs) and the Fleet Home Town News Center (FHTNC). In addition, the Chief of Information has responsibility (on behalf of the Secretary of the Navy as Executive Agent for the Department of Defense) for the High School News Service and has operational control of the U.S. Navy Band, Washington, DC.

(e) The Navy Office of Information Branch Offices (NAVINFOs) are located in Atlanta, Boston, Chicago, Dallas, Los Angeles, and New York. As representatives of the Secretary of the Navy, Chief of Naval Operations, and Chief of Information, the NAVINFOs have a primary mission of providing direct liaison with local and regional mass communications media.

(1) The function of the NAVINFOs are as follows:

(i) Establish and maintain close personal relationships with local television, radio, film, publishing, and other mass-media organizations including minority-group-oriented media.

(ii) Seek ways through these media to inform the public about naval personnel and activities.

(iii) Provide assistance to media organizations and respond to their interest in Navy programs, stories, and features. In this regard, maintain informal liaison with various information offices afloat and ashore in order to respond to requests from local media representatives, particularly those from inland areas, who desire to visit fleet units or activities ashore.

(iv) Provide advice on Navy cooperation and assistance, as appropriate, to representatives of national industrial and commercial organizations, including advertising agencies.

(v) Maintain a library of Navy motion picture films for use by local television stations, distribute news films and audio material, and otherwise perform normal audio-visual functions at the local level.

(vi) Provide personnel and other assistance as appropriate, to special Command Information Bureaus and public information staffs of other naval activities as directed by the Chief of Information.

(vii) Advise the Chief of Information on current trends and significant problems relating to local media requirements.

(viii) Seek ways to support the long-range goals and immediate priorities of the Navy.

(ix) Provide advice and assistance in the placement of news and feature materials to the field activities of the Navy Recruiting Command.

(x) Perform such other tasks as may be assigned by the Chief of Information.

(2) Additionally, NAVINFO Los Angeles is the Navy representative for all appropriate liaison with motion picture and network television offices in the Hollywood area. Naval activities will channel all requests for information or assistance from these media to NAVINFO Los Angeles, which will coordinate with CHINFO.

(3) Additionally, NAVINFO New York is the Navy representative for all appropriate liaison with television and radio networks in the New York area and with magazine and book publishers in that area. Requests for assistance originating from these media should be directed to NAVINFO New York, which will coordinate with CHINFO.

(4) Except as specifically directed by CHINFO, the Branch Offices do not have responsibility or authority for community relations or internal relations.

(5) Direct liaison between NAVINFOs and Naval District public affairs offices, Navy recruiters and other naval activities afloat and ashore is encouraged.

(f) Areas covered by the respective offices are:

(1) NAVINFO Atlanta: Alabama, the District of Columbia, Florida, Georgia, Kentucky, Maryland, Mississippi, North Carolina, South Carolina, Tennessee, Virginia, and Southern West Virginia.

(2) NAVINFO Boston: Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont.

(3) NAVINFO Chicago: Illinois, Indiana, Iowa, Michigan, Minnesota, Nebraska, North Dakota, Ohio, South Dakota, Wisconsin, and Northern West Virginia.

(4) NAVINFO Dallas: Arkansas, Colorado, Kansas, Louisiana, Missouri, New Mexico, Oklahoma, and Texas.

(5) NAVINFO Los Angeles: Arizona, California, Idaho, Montana, Nevada, Oregon, Utah, Washington, and Wyoming.

(6) NAVINFO New York: Connecticut, Delaware, New Jersey, New York, and Pennsylvania.

(g) The Navy Public Affairs Centers (NAVPACENs) are located in Norfolk and San Diego. The centers have a primary mission of producing Navy stories for dissemination to the media through normal information channels.

(1) The following tasks are included among the functions of the NAVPACENs.

(i) Produce written, audio and photographic feature public information material about fleet and shore personnel, units and activities, as coordinated with and approved for policy and concept by the respective fleet and shore commander concerned.

(ii) Serve as public affairs emergency reaction teams/resource personnel responsive to the requirements of the CNO and CHINFO, and when feasible and appropriate and as approved by CNO or CHINFO, serve as public affairs emergency reaction teams/resource personnel in support of Fleet Commanders.

(iii) Develop feature material to support the long range goals and the immediate priorities of the Navy. Direct liaison is authorized with the Navy Recruiting Command, Recruiting Areas, Recruiting Districts, and other Commanders as appropriate to achieve this function.

(iv) Perform such other tasks as may be assigned by the Chief of Information.

(2) NAVPACENs will have no public affairs news media responsibilities which conflict with the basic public affairs responsibilities of Fleet Commanders-in-Chief. Specifically, NAVPACENs are excluded from responding to news media queries, releasing news information, arranging news media embarkations, or any other day-to-day news media services concerning the respective fleets. These responsibilities remain with the Fleet Commander.

(3) NAVPACENs have no direct responsibility or authority for community relations or internal relations and shall defer in these areas to the cognizant Naval District Commandant.

(4) Direct liaison with Fleet Commanders-in-Chief and NAVINFOs is appropriate and authorized. As approved by the Fleet CINCs, direct liaison with forces afloat and shore activities under the Fleet CINCs is appropriate.

(5) NAVPACENs will carry out their mission and functions in such a manner as not to interfere with the public affairs responsibilities of the District Commandants.

[44 FR 6389, Feb. 1, 1979]

### § 705.3 [Reserved]

### § 705.4 Communication directly with private organizations and individuals.

(a) Questions from the public and requests from groups or individuals for pamphlets, photos, biographies, historical matter, etc., must be promptly answered. (32 CFR part 701, subparts A–D refers.)

(b) Assistance within the command's capabilities should (and in some cases, must) be given. Where an established channel for obtaining the item exists, such as a publication stocked by the Superintendent of Documents (Government Printing Office), or photos, as explained in the subparagraph below, the requester may be directed to it. Under some circumstances, a charge may be made. (Consult part 701 or the command's Freedom of Information authority for details.) If a lengthy search, beyond the convenient manpower resources of the command, would be required, the requester may be offered the opportunity of examining the material at the command instead of copies being made.

(c) If a request is refused, the reason must be fully and courteously explained, as required by part 701 of this chapter.

(d) Copies of released U.S. Navy photos may be purchased by the general public.

(1) Photos made within the last 10 years may be purchased from the Naval Photographic Center. Information on the conditions of sale can be obtained by writing to the Commanding Officer, Naval Photographic Center, Naval Station, Washington, DC 20390.

(2) Photos made more than 10 years prior to the current date may be purchased from the National Archives. Details are available from: Audio-Visual Branch National Archives and Records Service, General Services Administration, Washington, DC 20408.

[41 FR 29101, July 15, 1976, as amended at 44 FR 6390, Feb. 1, 1979]

### § 705.5 Taking of photos on board naval ships, aircraft and installations by members of the general public.

(a) Visitors will not be allowed to take photographic equipment on board a naval ship or aircraft or into a naval activity or to take photographs within a naval jurisdiction unless specially authorized by the officer in command or higher authority.

(b) Guests of the Navy who wish to take photos within naval jurisdictions will be advised of areas where photography is permitted. An escort will be assigned to assure that security is maintained, unless photography is permitted throughout the ship, aircraft or installation, or the areas in which it is not permitted are appropriately guarded or secured.

(c) If there is reason to believe that film exposed by a visitor or media photographer contains classified information, the film will be processed under Navy jurisdiction.

(1) Classified photos, if any, will be retained. All unclassified film will be returned to the owner.

(2) When film exposed by civilian visitors or media representatives in sensitive areas is beyond the capability of the local command to process, it may be forwarded to the Commanding Officer, Naval Photographic Center, for processing. Any special processing instructions should be sent with the film.

### § 705.6 Releasing public information material to the media.

(a) Methods of releasing information:

(1) Release at the seat of government and/or as approved by the Assistant Secretary of Defense (Public Affairs).

(i) Overall responsibility for release of information rests with the Assistant Secretary of Defense (Public Affairs). The Chief of Information is responsible for coordinating with him releases of national and international interest (and in the case of audiovisual material of regional interest) and for arranging for local release of such material if considered appropriate by OASD(PA). Information of the above types and also information proposed for release at the seat of government, with the exception of ''spot news,'' as described in paragraph (b) of this section, following.

(2) Releases by local commands:

(i) News of purely local interest may be released by the command concerned. Higher and coordinating authorities (such as the District Commandant) will be informed, when appropriate, that the release has been made.

(ii) News of national or other wide interest may be released by a local command under the following circumstances:

(A) The Assistant Secretary of Defense (Public Affairs), having approved a release, directs that it be issued by the command concerned.

(B) An event of immediate and urgent news interest, such as a disasterous accident, occurs at the command, and emergency announcements must be made as delay in issuing information would be against the best interests of the Navy. The officer in command will make a ''spot news'' release of all appropriate information considered releasable.

(*1*) Copies of spot news releases made (or a description if the announcement is made orally) will be forwarded promptly to the Chief of Information.

(*2*) If the situation is considered critical, the spot news release will be forwarded by telephone or message.

(b) Means through which information is released to media:

(1) Navy oriented information material (written, taped, motion picture,

still photo) is regularly released to all media presumed to be interested.

(2) Similar material is provided in response to query from a news media representative. The material may be produced by the Navy, or the newsman may be assisted in researching, filming, etc. himself.

(3) Exclusive releases:

(i) Information concerning naval activities may be provided on an exclusive basis only when a specific request or inquiry is received from one news media representative for material not requested by other media.

(ii) In such cases, and assuming that the information is properly releasable, the following rules will apply:

(A) If prior to the time information is given to the newsman making the original inquiry or request substantially similar inquiries or requests are received from other newsmen, the first inquirer will be so informed, and subsequent inquirers will be advised that a prior request has been received. None of the inquirers will be told the identity of the individuals or media who have placed these similar inquiries.

(B) If not more than three similar requests are received, the information will be provided simultaneously to each inquirer.

(C) If more than three requests for substantially the same information have been received before any are answered, inquirers will be advised as soon as possible that the information cannot be given on an exclusive or limited basis, and a general release covering the subject will be issued to all media.

(4) News conferences:

(i) A news conference is held when a command has something specific to announce to the press that cannot be handled in a news release or by phone call. A news conference should not be called just to get together with the press. A request from the press is also a reason for conducting a news conference. Special events, significant operations or serious accidents are frequent reasons for calling news conferences. If requested, spokesmen may be made available to the press for questions without specific subject matter in mind, but the press should be clearly informed of the nature of this meeting. Technically, this is not considered a news conference.

(ii) When a news conference is held, it is essential that all interested media be invited to attend.

(iii) A record of what is said should be kept. Ideally, the news conference should be tape recorded and a public affairs officer should be present.

(iv) Official spokesmen will be prepared to answer questions in a frank and candid manner. If the answer would compromise military security, the inquirer should be so advised. If the answer is not known to the spokesman, he should say so and add that the matter will be checked and any available unclassified information provided later.

(v) Newsmen are not normally asked to submit their questions in advance. If this is considered advisable, as in cases where highly technical answers may be required, the answers are prepared in advance and given to all attending newsmen (not just the questioner) at the news conference.

(5) Interviews. These are similar to news conferences except that they involve a single newsman (who has usually requested the interview) and a single Navy spokesman.

(i) Required procedures are essentially the same as for news conferences. However, a public affairs officer should be present only if desired by the person being interviewed. The interview may be taped, if the newsman agrees.

(ii) Without penalizing initiative displayed by a newsman in asking pertinent questions, care should be exercised by the naval spokesman not to make a major revelation of news material to a single media outlet in the course of a routine interview.

(iii) If major areas of difficulty arise in the interview, the Chief of Information should be notified of them.

(6) Background briefings; ''Not for attribution''; or ''Off the record.''

(i) Since there is a possibility or risk of a misunderstanding arising in these briefings, it is important that all concerned understand and agree to the ground rules.

(ii) In general, information will not be made public unless it can be openly

attributed to the Navy and disseminated without reservation. Occasionally, a backgrounder may be helpful. An example is a briefing of embarked newsmen in advance of an operation, providing information which may not be reported until the operation is over. The purpose is to help the newsmen understand the operation while it is taking place.

**§ 705.7 Radio and television.**

(a) Navy relationships with radio and TV representatives are of two types:

(1) Dissemination to them of Navy produced tapes, photos, films, etc. (This is discussed in more detail in § 705.17).

(2) Cooperation with them when they produce a program on a Navy subject. This is discussed in the paragraph following:

(b) Requirement for approval by higher authority.

(1) Commanding officers may:

(i) Release audiovisual material which is spot news, as defined in § 705.6(a)(2)(ii) preceding, or is of purely local interest.

(ii) Participate in local community audiovisual projects of benefit to the Department of Defense or in the national interest.

(iii) Approve one-time, one-station participation by personnel of their commands (as individuals) in programs of purely local interest.

(2) All other audiovisual material originated by the Department of the Navy or requiring Navy cooperation must be approved by the Chief of Information, who will effect the necessary coordination and/or approval of the Assistant Secretary of Defense (Public Affairs).

(i) Requests for assistance from nongovernmental audiovisual media will be forwarded, with the maximum available details and an evaluation of the request, through the chain of command to the Chief of Information.

(ii) No direct coordination or contact between local naval commands and the Assistant Secretary of Defense (PA) is authorized unless specifically provided for by separate directives or correspondence.

(c) Navy cooperation in productions by audiovisual media representatives (nongovernment).

(1) The production or project must:

(i) Be consistent with the goals and aims of the Department of Defense and/or be in the national interest.

(ii) Portray military operation, historical incidents, persons and places, in such a manner as to give a true portrayal and interpretation of military life.

(iii) Comply with accepted standards of dignity and propriety in the industry.

(2) There will be no deviation from established safety standards.

(3) Operational readiness shall not be impaired.

(4) Official activities of military personnel assisting the production must be within the scope of normal military activities. Exceptions to this policy will be made only in unusual circumstances.

(5) Diversion of ships, equipment, personnel and material resources from normal military locations or military operations will not normally be authorized for filming. Exceptions to such policy must be authorized by the Assistant Secretary of Defense (Public Affairs), through the Chief of Information.

(i) The production company concerned must reimburse the government for any extra expense involved. A strict accounting of the additional expenses incurred and charged to the production company must be maintained by the designated project officer. A copy of this accounting will be forwarded to the Chief of Information.

(ii) [Reserved]

(6) Naval material and personnel will not be employed in such a manner as to compete with commercial and private enterprise. In this regard, any person or agency requesting their use will furnish a noncompetitive certification.

(7) Additional details on procedures will be found in DOD Instruction 5410.16.

(8) In addition to cooperation requested by the media, commands will be alert to the advantages of providing Navy programming and/or encouraging participation by Navy personnel in

local radio and TV programming. Examples are community forums, local talent shows, educational and religious programs, children's shows, sports programs, etc.

(d) Participation by individual Navy personnel on radio or TV programs:

(1) In general, such participation is encouraged if it is:

(i) Dignified and considered in the interests of the Navy.

(ii) Compatible with operational commitments.

(iii) Not in competition with the regular employment of professional performers.

(2) The public affairs officer will screen requests for such appearances for members of his command to see that the programs are in good taste, and that neither the Navy nor its personnel are exposed to embarrassment for the sake of entertainment.

(3) Approval of participation by Navy individuals:

(i) Approval is not required for personnel attending audience participation broadcasts if they are selected at random from the audience.

(ii) One-time, one-station participation of purely local interest may be approved by the officer in command concerned.

(iii) If participation will be on a network (defined as more than one station, even if local) of if the same person or program is requested by two or more unrelated stations, approval by the Chief of Information must be obtained even if the show is of local interest only.

(e) Use of official footage:

(1) Use of official U.S. Navy stock film footage on TV broadcasts is not authorized without approval and clearance by the Chief of Information and the Department of Defense.

(2) Use of Navy public information motion pictures cleared for TV is authorized and encouraged except that such films may be used on subscription or pay TV only when offered to the viewers at no cost.

(3) Navy films will not be cut or portions duplicated for TV use in lieu of stock footage without prior approval by the Chief of Information.

(f) *Music clearance*. The Navy assumes no responsibility for clearance of music used on Navy recordings, transcriptions, or films not specially produced or authorized for radio or TV broadcast.

(g) *Disclaimers*. A disclaimer is not necessary if a product is advertised on a program in which the Navy participates, but there must be no stated or implied endorsement of it by the Navy or by naval personnel appearing on the program.

(h) Requests for courtesy prints of commercial television programs:

(1) Requests will not be made directly to the producer or network concerned, but will be forwarded to the Chief of Information by the Navy requester.

(2) These courtesy prints will be exhibited only under circumstances which cannot be construed as competitive with commercial ventures.

### § 705.8 Motion pictures.

(a) The rules and procedures given in the preceding for TV will also apply to cooperation with commercial motion picture producers.

(b) The Navy assists in the production of commercial, privately financed, nontheatrical motion pictures of institutional or of educational value to the public. They Navy will not:

(1) Solicit their production.

(2) Provide lists of subjects the Navy considers ''desirable.''

(3) State that the Navy will use a commercially produced film.

(4) Imply endorsement of a product.

(5) Permit the use of official Navy seals.

(c) Navy assistance to motion pictures and all other audio-visual products produced by Navy contractors will be subject to the same rules and procedures that apply to other non-government producers. Audio-visual products produced by Navy contractors, with or without Navy assistance, will be submitted to the Chief of Information via the appropriate Navy headquarters activity for coordination with the Assistant Secretary of Defense (Public Affairs) for clearance for public release. They will be accompained by five copies of the script and a statement from the producer that costs were paid from corporate (vice contract) funds.

(d) When a commercial film which has been produced with Navy cooperation is screened in a community, local commands can provide Navy exhibits for display in theater lobbies, coordinate displays of recruiting material, and arrange for personal appearances of Department of Defense and Department of the Navy military and civilian personnel, provided such cooperation is approved by the Chief of Information and the Assistant Secretary of Defense (Public Affairs).

[41 FR 29101, July 15, 1976, as amended at 44 FR 6390, Feb. 1, 1979]

### § 705.9 Availability of motion pictures to external audiences.

(a) *Public access.* Navy and Marine Corps general motion pictures and motion picture projects not previously cleared for public exhibition will require clearance by the Chief of Information or the Marine Corps Director of Information, as appropriate, prior to public viewing. Concurrent review of legal rights and instruments associated with the production will be carried out by Patent Counsel, Naval Air Systems Command (AIR-OOP). Cleared motion pictures may also be made available for free loan as determined by the individual services. In addition, cleared motion pictures may be provided for rent or sale through the National Audio-Visual Center, National Archives and Records Service (GSA), Washington, DC 20409.

(b) *Foreign military training.* Motion pictures from the Navy inventory may be made available for foreign military training programs on approval by the Chief of Naval Operations. Classified motion pictures selected for such use will also require a security review by the Chief of Naval Operations.

### § 705.10 Still photography.

(a) Policy and procedures on taking photos by the general public, given in § 705.5 apply also to media representatives.

(b) Basic policy and procedures for still photos are set forth in the Manual of Naval Photography, OPNAVINST 3150.6D.

(c) Authority to forbid photography:

(1) On Navy property, the officer in command may forbid the taking of photographs and may confiscate film, reviewing it if it is suspected that classified material has been photographed. In such cases, all unclassified photos will be returned promptly to the photographer.

(2) Navy personnel have no authority to confiscate film off Navy property. If, as in an accident, classified equipment is exposed which cannot be removed or covered, Navy representatives will ask news media photographers not to photograph it and will inform them of 18 U.S.C. 793(e), 795, 797, which makes it a criminal offense to photograph classified material. Navy personnel will not use force if media photographers refuse to cooperate, but will instead seek the assistance of appropriate civil authorities and/or the photographer's superior in recovering film or photographs presumed to be of classified nature.

(3) If media photographers are uncooperative in regard to protection of classified material, an account of the matter will be forwarded to the Chief of Information.

(d) Release of photographs:

(1) Most unclassified photographs of interest to the public may be released to news media. However, the rights of individuals photographed and special constraints such as those described in section 0403 of the Public Affairs Regulations must be taken into consideration before a decision is made to release a photograph. In addition, photos which might be harmful to recruiting or otherwise not be in the Navy's best interests will not be used unless this failure to release them constitutes suppression of legitimate news.

(2) Photographs of strictly local interest can be made available by the command to local media without being submitted to review by higher authority.

(3) If a feature type photo released locally is considered of possible interest elsewhere, because of its human interest or artistic merit, a single print should be forwarded to the Chief of Information, together with a notation of the distribution made.

(4) Photographs of national interest:

(i) ''Spot news'' photos may be released by a District Commandant or Fleet or Force Commander.

(ii) If a photo has been released by a local command to national news media:

(A) The original negative or transparency will be forwarded by the fastest available means to the Commanding Officer, Naval Photographic Center, Naval Station, Washington, DC 20390. Such forwarding will be in accordance with the Manual of Naval Photography, par. 0445, subparagraphs 3 and 4.

(B) One print, a copy of the letter of transmittal, and the distribution list will be forwarded to the Chief of Information.

(C) Navy units with a Unified Command will forward the photos through Unified Command channels.

(D) All other commands will forward the photos to the Chief of Information who will effect coordination with the Office of the Assistant Secretary of Defense (Public Affairs) and, if necessary, arrange for security review.

(iii) Photography of research activities is normally considered to be of national interest.

(iv) Still photographs of national news interest may be forwarded, unprocessed, for release by the Chief of Information by any command not subject to the authority of a Unified or Specified Commander. Such forwarding will be in accordance with paragraph 0445, subparagraph 3, of the Manual of Naval Photography. All available caption material will be forwarded with this unprocessed photography.

### § 705.11 Supplying photographs and services to other than Navy and Marine Corps.

(a) To avoid competition with civilian photographic organizations, naval aircraft will not be used to take photographs for, nor will photographs or mosaic maps be provided to any individuals, corporations, or agencies other than departments or agencies of the federal government, without specific permission from the Chief of Naval Operations.

(b) In the case of natural catastrophe, or other circumstances where prompt action is required, the senior officer present may authorize a departure from the preceding paragraph. In all such cases, a report of the circumstances will be made to the Chief of Naval Operations.

(c) This policy does not preclude releases to the media, news companies, and others in accordance with established procedures, or the sale of released photographs to private agencies or individuals under existing Department of Defense regulations and part 701, subparts A–D, Availability to the public of Department of the Navy Information and Records. Normally, requests by individuals for still photographs and motion picture photography for private use are forwarded to the Commanding Officer, Naval Photographic Center, Naval Station, Washington, DC 20390, for action. Procedures for the collection or authority for waiver of fees for service and material provided are set forth in Volume III, NAVCOMPT Manual, and part 701, subparts A–D.

(d) Navy aerial photography released for sale to the public is transferred to the United States Department of the Interior. Inquirers regarding the purchase of this photography should be directed to Chief, Map Information Office, Geological Survey, Department of the Interior, Washington, DC 20025.

(e) Navy training films suitable for sale to the public are transferred to the National Audio-Visual Center, National Archives and Records Service, General Services Administration, Washington, DC 20408. Inquires regarding the sale of Navy training films should be addressed to the National Audio-Visual Center.

(f) This policy does not preclude releases to contractors and others properly engaged in the conduct of the Navy's business. However, when services are performed for other agencies of the government, and under certain conditions, for other military departments, the Navy Comptroller Manual prescribes that such are subject to reimbursement.

(g) All private inquiries from foreign nationals should be returned, advising the addressee to contact his local U.S. Information Service officer for the desired materials.

**§ 705.12 Print media.**

Requests for reprints of items published in national media will be addressed to the Chief of Information. Commands will be careful not to reproduce on their own authority any copyrighted material without advance permission from the copyright holder.

**§ 705.13 Commercial advertising.**

(a) The Navy encourages cooperation with advertisers. However, the layout, artwork and text of the proposed advertisement must be submitted to the Chief of Information for review and for clearance by other appropriate authorities.

(b) Requests from commercial enterprises (including those with Navy contracts) for use of Navy personnel, facilities, equipment or supplies for advertising purposes must be referred to the Chief of Information.

(c) Official Navy photos which have been cleared and are released for open publication may be furnished for commercial advertising, if properly identified and captioned. No photos will be taken exclusively for the use of an advertiser.

(d) Navy cooperation in commercial advertising, publicity and other promotional activities will be based on the following requirements.

(1) It must be in accordance with the provisions of 32 CFR part 721.

(2) It must be in good taste and not reflect discredit on the Navy or the U.S. Government. Statements made must be matters of fact, without misleading information or other objectionable features.

(3) It must not indicate that a product is used by the Navy to the exclusion of similar products offered by other manufacturers or appear to endorse or selectively benefit or favor (directly or indirectly) any private individual, sect, fraternal organization, commercial venture or political group, or be associated with solicitation of votes in a political election. It will not infer Navy responsibility for the accuracy of the advertiser's claims or for his compliance with laws protecting the rights of privacy of military personnel whose photographs, names or statements appear in the advertisement. It will neither indicate that a product has undergone Navy tests nor disclose data from any Navy tests which may have been made.

(4) It may not promote the use of tobacco or alcohol.

(e) Use of uniforms and naval insignias. These may be used provided it is done in a dignified manner.

(f) Use of Naval personnel:

(1) Personnel may receive no compensation.

(2) Personnel will not be inconvenienced or have their training or normal duties interrupted.

(3) Written consent from the person concerned must be obtained before a photo may be used.

(4) Navy civilians and military personnel on active duty may not use their position titles or ranks in connection with any commercial enterprise or endorsement of a commercial product. (Retired personnel and Reserves not on active duty may use their military titles in connection with commercial enterprises if this does not give rise to the appearance of sponsorship of the enterprise by the Navy or Department or in any way reflect discredit upon them.)

(5) Testimonials from naval personnel are not banned, but the person giving the testimonial must not be specifically identified.

(i) The use of name, initials, rank or rate of Navy personnel appearing in testimonial advertising is not permitted, but such expressions as, ''says a Navy chief,'' may be used.

(ii) Care will be taken to ensure that testimonials from Navy personnel are presented in such a way as to make clear that the views expressed are those of the individual and not of the Department of the Navy.

**§ 705.14 Embarkation of media representatives.**

(a) *General.* (1) Although this paragraph applies primarily to embarkation in ships, provisions which are applicable to embarkation on aircraft or visits to shore installations apply also to those situations.

(2) See also § 705.37 on transportation of non-Navy civilians.

(b) *Invitations to embark.* (1) Invitations should be extended as far in advance as possible and inclusive information on the following should be provided:

(i) Type, scope and duration of operation or cruise.

(ii) Communications, methods of press transmission, and charges, if any.

(iii) Transportation arrangements.

(iv) Approximate cost of meals and/or quarters, and the statement that the newsman will be expected to pay for these and other personal expenses incurred.

(2) It should be made clear to the newsman that there may be limits on movement from one participating unit to another. If helicopters or highline transfers are to be used, their limitations and hazards should be explained.

(3) On operations where security is critical, embarkation of newsmen may be made contingent to their agreement to submit copy for security review. Under such circumstances, the reason for the review will be made clear prior to embarkation, and every effort will be made to avoid any interpretation of such review as ''censorship'' or interference with freedom of the press.

(c) *Arrangements aboard ship.* (1) Where appropriate, a briefing should be held at the earliest convenient time after embarkation at which newsmen may meet the commanding officer and other key personnel and guests and at which previously supplied information is reviewed.

(2) If feasible, an escort officer will be assigned to each newsman (or group of newsmen having similar requirements).

(3) It should be reported in the ship's newspaper (and on radio and closed-circuit TV, if any) that newsmen will be embarked, giving their names and the media they represent.

(4) If a correspondent is interested in home town material, personnel from his area should be contacted in advance, if possible, to determine if and when they would be available for interviews and photos.

(5) Representatives of press associations and radio and TV networks will be embarked in the Exercise Commander's flagship or the Exercise Control ship, when possible. This ship should also control the ship-to-shore press radio and teletype (RATT).

(6) When more than one representative from the same medium is embarked, an attempt should be made to have them located at separate vantage points.

(d) *Communications.* (1) Every effort will be made to provide suitable communication facilities for newsmen embarked (including equipment and personnel, if feasible).

(2) All persons embarked with permission of proper authority and accredited as correspondents are eligible to file press traffic, as authorized by the procedures set forth in Naval Telecommunication Procedures (NTP–9), ''Commercial Communications.''

(3) Navy radio or wire transmission facilities, where available, may be made available to news media (including accredited civilian photographers) when operational requirements permit, in accordance with instructions set forth by the Director of Naval Communications. This includes making live broadcasts or telecasts. (A live network broadcast or telecast must, however, be approved by the Chief of Information.)

(4) Messages and instructions from editors and station managers to embarked newsmen will be handled as press traffic, as authorized in Naval Telecommunication Procedures (NTP–9).

(5) Stations receiving press circuits will be authorized to receipt for press traffic without asking for time-consuming ''repeats.''

(6) Under normal circumstances, press copy will be transmitted on a first-come, first-served basis; however, newsmen will be informed that the prerogative of limiting the amount to be filed during any one period rests with the Exercise Commander.

(7) If it becomes necessary for operational reasons for newsmen to pool copy, such messages shall be filed as ''multiple address messages'' or book messages, as appropriate, or when requested by the newsmen concerned.

(8) If the locale of the exercise permits newsfilm and press mail to be flown ashore, flights should be scheduled on a high priority basis to connect with scheduled commercial air traffic.

Operational aircraft as well as scheduled government air flights should be considered for delivery of television news film, radio tapes and photography to the nearest commercial communications facility.

(e) *Voluntary submission of material by a newsman for security review.* When a review is not required but is sought by the newsman, no attempt will be made to delete or change any material, whether or not it appears critical of the Navy or of naval personnel. If any classified information is included, the newsman will be asked to delete it. In addition, his attention will be drawn to any inaccurate or possibly misleading statements.

[41 FR 29101, July 15, 1976, as amended at 44 FR 6390, Feb. 1, 1979]

### § 705.15 Employment of Navy personnel as correspondents or staff members of civilian news media.

(a) A member of the naval service on active duty or Navy civilian may act as correspondent for a news periodical or service, radio or TV station or network, or may work part-time for such an organization. The Secretary of the Navy will, however, be immediately informed, via the Chief of Information.

(1) See section 0307 (par. 5), section 0308 (par. 4), and section 0309 (par. 3) of the Navy Public Affairs Regulations for regulations referring to personnel assigned to public affairs staffs receiving compensation for such work.

(2) In time of war, only personnel assigned to public affairs billets and such other personnel as the Secretary of the Navy may authorize can act as correspondents for civilian media.

(b) Military personnel on active duty and Navy civilians may not serve on the staff of a ''civilian enterprise'' newspaper published for personnel of a Navy installation or activity.

### § 705.16 Navy produced public information material.

(a) *Still photo*—(1) *General.* (i) The policy and procedures given for media produced still photos in § 705.10, apply to Navy produced photos.

(ii) The Office of Information does not issue, nor have funds available for the purchases of, any photographic equipment or supplies for Navy commands. Details on the establishment of authorized laboratories and acquisition of equipment and supplies are given in the Manual of Navy Photography (OPNAVINST 3150.6D).

(2) *Photographic coverage of command events.* (i) If more than two photographers are required to cover a public event, consideration should be given to having them wear appropriate civilian attire.

(ii) Personnel in uniform who are amateur photographers and who are attending the event as spectators will not be discouraged from taking photos.

(3) *Unofficial photos taken by Navy personnel.* (i) The following regulations apply to Navy civilian employees and to Navy personnel in transit through a command, as well as to active duty personnel assigned to the command.

(ii) Personal cameras and related equipment are permitted on Navy ships, aircraft and stations at the discretion of the officer in command.

(iii) An officer in command may screen all photos taken by naval personnel with personal cameras within the jurisdiction of the command to protect classified information or to acquire photos for official use, including public affairs. Photographs taken by bystanders at times of accident, combat, or similar significant events can be valuable for preparation of official report and public release. They should be collected for screening and review as expeditiously as possible.

(iv) Amateur photographers should also be encouraged to volunteer the use of interesting or significant photos for public affairs use.

(v) Photos made by naval personnel, with either personal cameras and film, Navy equipment and film, or any combination thereof, may be designated ''Official Navy Photo'' if it is considered in the best interests of the Navy.

(A) All precautions will be taken to protect such film from loss or damage, and all unclassified personal photos not designated as ''official'' will be returned to the owner immediately after review.

(B) When a photo taken by an individual who is not an official photographer is selected for public affairs release:

(*1*) The photographer will receive credit for his work in the same manner as an official photographer.

(*2*) The original negative or transparency will be retained and assigned an official file number. It will then be handled like any other official Navy photograph.

(*3*) At least one duplicate negative or transparency of each unclassified personal photo which has been designated as ''official'' will be prepared and delivered to the photographer. A black-and-white print may also be prepared for the photographer's personal use.

(b) *Audiovisual.* (1) The Chief of Information releases TV featurettes directly to local TV stations and the Office of Information's Branch Offices (NAV INFO's). After such featurettes have been cleared for public release by the Assistant Secretary of Defense (Public Affairs).

(2) The Assistant Secretary of Defense (PA) must approve, prior to commitment of funds, the initiation of Navy audiovisual productions intended for public release.

(3) Motion picture film.

(i) Film of major news value will be forwarded immediately, unprocessed, to the Commanding Officer, U.S. Naval Photographic Center. The package should be labeled as follows:

NEWS FILM—DO NOT DELAY

Commanding Officer, U.S. Naval Photographic Center (ATTN: CHINFO Liaison), Washington, DC 20374.

NEWS FILM—DO NOT DELAY

The Commanding Officer of the Naval Photographic Center will be advised (with an information copy to the Chief of Information) of its forwarding, the subject, type and amount of footage, method of delivery, and estimated time of arrival in Washington.

(ii) The original negative of motion picture photography of feature value (photography which will not lose its timeliness over a reasonable length of time) will be forwarded to the Naval Photographic Center, and a copy of the forwarding letter will be sent to the Chief of Information.

(c) *Fleet Home Town News Center (FHTNC).* (1) All public affairs officers will assure that appropirate news and photo releases on personnel of their commands are regularly sent to the Fleet Home Town News Center.

(2) Procedures, requirements and formats are contained in CHIN-FOINST 5724.1.

[41 FR 29101, July 15, 1976, as amended at 44 FR 6390, Feb. 1, 1979]

### § 705.17 Participation guidelines.

(a) The provisions of this section refer to participation by naval personnel and use of Navy facilities and material in events sponsored by nongovernment organizations except where otherwise stated.

(b) In accordance with the established responsibilities of local officers in command, these officers will continue to determine whether facilities, equipment and personnel within their cognizance may be provided for such programs (except in the Washington, DC area where the Assistant Secretary of Defense (Public Affairs) is the authorizing authority).

(c) Officers in command will ensure that participation is appropriate in scope and type, and is limited to those occasions which are: In keeping with the dignity of the Department of the Navy, in good taste and in conformance with the provisions of part 721 of this chapter. The national, regional, state or local significance of the event and the agency sponsoring the event will be used as guides in determining the scope and type of Navy participation to be authorized.

(d) Participation in community relations programs is authorized and encouraged to accomplish the aims and purposes as set forth in § 705.18 (following). Where mutually beneficial to the Department of Defense and the public, support authorized and provided is always subject to operational considerations, availability of requested support and the policy guidance provided herein.

(e) Military personnel, facilities, and materiel may be used to support nongovernment public affairs programs when:

(1) The use of such facilities, equipment and personnel will not interfere with the military mission or the training or operational commitments of the command.

(2) Such programs are sponsored by responsible organizations.

(3) Such programs are known to be nonpartisan in character, and there is no reason to believe that the views to be expressed by the participants will be contrary to established national policy.

(f) The sponsoring organizations or groups will be clearly identified in all cases where naval personnel participate as speakers, or military support is furnished.

(g) Public affairs programs sponsored by civilian organizations will not be cosponsored by a naval command unless expressly authorized by the Chief of Information.

(h) Participation will not normally be authorized in public events when the presence of military participants deprives civilians of employment. Officers in command will screen all requests for use of material and personnel in Navy-sponsored social functions held off military installations.

(i) Navy participation and cooperation must not directly or indirectly endorse, or selectively benefit, or appear to endorse, benefit or favor, any private individual, group, corporation (whether for profit or nonprofit), sect, quasi-religious or ideological movement, fraternal, or political organization, or commercial venture, or be associated with the solicitation of votes in a political election.

(1) Providing use of government facilities, such as transportation, housing, or messing, at government expense to private groups is normally interpreted as a selective benefit or favor and is not authorized as part of a community relations program. Therefore, such provisions are normally not authorized as part of a community relations program, even though certain uses of facilities may be authorized under directives on domestic action or other programs.

(2) The above does not bar private groups from providing entertainment on base. However, the appearance must be for entertainment and not for fundraising, or any political or promotional purpose.

(j) Community relations programs must always be conducted in a manner free from any discrimination because of race, creed, color, national origin, or sex.

(1) Navy participation in a public event is not authorized if admission, seating and other accommodations and facilities are restricted in a discriminatory manner.

(2) Exceptions for participation may be made under certain circumstances for an ethnic or ideological group when they do not entertain any purpose of discriminating against any other group. Any such exceptions must be referred to the Chief of Information for consideration.

(3) Support to nationally recognized veterans' organizations is authorized when the participation is in support of positive programs which are not in themselves discriminatory.

(4) Navy support to nonpublic school activities is authorized when the participation is clearly in support of educational programs or Navy recruiting.

(5) Commands should ensure minority participation in all community relations activities and events, as appropriate. This includes but is not limited to the following:

(i) Ensure that the minority community is aware of the procedure for obtaining Navy support for community events and that they are appraised of the use of Navy demonstration teams, units, and speakers.

(ii) Encourage Navy involvement in, and attention to, local minority community events.

(iii) Continue to cultivate a rapport with key members of all minority communities.

(k) Participation is not authorized if there is fund raising of any type connected with the event, except as provided for in § 705.34.

(l) No admission charge may be levied on the public solely to see an Armed Forces demonstration, unit, or exhibit.

(1) When admission is charged, the Armed Forces activity must not be the sole or primary attraction.

(2) A general admission charge need not be considered prohibitory to Navy participation, but no specific or additional charge may be made because of Navy participation.

(3) Participation shall be incidental to the event except for programs of a

patriotic nature, celebration of national holidays, or events which are open to the general public at no charge for admission.

(4) The provisions of this paragraph do not apply to the Navy's Blue Angel Flight Demonstration Team or to the Navy Band and other special bands engaged in authorized concert tours conducted at no additional cost to the government.

(m) Some participation in or support of commercially sponsored programs on audio or visual media is allowable. See §§ 705.7 and 705.8.

(n) Some participation which supports commercial advertising, publicity and promotional activities or events is allowable. See section 0405, par. 3 of the Navy Public Affairs Regulations.

(o) Navy speakers may be provided for certain events at which other forms of Navy participation may not be appropriate. See section 0604, par. 8 of the Navy Public Affairs Regulations.

(p) When participation is in the mutual interest of the Navy and the sponsor of the event, participation will be authorized at no additional cost to the government. Additional costs to the government (travel and transportation of military personnel, meals and quarters, or standard per diem allowances, etc.) will be borne by the sponsor.

(q) Department of Defense policy prohibits payment by the Armed Forces for rental of exhibit space, utilities, or janitorial costs. Other exceptions may be given under unusual circumstances.

(r) Navy participation in professional sports events and post-season bowl games will frequently be authorized at no additional cost to the government, will emphasize Joint Service activity when possible, and must support recruiting programs. Chief of Information approval is required.

(s) Navy participation in public events shall be authorized only when it can be reasonably expected to bring credit to the individuals involved and to the Armed Forces and their recruiting objectives. Naval personnel will not be used in such capacities as ushers, guards, parking lot attendants, runner or messengers, baggage handlers or for crowd control, or in any installations.

(t) Maximum advantage of recruiting potential will be taken at appropriate events for which Navy participation has been authorized.

(u) Navy support will not normally be authorized for commercially-oriented events such as shopping center promotions, Christmas parades, and other such events clearly sponsored by, or conducted for the benefit of commercial interests. However, this policy does not preclude participation of Navy recruiting personnel and their organic equipment, materials and exhibits so long as their participation is not used to stimulate sales or increase the flow of business traffic or to give that appearance. Requests for exceptions will be considered on a case-by-case basis by the Chief of Information.

(v) Questions as to appropriateness of Navy participation, or as to existing Navy and OASD (PA) policy, may be referred to the Chief of Information.

(w) Procedures for requesting participation are addressed in § 705.21.

[41 FR 29101, July 15, 1976, as amended at 44 FR 6390, Feb. 1, 1979]

### § 705.18 Authority and coordination.

(a) Each naval command will coordinate its community relations program with the senior authority having responsibility for community relations in its area (District Commandant, Unified Commander, or other).

(b) Within policy limitations outlined in this section, the command receiving a request for Navy participation, and processing the required resources, has the authority to process the request and provide the support requested.

(c) Requests for support exceeding local capability, or requiring approval from higher authority, or requiring an exception to policy will be referred as directed in § 705.21 for determination.

(d) The Assistant Secretary of Defense (Public Affairs) has the overall responsibility for the Department of Defense community relations program. Civilian sponsors should be advised to address requests for approval of the following types of programs directly to the Director of Community Relations, Office of the Assistant Secretary of Defense (Public Affairs), Pentagon, Washington, DC 20301:

(1) National and international events, including conventions, except those taking place in overseas areas which are primarily of internal concern to Unified Commanders.

(2) Events outside the United States which have an interest and impact extending beyond the Unified Command areas, or which require assistance from outside the command area.

(3) Public events in the Washington, DC area.

(4) Aerial, parachute, or simulated tactical demonstrations held in the public domain, except those held in areas assigned to overseas Unified Commands.

(5) Aerial reviews on military installations within the United States if the review involves more than one Service.

(6) Programmed national sports, professional athletic events, formal international competitions, and contests between a Navy and professional team in the public domain. See section 0605, par. 18 of the Navy Public Affairs Regulations.

(7) Performing Navy units appearing on regional or national television.

(8) Overall planning for Armed Forces Day (not including local activities).

(9) Granting exceptions to policy.

(e) Overseas, Unified Commanders are designated to act for and on behalf of the Secretary of Defense in implementing community relations programs within their command areas and in granting any exceptions to policy or regulations. This authority may be delegated.

(1) Policy, direction and guidance for Unified Command community relations programs are provided to Navy components of these commands by the Unified Commander concerned.

(2) Authority of the Commander-in-Chief, Pacific extends to planning and execution of community relations programs in Alaska and Hawaii. Participation in events held in Alaska and Hawaii will be governed by the same principles as policies applicable to other states.

(3) Community relations programs and events taking place within the United States which have an effect on a Unified or Specified Command as a whole, or are otherwise of significant concern to the Unified Command, require complete coordination through appropriate channels between the Unified Command and naval activities concerned.

(4) Unified Commanders overseas requiring Navy support for a community reltaions program or participation in a public event should coordinate their requirements with the appropriate Navy component command.

(f) The Secretary of the Navy will plan and execute Navy community relations programs and approve Navy participation in public events not otherwise reserved or assigned to the Secretary of Defense. This authority may be delegated.

**§ 705.19 Financing.**

(a) The financial requirements for community relations purposes will be kept to the minimum necessary to accomplish Department of Defense objectives.

(b) Costs of participation will normally be at government expense for the following types of events and programs when they are in the primary interest of the Department of Defense:

(1) Public observances of national holidays.

(2) Official ceremonies and functions.

(3) Speaking engagements.

(4) Programmed, scheduled tours by Navy information activity support units (e.g., an exhibit from the Navy Exhibit Center) when this method of reaching special audiences is considered by the Secretary of the Navy to be the most effective and economical way of accomplishing a priority public affairs program.

(5) Tours by units (e.g., the Navy Band) for which appropriated funds have been specifically provided.

(6) Support of recruiting.

(7) Events considered to be in the national interest, or in the professional, scientific, or technical interests of the Navy or Department of Defense, when approved by the Secretary of Defense or the overseas Unified Commander, as appropriate.

(c) Navy participation in all other public events will normally be at no additional costs to the government.

(1) Continuing type costs to the government which would have existed had

the Navy not participated in the event will not be reimbursed by the sponsor.

(2) Transportation costs may be excluded from the costs to be borne by the sponsor when the transportation can be accomplished by government aircraft on a normal training flight or opportune airlift.

### § 705.20 Use of Navy material and facilities.

(a) The loan of equipment and permission to use facilities will be dependent on the following:

(1) The program support must be within the command's public affairs responsibility.

(2) The loan of the equipment must not interfere with the military mission of the command.

(3) Equipment must be available within the command or obtainable from another Navy command in the local area.

(4) The event must be of the type for which participation is considered appropriate.

(5) It must not be in any direct or implied competition with a commercial source.

(6) There must be no potential danger to persons or private property that could result in a claim against the government. Safety requirements will be observed.

(b) Use of open mess facilities will be permitted only under one of the following conditions:

(1) Incident to the holding of a professional or technical seminar at the command.

(2) Incident to an official visit to the command by a civic group.

(3) Navy League Council luncheon or dinner meetings (not to exceed one per quarter per group).

(4) Incident to group visits by the Boy Scouts of America, Boys Clubs of America, the Navy League Sea Cadets (by virtue of their federal charters), Girl Scouts and the Navy League Shipmates, and a few representative adult leaders.

(c) Use of the official Navy flag will be in accordance with SECNAVINST 10520.2C and of official emblem in accordance with OPNAVINST 5030.11B.

(d) Requests not meeting the criteria cited here, but which are considered by the officer in command to have merit, may be referred to the Chief of Information.

[41 FR 29101, July 15, 1976, as amended at 44 FR 6391, Feb. 1, 1979]

### § 705.21 Requests for Navy participation.

(a) Decisions will be made on a case-by-case basis. Events which are inappropriate for one type of participation may be entirely appropriate for another type of participation. A positive and flexible approach should be employed.

(b) Requests by civilian organizations for Navy participation in programs or events they sponsor should be addressed to the nearest naval installation and should be evaluated and authorized at that level if possible. Request exceeding local resoures, or requiring authorization from higher authority, should be forwarded through appropriate channels.

(c) Requests for Armed Forces participation in public events are to be submitted on official request forms (§§ 705.33, 705.34 and 705.36) by the sponsors of events occurring outside a command's area of direct knowledge and local capability, or involving a type or level of participation unavailable locally, or requiring approval of higher authority.

(d) Fact sheets expounding upon normally requested assets are enclosed in §§ 705.33, 705.34 and 705.36 and may be reproduced and distributed locally.

(e) The official request form is to be used on all requests referred to the Chief of Information and to the Office of Assistant Secretary of Defense (Public Affairs).

### § 705.22 Relations with community groups.

(a) Naval commands will cooperate with and assist community groups within their capabilities, to the event authorized by current instructions, and will participate in their activitis to the extent feasible.

(b) Navy commands will encourage membership of personnel in community organizations.

(c) Officers in command will withhold approval of requests from community groups, organizations or individuals

whose purposes are unclear, pending advice from the Chief of Information.

(d) Commands may make facilities, less housing and messing, available to community groups, at no expense to the government, when it is in the best interest of the Navy to do so. Mess facilities may not be used for meetings of civic groups or other asociations unless all the members of the group concerned are authorized participants of the mess as prescribed in NAVPERS 15951, except as provided below:

(1) Requests to make open mess facilities available to professional or technical seminars or civic groups meeting in connection with an official visit to the activity may be submitted to the officer in charge of the mess, or other appropriate authority. Such requests may be approved when it is shown that the inspection of the activity or the holding of a professional seminar is of principal importance and the use of mess facilities is incidental thereto.

(2) Because of the exceptional nature of the Navy League, as recognized by the Secretary of the Navy, open mess facilities may be used for luncheon or dinner meetings of Navy League Councils, but not more often than once per quarter per group.

(e) Relations with Industry and Labor in the Community (refer to SECNAVINST 5370.2F and DOD Directive 5500.7):

(1) Relations with Navy contractors and with industry and business in general are the responsibility of the officer in command, with the assistance of his public affairs officer.

(2) Navy commands will cooperate with industry and its representatives in planning and executing community relations projects of mutual interest.

(i) Visits to commands will be scheduled for industrial and employee groups under the same conditions as for other civilian groups.

(ii) A contractor may be identified in a news release, exhibit, or the like whenever the major responsibility for the product can be clearly and fairly credited to him. In such cases, both the manufacturer's name for the product and the Navy designation of it will be used.

(iii) Commands will not solicit, nor authorize others to solicit, contractors to provide advertising, contributions, donations, subscriptions, etc. Where there is a legitimate need for industrial promotion items, such as scale models, the command will contact the Chief of Information for advice as to the procedure for requesting procurement.

(iv) Similarly, if Defense contractors wish to distribute information material through official Navy channels, the Office of Information will be queried as to the desirability and feasibility of undertaking the desired distribution.

(v) Visits to contractor facilities are governed by the provisions of DOD Manual 5520.22–M (Industrial Security Manual for Safeguarding Classified Information). If nationally known press representatives will be involved, prior approval must be obtained both from the contractor (via the Chief of Information) and from the Assistant Secretary of Defense (Public Affairs).

(3) Commands will maintain the same relationship with labor unions as with other community groups and will not take action in connection with labor disputes. Personnel inadvertently or incidentally involved in labor disputes will consult officers in command for guidance.

(f) Emergency Assistance to the Community:

(1) Navy commands will offer and provide assistance to adjacent communities in the event of disaster or other emergency.

(2) The Chief of Information will be advised immediately of action when taken, and copies of subsequent reports to the Chief of Naval Operations will be forwarded to the Chief of Information.

(3) Navy commands will participate in planning by local Civil Defense officials.

[41 FR 29101, July 15, 1976, as amended at 44 FR 6391, Feb. 1, 1979]

### § 705.23 Guest cruises.

(a) *General policy*. (1) The embarkation of civilian guests in Navy ships is appropriate in the furtherance of continuing public awareness of the Navy and its mission.

(i) Examples of embarkations for public affairs purposes are (but not

limited to): Individuals, community service clubs, civic groups, the Navy League, and trade and professional associations.

(ii) Embarkation of media representatives on assignment is discussed in § 705.14.

(iii) Other categories may be established by the Secretary of the Navy, subject to the approval of the Secretary of Defense.

(2) It has also been demonstrated that the occasional embarkation on cruises of families and personal guests of naval personnel has contributed materially to the morale of the family circle and has instilled in each individual a sense of pride in his ship. For further information see OPNAVINST 5720.2G.

(3) Embarkations should be conducted within the framework of regularly scheduled operations; underway periods solely to accommodate guests are not authorized.

(4) Commander-in-Chief, Pacific Fleet, Commander-in-Chief, Atlantic Fleet, Commander-in-Chief, U.S. Naval Forces Europe, Commander Military Sealift Command (and their subordinate commands if so designated), Chief of Naval Education and Training, and District Commandants may authorize the embarkation of female civilians for daylight cruises. Embarkation of civilians for overnight cruises must be authorized by the Chief of Naval Operations via the Chief of Information.

(5) All guest visits are normally authorized on an unclassified basis.

(6) In all instances, due precautions must be taken for the safety of the guests. (See section 0403, pars. 6(b) and, 6(e), of the Navy Public Affairs Regulations, for procedures to be followed in the case of death of, or injury to, civilians embarked on naval ships.)

(7) For further information on policy, procedures, and eligibility criteria, see OPNAVINST 5720.2G.

(b) *Authority*. (1) Authority to establish procedures for the conduct of the embarkation of guests for public affairs purposes (including the Secretary of the Navy Guest Cruise and Guest of the Navy Cruise programs, which are discussed in § 705.24) is vested in the Secretary of the Navy. This authority is limited only insofar as the Chairman of the Joint Chiefs of Staff and the commanders of the Unified and Specified Commands (and their component commanders, if so designated) have the authority to use Navy ships to embark individuals other than news media representatives for public affairs purposes.

(i) Public affairs embarkations originating within the geographical limits of the Unified Command will be approved by and coordinated with the commanders of such commands. This authority may be delegated. Requests for such embarkations originating with the subordinate fleet or force command of a Unified Command will be submitted via the operational chain of command, to the appropriate commander of the Unified Command, unless delegated.

(ii) Requests for public affairs embarkations originating from any Navy source other than the Chairman of the Joint Chiefs of Staff, or the Unified and Specified Commanders or their subordinate commands, will be submitted to the Chief of Information, who will effect coordination with the Chief of Naval Operations and/or the Assistant Secretary of Defense (Public Affairs) as appropriate.

(iii) When guests debark in a foreign port which is in the geographic area of a Unified Command other than that in which the cruise originated, the Chief of Information will coordinate travel by obtaining concurrence of all appropriate commanders and the approval of the Chief of Naval Operations, and the Assistant secretary of Defense (Public Affairs) as appropriate.

(2) Officers in command to whom authority to embark guests for public affairs purposes is delegated will make maximum use of this authority.

(c) *Secretary of the Navy Guest Cruise and Guest of the Navy Cruise Programs*. (1) The objective of these two programs is: To expose top-level and middle-level opinion leaders in the fields of business, industry, science, education, and labor to the operation of the U.S. Navy, in order that they may gain a better understanding of its capabilities and problems, the complicated nature of modern sea-based equipment, and the high levels of responsibility and training required of Navy men and women.

(2) In addition to policy contained in paragraph (c)(1) of this section, the following policy guidelines apply to the conduct of the Secretary of the Navy Guest Cruise and the Guest of the Navy Cruise Programs.

(i) *Secretary of the Navy Guest Cruise Program.* (A) Only aircraft carriers and cruisers will be used.

(B) Cruises will be conducted once each quarter on each coast, contingent upon the availability of appropriate ships.

(C) The optimum number of guests is 15.

(D) Guests will be drawn from top-level executives and leaders who have not had previous exposure to the Navy. ''Previous exposure'' is defined as active or reserve service in the U.S. Navy or U.S. Marine Corps within the last 10 years; membership in the Navy League or any other Navy-oriented organization; or participation in a cruise on a U.S. Navy ship in the last 10 years.

(E) Whenever feasible, Secretary of the Navy Guests will be greeted by CINCLANTFLT or CINCPACFLT, or in their absence by the SOPA. Comprehensive unclassified briefings will be given dealing with the Navy's mission, fleet operations, and current problems.

(F) Cruises will vary in length from 3 to 7 days, when appropriate, to conform with the operating schedule of the ship.

(ii) *Guests of the Navy Cruise Program.* (A) All types of ships will be used. This will include carriers when available, after selection of a cruise for the Secretary of the Navy Guest Cruise Program.

(B) Guest of the Navy Cruise guests will be drawn from middle-level executives and leaders who have not had previous exposure to the Navy. Guests should include persons who have direct impact on recruiting, such as secondary school principals, guidance counselors, coaches and teachers.

(C) Cruises of relatively short duration (3 to 5 days) are preferred, although cruises up to 7 days are authorized. Protracted cruises will not be approved except for special circumstances.

(D) Invitations will be extended by the District of Commandants. Invitations will include:

(*1*) Statement of the purpose of the Guest of the Navy Cruise Program.

(*2*) Authorization for embarkation and, if applicable, for COD flights, with instructions for reporting on board.

(*3*) Name and rank of the commanding officer and, if applicable, name and rank of embarked flag officer.

(*4*) A caution that guests should not accept the invitation unless they are in good health.

(*5*) Statement to the effect that the tempo of operations might cause changes in scheduling which could result in the invitation having to be withdrawn.

(E) The following necessary information may be included separately with a letter of invitation: Recommended wardrobe, passport and immunization requirements, availability of emergency medical and dental facilities, ship's store and laundry facilities, statement that guest's use of a camera will be authorized subject to certain restrictions, and a listing of those restrictions. In addition, the following statement will be included with each invitation, or form part of the attached information sheets:

The Department of the Navy has no specific authority to use its funds to defray or reimburse any personal expenses of a navy guest. As a result, the Department of the Navy cannot provide you with transportation to the port of embarkation or from the port of debarkation back to your home. Your expenses for meals will be quite nominal while you are on board a naval ship or facility. You should make provision for any extraordinary expense which may arise. For example, if a personal or other emergency arises which necessitates your returning home during the cruise, you should be prepared to take commercial transportation at your own expense from the most distant point on the cruise itinerary.

Navy ships and aircraft, by their very nature, present certain hazards not normally encountered on shore. These hazards require persons on board to exercise a high degree of care for their own safety.

Acceptance of this invitation will be considered your understanding of the above arrangements and limitations.

(iii) *Applicable to both programs.* (A) Guests will provide their own transportation from home to the ship and return, and must reimburse the Navy for living and incidental expenses while embarked so that the program may be conducted at no additional expense to the government.

(B) Because the number of billets available to accommodate all of the potential guests is limited, the guest's opportunity to communicate his experience to his associates must be considered. For this reason, one of the criteria for selection of guests will be their level of activity in civic, professional, and social organizations. In nominating and selecting guests, effort will be made to ensure that minority citizens are included as appropriate.

(C) Atlantic cruises will be made on ships operating between East Coast ports, or between CONUS and the U.S. Caribbean ports of San Juan, PR, or Charlotte Amalie (St. Thomas), Virgin Islands. Pacific cruises will be made on ships operating between West Coast ports: Between CONUS and ports in Hawaii, Alaska, Mexico or Canada; or between ports within Hawaii or Alaska.

(D) Guests will be informed of security restrictions. Unclassified photography should be permitted on board, as pictures renew guests' feelings of identification with a ship. Guests will be advised of areas, however, where photography is prohibited, and security regulations will be courteously but firmly enforced.

(E) Guests will be billeted in officers quarters and normally subsisted in the wardroom. It is not necessary that guests be assigned individual rooms. Billeting with ship's officers promotes mutual understanding, and guests feel more closely identified with the ship's company. They will be invited to dine at least once in each mess on board, if the length of the cruise permits. Guests will be encouraged to speak freely and mingle with the crew.

(F) Guests will be accorded privileges of the cigar mess commissioned officers mess (open) ashore—with the exception of package store privileges—and the use of ship's or Navy Exchange laundry and tailor shops. Other Navy Exchange privileges will be limited to purchase of items for immediate personal use.

(G) Only emergency medical and dental care will be provided and then only where civilian care is not conveniently available.

(*1*) In the event of injury to civilians embarked in Navy ships and aircraft or visiting naval activities, commanding officers will notify the Chief of information, the appropriate Commandant, and operational commanders, by message, of the injury and action taken.

(*2*) In the event of an emergency not covered by Navy Regulations, the facts and circumstances will be reported immediately to the Secretary of the Navy.

(H) Guests may be allotted time for side trips at their own expense when an itinerary includes naval activities or ports adjacent to recognized points of interest.

(I) As a souvenir of the cruise, it is suggested that guests be provided with a photograph of the ship, perhaps suitably inscribed by the commanding officer prior to debarkation.

(J) Any publicity will be limited to that initiated by the participants. Navy-sponsored publicity will be avoided unless sought by the participants. At the same time, media inquiries or inquiries from the general public will be answered fully, the purposes of the cruise program outlined and the fact stressed that no cost to the government is incurred.

[41 FR 29101, July 15, 1976, as amended at 44 FR 6391, Feb. 1, 1979]

### § 705.24 Exhibits.

(a) Navy exhibits are representations or collections of naval equipment, models, devices and information and orientation material placed on public display for information purposes before audiences at conventions, conferences, seminars, demonstrations, exhibits, fairs, or similar events. Also included are general purpose displays in public buildings or public locations. Museums also occasionally request a Navy exhibit on a permanent or temporary loan basis.

(1) Exhibits may be displayed in any appropriate location or event (including commercially owned spaces such as shopping centers, malls, etc.) provided

it is clearly established that such areas are places the general public frequents and that the exhibit is not for the purpose of drawing the public to that location, and that it is determined that participation is in the best interests of the Department of Defense and the Department of the Navy.

(2) [Reserved]

(b) Exhibits will be used for the following purposes only:

(1) To inform the public of the Navy's mission and operations.

(2) To disseminate technical and scientific information.

(3) To assist recruiting of personnel for Navy military service and for civilian employment in the Department of the Navy.

(c) Exhibit requests and procedures:

(1) Requests for Navy exhibits, other than local exhibits may be forwarded to the Navy Recruiting Exhibit Center via the local Navy recruiter with an information copy to the Chief of Information. The primary mission of the Navy Recruiting Exhibit Center is to support local Navy recruiters. Requests for exhibits for community relations events will be considered favorably only when not in conflict with recruiting requirements.

(i) Requests for exhibits must be submitted well in advance of their proposed dates of use.

(ii) Requests for mobile exhibits requiring tractor-trailer transportation should be forwarded prior to November 15th previous to the year desired. A tour itinerary of mobile exhibits will then be established for the following year.

(iii) The period of time for which an exhibit is authorized will be determined by the nature of the event and the type of exhibit (e.g., equipment from local resources used for a local celebration would normally not be exhibited for more than three days; but, a formal exhibit at an exposition might remain for the duration of the event).

(2) The office of the Assistant Secretary of Defense (Public Affairs) is the approving authority for Navy exhibits in events of international or national scope, or those requiring major coordination among the Armed Forces, or with other agencies of the Federal Government.

(i) All Navy activities will forward such requests to the Chief of Information for coordination with the OASD (PA).

(ii) Subordinate commands of a Unified Command will forward exhibit requests of the above types to the Unified Commander concerned, via the chain of command.

(3) The official OASD(PA) Request Form for Armed Forces Participation will be used. See Armed Forces Request Form, § 705.36.

(4) Requests for exceptions to policy for exhibit displays should be forwarded to the Officer in Charge, Navy Recruiting Exhibit Center.

(5) Policy guidance on costs is defined in § 705.19.

(6) Occasionally, a project officer will be assigned to coordinate use of the exhibit with the sponsor.

(i) Project officers are normally commissioned officers, equivalent civilian personnel, local recruiters or reservists, who have been assigned the responsibility of coordinating Service participation in a special event.

(ii) The project officer should establish immediate liaison with the sponsor.

(iii) The project officer should assist in determining the actual location of the exhibit, make arrangements for assembling and disassembling the exhibit material, and supervise these operations.

(iv) The project officer will ensure Navy and Department of Defense policies are followed, and will coordinate local news releases concerning Navy participation.

[41 FR 29101, July 15, 1976, as amended at 44 FR 6391, Feb. 1, 1979]

### § 705.25 Navy Exhibit Center.

(a) The center is a field activity of the Chief of Information and is located in the Washington Navy Yard. Its primary mission is to produce, transport and display U.S. Navy exhibits throughout the United States. It also facilitates assignments of Navy combat artists and, additionally, produces exhibits for its own tours and for short-term loans to naval commands.

(b) [Reserved]

[41 FR 29101, July 15, 1976, as amended at 44 FR 6391, Feb. 1, 1979]

### § 705.26 Exhibit availability report.

(a) A center index of exhibits which are available at the local level in each Naval District is maintained by the exhibit center. To achieve maximum effectiveness for an overall integrated program, an up-to-date registry of all exhibits is required.

(b) A current inventory of exhibits headquartered in Washington, DC, and managed by the Navy Recruiting Exhibit Center for scheduling purposes may be obtained by writing to: Officer-in-Charge, Navy Recruiting Exhibit Center, Washington Navy Yard, Washington, DC 20374.

[41 FR 29101, July 15, 1976, as amended at 44 FR 6391, Feb. 1, 1979]

### §§ 705.27–705.28 [Reserved]

### § 705.29 Navy Art Collection.

(a) The U.S. Navy has continued to record its military actions, explorations, launchings, etc., in fine art form since before World War II. The present Navy Combat Art Collection contains over 4,000 paintings and sketches. A significant number of new works is being added each year. The combat artists of World War II have been replaced by civilian artists who witness today's Navy in action, record their impressions, and donate their works of art to the Department of the Navy.

(1) The voluntary services of most of the artists are arranged through the Navy Art Cooperation and Liaison Committee (NACAL) which operates in close cooperation with the Salmagundi Club of New York City and the Municipal Art Department of the City of Los Angeles.

(2) The Chief of Information has established liaison with the Salmagundi Club in order to maintain a continuing historical record of the Navy. Organized in 1871, the Salmagundi Club is the oldest club of professional artists in the United States. The Club appointed a Navy Art Cooperation and Liaison (NACAL) Committee to advise the Navy on art matters and to nominate artists for assignment to paint Navy activities through the world. The Chief of Information reviews the nominations, and issues SECNAV invitational travel orders to each artist approved.

(3) The following policy pertains:

(i) All finished art portraying the Navy and produced by Navy artists on active duty for that purpose and by guest artists working under invitational travel orders becomes the property of the Department of the Navy.

(ii) Civilian artists selected to paint Navy life through cooperation of a private sponsor and the Chief of Information may be authorized by the Chief of Information or the Office of the Secretary of Defense to retain their works.

(iii) Paintings, sketches, drawings and other forms of artwork will not be accepted by the Department of the Navy unless all reproduction rights are surrendered and unless they become the permanent property of the Department of the Navy.

(iv) Requests for reproduction of combat art for use in advertising or publication will be directed to the Chief of Information.

(b) Responsibilities:

(1) The Chief of Information exercises supervision and control of the Navy Art Program and issues SECNAV invitational travel orders and letters of invitation to artists selected for assignment.

(2) When directed by the Chief of Information or other appropriate Navy authority, a NACAL project officer will perform the following functions:

(i) Act as a local liaison officer for the NACAL Program.

(ii) Assist NACAL artists on assignments within his area.

(3) The Curator Navy Combat Art Center, in coordination with the Chief of Information, will:

(i) Plan trips for the NACAL Program.

(ii) Approve requests for art displays.

(iii) Provide logistic support for the maintenance, storage, shipment and display of the Navy Combat Art Program.

(c) Requests for art displays should be forwarded to the Director, Community Relations Division, Office of Information, Navy Department, Washington, DC 20350.

(d) Exhibition of Navy Art:

(1) Operation Palette I'' is a carefully selected group of 75 to 100 combat art

paintings depicting Navy and Marine Corps activities during World War II. The schedule of ''Operation Palette I'' is promulgated by the Officer-in-Charge, Navy Recruiting Exhibit Center and supervised by the Chief of Information, with the concurrence of District Commandants. Schedules are arranged so that the exhibition travels within a particular Naval District for several months at a time. District Commandants designate project officers for each city where ''Operation Palette I'' is exhibited. The project officer makes all arrangements, including suitable location, publicity and personnel to assist the chief petty officer who travels with the collection. Promotional kits are provided by the Officer-in-Charge, Navy Recruiting Exhibit Center. Requests for exhibitions are not desired, since the collection always travels on a prearranged tour.

(2) ''Operation Palette II'' consists of 75 to 100 paintings representative of the worldwide operations of the contemporary Navy and Marine Corps * * * the Navy today * * *, and travels on prearranged tours similar to ''Operation Palette I.''

(3) Other exhibitions of original paintings from the Combat Art Collection may be scheduled on request by either Navy commands or civilian art groups. Requests should be directed to the Director, Community Relations Division, Office of Information, Navy Department, Washington, DC 20350 and contain the following:

(i) The occasion.

(ii) Inclusive dates. (Not less than 10 days or more than 90 days sub-custody.)

(iii) Expected attendance and type of publicity planned.

(iv) Amount of space allotted.

(v) If Navy-sponsored show, certification that 24-hour security will be provided for the paintings while in custody.

(vi) If civilian-sponsored show, statement that transportation and insurance requirements will be met. (Physical security must be available for exhibit, with an attendant on duty during open hours and locked building or other means of protecting exhibit when closed to the public.)

(e) Navy Combat Art Lithograph Program:

(1) This program makes available full color, high quality lithographs which are faithful reproductions of the original artwork on quality paper of selected works of art from the Navy Art Collection.

(2) Additional information and ordering details are contained in CHINFO NOTICE 5605, which is issued periodically.

[41 FR 29101, July 15, 1976, as amended at 44 FR 6391, Feb. 1, 1979]

### § 705.30 Aerospace Education Workshop.

(a) This program is devised by the Navy to give students at colleges and universities conducting teacher training a comprehensive background in the field of aviation. The teachers in turn integrate this knowledge into their education programs.

(b) Appropriate commands are encouraged to provide assistance to educational institutions sponsoring the workshop program: *Provided*, That such support does not interfere with the command's primary mission and that such cooperation involves no additional expense to the government.

(c) The Chief of Naval Operations has cognizance of all assistance provided by the Navy to all Aerospace Education Workshop program. A summary report of local command participation in Aerospace projects will be submitted to the Chief of Naval Operations via the appropriate chain of command. Information copies of such reports will be sent to Commander, Navy Recruiting Command and the Chief of Information. For further information see OPNAVINST 5726.1C.

### § 705.31 USS Arizona Memorial, Pearl Harbor.

(a) Limited space and the desirability of keeping the Memorial simple and dignified require the following practices to be observed:

(1) Rendering of formal ceremonies on the USS Arizona Memorial will be confined to Memorial Day.

(2) Observances on December 7, or any other date, at the request of individuals or organizations, will consist of

simple wreath-laying, or other appropriate expressions conducted with dignity.

(3) Plaques intended for display on the Memorial may be presented by headquarters of national organizations only. Plaques from regional, state or local organizations cannot be accepted. Only one plaque will be accepted from any organization. The overall size of the plaques, including mounting, must be no larger than 12 inches square.

(b) The Commandant, Fourteenth Naval District, is designated to coordinate all formal or informal observances involving the Memorial.

### § 705.32 Aviation events and parachute demonstrations.

(a) Armed Forces aircraft and parachutists may be authorized to participate in appropriate in public events which meet basic Department of Defense criteria. This participation may be one of the officially designated military flight or parachute demonstration teams, flyover by aircraft, a general demonstration of capabilities by aircraft, or the static display of aircraft.

(b) Events which are appropriate for aviation participation include: Dedication of airports; aviation shows; aircraft exposition; air fairs; recruiting programs; civic events which contribute to the public knowledge of naval aviation equipment and capabilities and to the advancement of general aviation; public observances of certain national holidays (Armed Forces Day, Veterans Day, Memorial Day and Independence Day); national conventions of major veterans organizations; memorial services for deceased, nationally recognized dignitaries; and receptions for foreign dignitaries.

(c) Support of Armed Forces recruiting is the primary purpose of military flight and parachute demonstration teams. Armed Forces recruiting teams are available to assist sponsors in coordinating advance publicity and information coverage to insure maximum exposure for the demonstration team and the event. This assistence is at no additional expense to the sponsor; however, the sponsor is required to give full support to the recruiting effort and to cooperate fully with local service officials. Such support could include (but is not limited to) the provision of prime space for recruiters at the event site and the provision of courtesy passes in controlled quantities to recruiters for the purpose of bringing recruit prospects and recruiting advisors to view the show.

(d) DOD support of air show fund raising efforts in the form of provision of military flight and parachute demonstration teams is limited to charities recognized by the Federal Services Fund-Raising Program. These include such agencies as the United Givers Fund, Community Chests, National Health Agencies (as a group), International Service Agencies and the military aid societies. Armed Forces support to fund-raising events for a single cause, even though the charity is a member of a federated or joint campaign or donates in part to one or several of the campaigns, is inconsistent with the basic position of Department of Defense. The name of the nearest Combined Federal Campaign coordinator will be supplied to the sponsor, or if he chooses, he might elect to work with the local United Givers Fund (Community Chest). As a minimum, the sponsor must agree to provide at least half of the profit above costs to the Combined Federal or United Givers Campaigns to receive Armed Forces support.

(e) *Request form.* This form is used to request military flight and parachute demonstration team participation in public events. The information is required to evaluate the event for appropriateness and compliance with Department of Defense policies and for coordination with the units involved.

GENERAL

1. Title of Event _____
Town or City: _____ State: _____
Date: _____ Time—From: _____
To: _____ Place: (Airport, etc.) _____
2. Sponsor: _____
3. The sponsor (is) (is not) a civic organization and the event (does) (does not) have the official backing of the mayor.
4. The sponsoring organization (does) (does not) exclude any person from its membership or practice any form of discrimination in its functins, based on race, creed, color or national origin.
5. Sponsor's representative authorized to complete arrangements for Armed Forces

participation and responsible for reimbursing Department of Defense for accrued expenses when required:

Name: _____
Address: _____
City, State: _____ Zip: _____
Telephone: (Office) _____ (AC) _____
_____
(home) _____ (AC) _____
_____

6. Purpose of this event (explain fully): _____
_____
7. Expected attendance: _____
8. Is this event being used to promote funds for any purpose? _____
9. Admission charge: _____
''Charge for seating: _____
10. Disposition of profits which may accrue:
11. Will admission, seating and all other accommodations and facilities connected with the event be available to all persons without regard to race, creed, color or national origin? _____
12. Will the standard Military Services allowance for quarters and meals be provided by the sponsor for Armed Forces participants? _____
13. Will transportation at sponsor's expense be proviced for Armed Forces participants between the site of this event and hotel?
_____
14. Will telephone facilities, at sponsor's expense, be made available for necessary official communications regarding the event?
_____
15. It may be necessary for representatives of the requested unit to visit the site prior to the event. Will transportation, meals and hotel accommodations be provided by the sponsor? _____
_____
16. Please describe the space which will be provided to recruiters: _____
_____
_____
_____
17. Designate charity beneficiary(s): _____
_____

FLIGHT TEAM, PARACHUTE TEAM, FLYOVERS, STATICS

1. This request is for (check appropriate line):

Flight Team Demonstration ..... .....
U.S. Navy Blue Angels ..... .....
U.S. Air Force Thunderbirds. (Cost for either team is $1500.00 for each day team scheduled at your event.) ..... .....
Aircraft Flyover: (No cost to sponsor.) ..... .....
Static Aircraft: (Cost is $25.00 per day per crewmember.) ..... .....
U.S. Army Silver Eagles: (Cost for this team is $750.00 for each day team scheduled at your event.) ... .....
Parachute Team Demonstration U.S. Army Golden Knights: (Cost is $25.00 per day per man for each day required to support your event. Team consists of 10–14 personnel.) ..... .....
(Other) ..... .....

2. Flight and/or Parachute Team demonstrations are restricted to appropriate events at airports, over open bodies of water, or over suitable open areas of land. Please give the specific location of your event ____
_____
If an airport, name of airdrome facility and longest usable landing runway. Airport: __
_____
Runway data: _____ feet.
3. Flyovers, Flight and Parachute Team demonstrations require that sponsors secure FAA clearance or waiver. Will steps be taken by sponsor to accomplish this at least sixty days prior to the event? _____
4. Flight and Parachute Team demonstrations must adhere to FAA regulations which specify that spectators not be permitted within 1500 feet of an area over which the flight demonstration takes place, or 250 feet of the jump area over which parachutists are performing. What type of crowd control is planned? _____
_____
5. Flight and Parachute Team demonstrations require that an ambulance and a doctor be on the site during the demonstration. Will this requirement be met? _____
6. Flight and Parachute Team demonstrations require that the sponsor provide a recent aerial photograph, taken vertically from an altitude of 5,000 feet or higher, to the team(s) giving the demonstration. Will this requirement be met? _____
7. Flight Team demonstrations and Static Aircraft displays require that the sponsor provide suitable aircraft fuel (JP jet fuel or aviation gas, as appropriate) and pay the cost of transporting and handling this fuel, if it is not available at the staging airport under military contract prices. Will this requirement be met? _____
8. Flight Team demonstrations and Static Aircraft displays require mobile firefighting, crash and ground-to-air communications equipment at the demonstration site. Will this requirement be met? _____
9. Flight Teams and Static Aircraft displays require that the sponsor provide guards for the aircraft that land and are parked at the site during their entire stay. Will this requirement be met? _____
10. Parachute Team demonstrations may require that the sponsor arrange aircraft transportation from the team's home base to the location of the event, for use as a jump platform and return to the home base. Will this requirement be met, if necessary? _____

11. Name and address of any Armed Forces representative or government official with whom you have discussed possible participation: _____

CERTIFICATION

I certify that the information provided above is complete and correct to the best of my knowledge and belief. I understand that representatives of the Military Services will contact me to discuss arrangements and costs involved prior to final commitments.

Signature: _____
(Sponsor's Representative)

Date of Request: _____

Return this form to: _____

(f) *Definitions.* A flight team demonstration is an exhibition of precision aerial maneuvers flown by the official Department of Defense military flight demonstration teams, the U.S. Air Force Thunderbirds, the U.S. Navy Blue Angels and the U.S. Army Silver Eagles. An aircraft demonstration is a flight demonstration by aircraft other than those of the teams listed above and designed to portray tactical capabilities of aircraft by a single aircraft (*i.e.*, the U.S. Marine Corps ''Harrier'') or group of aircraft, including air-to-air refueling, helicopter hover and pick-up or rappelling capabilities, Low Altitude Parachute Extraction System, maximum performance take-off, etc. A parachute demonstration is an exhibition of free-fall and precision landing techniques by the official DOD parachute team, the U.S. Army Golden Knights. Other parachute demonstrations can be performed by the U.S. Navy Parachute Team, or another unofficial team or sports parachute club representing the Department of Defense. A flyover is a flight of not more than four aircraft over a fixed point at a specific time and does not involve precision maneuvers or demonstrations. Flyovers are authorized for certain events when the presence of Armed Forces aircraft overhead would contribute to the effectiveness of the event based on a direct correlation between the event and the aircraft. Flyovers can also be authorized for occasions primarily designed to encourage the advancement of aviation and which are of more than local interest. Flyovers by any of the official DOD flight teams are not authorized. Parades are not considered an appropriate event for authorizing flyover support. The static display of aircraft is the ground display of any military aircraft and its related equipment, not involving flight, taxiing or starting of engines.

(g) Events which are appropriate for Armed Forces aviation participation in the public domain include such activities as dedication of airports and facilities, aviation shows, expositions, and fairs; and other civic events which contribute to the public knowledge of the U.S. Military Services aviation equipment and capabilities. The number one priority for utilization of military aircraft and parachutists in such events in the public domain is to support the recruiting aspects of the all-volunteer force concept. The approval of any such military demonstration will only be authorized if a maximum recruiting benefit exists at each location.

(h) *Costs.* (1) The cost for either the United States Air Force Thunderbirds or the United States Navy Blue Angels will be $1500 for each day a demonstration is scheduled. If the United States Army Golden Knights precision parachute team is scheduled for your event, the cost will be $25 per man per day for each day required to support your event, to include the days of travel if required. Under normal conditions, this group is comprised of fourteen members: Nine jumpers, three aircraft crewmen, one ground controller, and a narrator. The sponsor will be advised by the Golden Knights in advance of the costs related to his event for which the government must be reimbursed. The United States Army Silver Eagles helicopter team, composed of seven helicopters, performs precision formation manuevers and solo helicopter aerobatics to demonstrate the capabilities of modern helicopters and the skill of Army aviators. The Silver Eagles performance lasts about 30 minutes and is conducted entirely in full view of spectators on the crowd line. The cost for the team is $750 for each day a demonstration is scheduled. The sponsor should make a check payable to the Treasurer of the United States for the required amount and present it to the

appropriate demonstration team commander in advance of the scheduled event.

(2) Costs associated with static aircraft are normally $25 per day for each crew member plus possible fuel requirements discussed below. Charges for any other military parachuting demonstration (*i.e.*, U.S. Navy Parachute Team, local Armed Forces sport parachute clubs, etc.) will depend on the number of personnel and transportation involved. Checks payable to the Treasurer of the United States should be made available to the appropriate aircraft commander for static displays or parachute team commander upon arrival at the event.

(i) As noted in the Department of Defense request form, the sponsor is required to pay per diem costs for team and static display crew members except for flyovers or aircraft demonstrations not involving landing.

(3) These costs are binding after a team or crew personnel have arrived at the show site, even though weather conditions or other unforeseen circumstances force the event to be cancelled. These funds provided by the sponsor will be utilized by team members or crew personnel for paying housing and subsistence costs. The actual breakdown of the per diem involved is $13.20 for housing, $9.30 for subsistence, and $2.50 for incidental expenses. In those locations where housing and subsistence cannot be procured for these amounts, it will be the responsibility of the sponsor to absorb the additional cost. As stated, these costs will cover participation but does not include certain ground support requirements (*i.e.*, ground transportation, telephone, etc.) to be furnished by a sponsor as outlined in a team support packet.

(4) Other costs that could be incurred by the sponsor are in the area of the sponsor's agreement to provide suitable aircraft fuel (defined as JP jet fuel or aviation gas and lubricants) at U.S. Government contract prices. Where fuel is available from local military stocks—usually military installations—or when fuel is available from commercial into-plane contract locations, the U.S. Government will pay all fuel costs. If military contract fuel is not available at the show site, the sponsor will be required to pay all costs above the contract price and that price charged by the local supplier. However, the sponsor may choose to transport military contract fuel from a military base or a commercial airport having a U.S. Government into-plane contract. In this case, his cost would be only the transporting and handling of this fuel to the show site.

(5) The Department of Defense no longer requires the sponsor to provide the Department with a public liability and property damage insurance policy. This should in no way deter the sponsor from obtaining such liability and property damage insurance he feels is necessary for his own protection. Due to the costs that could accrue to the sponsor in case of cancellations because of inclement weather, the sponsor may wish to consider rain insurance to protect his investment. Previous sponsors have advised us that such insurance is available from most commercial companies.

(i) *Other information*. (1) Flight and/or parachute team demonstrations are restricted to appropriate events at airports, over open bodies of water, or over suitable open areas of land. For the U.S. Air Force Thunderbirds or U.S. Navy Blue Angels to operate from an airport show site, the following operational requirements must be met:

(i) Minimum useable runway length for the Thunderbirds is 5000 feet by 150 feet in width.

(ii) Minimum useable runway length for the Blue Angels is 6000 feet by 150 feet in width.

(iii) Minimum single landing gear load bearing capacity for Thunderbirds is 45,000 pounds; for Blue Angels, 21,000 pounds. Tandem landing gear load bearing capacity is 155,000 pounds for Blue Angels and Thunderbirds.

(2) A staged performance may not be given if the location planned for the show site does not meet these minimums. The maximum distance for a staged performance'' under normal conditions is 50 nautical miles. It should be noted that staged performances are seldom authorized since the recruiting potential is reduced at such events.

(3) The type and number of static and/or flyover aircraft which may be

assigned is entirely dependent upon the Military Services' capability to provide such resources at the time of your event. This capability is affected by operational commitments and sponsors are advised that confirmation of static/flyover aircraft cannot be made by the appropriate Service more than 15–30 days before your event.

(4) The U.S. Army Silver Eagles are normally restricted to performances at airports. Other open land areas may be operationally suitable but require the prior approval of the team commander in each case.

(5) Only one flight demonstration team and a parachute demonstration team may be authorized for any one event. Military aircraft demonstrations may not be authorized for events on the days a flight team is participating. A flyover is not authorized when a flight team is participating unless it can be provided by a locally-based National Guard or Reserve component.

(6) Participation by the U.S. Navy Blue Angels and the U.S. Air Force Thunderbirds is normally limited to two consecutive years in any one event. This usually involves one appearance by each of the two flight teams. This provision may be waived when other appropriate requests have not been received, when the team is performing in the same geographical area and has open dates or when the event is national or international in nature and participation would be in the best interests of Department of Defense. Participation in an event is normally limited to two days unless a third day can be included without preempting other requests.

(7) Sponsors are required to obtain a Federal Aviation Agency (FAA) waiver for any demonstration by military aircraft and/or parachutists in the public domain. The final authorization for such Armed Forces participation hinges upon the sponsor securing this waiver far enough in advance to permit adequate planning (normally not later than 60 days prior to the event). Further guidance on the details of obtaining this waiver will be contained in the team support packet or FAA. FAA regulations require that spectators be confined 1500 feet from a flight or aircraft demonstration and 250 feet from a parachute demonstration.

(i) In some cases, parachute demonstrations require that the sponsor arrange for appropriate transportation for the team and equipment from its home station to the event and return.

(ii) Mass parachute jumps, drops of equipment, assault aircraft demonstrations, or tactical helicopter troop landings under simulated tactical conditions, will be limited to military installations. These activities, except those scheduled as part of regular training programs, are not authorized for public events in the civil domain.

(8) When civilian air racing is involved in an event where Armed Forces participation has also been scheduled, prize monies must come from sources other than admission charges.

(9) Flight team, parachute and aircraft demonstrations also require that the sponsor provide: (i) Recent aerial photograph of the site; (ii) an ambulance and doctor at the site; and (iii) Guards for the Armed Forces aircraft during their entire stay. The aerial photograph should be recent, taken vertically from at least 5,000 feet.

(10) Maximum advantage of Armed Forces recruiting will be taken at appropriate events in the public domain where demonstrations by military aircraft and parachutists have been authorized.

(11) Exception to the policies contained herein will only be considered by OASD(PA) on events of national or international significance.

(12) Department of Defense hosts a scheduling conference in mid-December each year to prepare U.S. Air Force Thunderbirds, U.S. Navy Blue Angels, U.S. Army Golden Knights and U.S. Army Silver Eagles participation schedules for the ensuing year. All requests for such demonstrations from sponsors should reach OASD(PA) prior to the middle of November each year to be considered at this conference. In order to accommodate many requests Department of Defense receives for other parachuting demonstrations, aircraft demonstrations, static aircraft displays, and flyovers, each request must be received by OASD(PA) a minimum of 30 days in advance of the

event and preferably 60 days in advance.

(13) If there are any points that a member of the public might wish to have clarified, contact Chief, Aerial Events Branch, OASD(PA), Room 1E790, The Pentagon, Washington, DC 20301. Telephone: AC (202) 695–6795 or 695–9900.

### § 705.33 Participation by Armed Forces bands, choral groups, and troops in the public domain.

(a) Military musical participation in public events which otherwise meet the criteria outlined herein will be limited to patriotic programs as opposed to pure entertainment and will not duplicate a performance within the capability of a civilian group. For example, music to accompany the presentation of the national colors, or a performance of military or patriotic music by a military band, drum and bugle corps or choral group may be authorized; background, dinner, dance or other social music is considered ''entertainment.''

(b) Requests received for military musical participation in appropriate events in the civilian domain must include an indication from the sponsor that there is no conflict with the local civilian musicians concerning the appearance of Navy musicians. A statement to this effect from the cognizant local musicians' union must be obtained by the sponsor and attached to his request.

(c) Armed Forces musical units may be authorized to provide certain specified musical programs in the public domain. The performance must not place military musicians in competition with professional civilian musicians. Background, dinner, dance or other social music cannot be authorized. The specified programs which may be authorized usually include a short opening or closing patriotic presentation. Musical selections normally consist of a medley of military or patriotic songs, honors to the President or Vice President (if he is there), or music to accompany the presentation of colors by a Color Detail.

(1) Armed Forces musical units may be authorized to participate in official government, military and civic functions.

(i) Official government functions include those in which senior officials of the Federal government are involved in the performance of their official duties.

(ii) Official military functions include social activities held on military installations (or off when the Military Service certifies that suitable facilities are not available on post) which are sponsored by the Military Services, have as their principal purpose the promotion of esprit de corps, and are conducted primarily for active duty personnel and their guests.

(iii) Official civic functions include such State, county or municipal events as inaugurals, dedication of public buildings and projects, the convening of legislative bodies, and ceremonies for officially invited government visitors.

(2) Armed Forces musical units may also be authorized to provide patriotic and military programs at national conventions and meetings of nationally-recognized civic, patriotic and veterans organizations.

(d) Bands, drill teams and other units can normally participate at no cost to the sponsor if the event is within the installation's immediate community relations area (approximately 100-mile radius).

(1) Normally, not more than one band or other musical unit will be authorized for a parade in the civilian domain. This guidance intended to assure widest possible participation in public events of local interest (particularly on national holidays) does not apply to national convention of veterans' groups or other events having national significance.

(2) All Armed Forces participation in international and national events, and in the Washington, DC area, must be authorized by the Assistant Secretary of Defense (Public Affairs).

(3) Requests for Armed Forces musical or troop units when no military installation is accessible, or for the Washington, DC-based ceremonial bands or troop units (when the event is outside the Washington, DC area), should be addressed to the parent Service of the unit:

(I) U.S. ARMY

Chief of Public Information, Department of the Army, Washington, DC 20310.

(II) U.S. NAVY

Chief of Information, Code OI–321, Department of the Navy, Washington, DC 20350.

(III) U.S. AIR FORCE

Director of Information, Secretary of the Air Force, Community Relations Division, Washington, DC 20330.

(IV) U.S. MARINE CORPS

Commandant of the Marine Corps, Code AG, Headquarters, U.S. Marine Corps, Washington, DC 20380.

(4) Armed Forces units may not be authorized to participate when:

(i) The event directly or indirectly endorses or selectively benefits or favors (or appears to do so) any private individual, commercial venture, sect, fraternal organization, political group, or if it is associated with solicitation of votes in a political election.

(ii) Admission, seating and other accommodations or facilities are restricted in any manner with regard to race, creed, color or national origin.

(iii) The sponsoring organization or group excludes any person from its membership or practices any form of discrimination in its functions, based on race, creed, color or national origin.

(iv) An admission charge is levied on the public primarily to see participation by an Armed Forces unit.

(v) There is fund-raising of any type connected with the event, unless all profits are to be donated to a charity which is one of the consolidated programs recognized by the Federal Services Fund-Raising Program. These are the United Givers Fund Community Chest, National Health Agencies (as a group), the International Service Agencies, and the American Red Cross (when not included in a consolidated campaign). The Military Services' Welfare Societies (Army Emergency Relief, Navy Relief and Air Force Aid Society) are also included.

(5) Sponsors of an event must agree to reimburse the Military Services concerned for transportation and per diem when participation is authorized at no additional cost to the government.

(6) Participation by Armed Forces musical units in other areas is within the authority of local military commanders, and requests for participation should be made directly to those local military installations. All requests should be submitted no earlier than 60 days and preferably no later than 45 days prior to the event.

**§ 705.34 Other special events.**

(a) *Ship visits*. Requests for visits generally originate with civic groups desiring Navy participation in local events. Often, members of Congress endorse these requests, advising the Navy of their interest in a particular event. Because of the marked increase in requests for ship visits, and in order to give equal consideration to all requests, the Chief of Information has arranged for quarterly meetings of representatives from CHINFO, Commander, Navy Recruiting Command, Chief of Naval Operations and Chief of Legislative Affairs. Based on the importance of the event (nationally, regionally, or locally) location, and prospective audience, recommendations are consolidated and forwarded to the fleet commanders prior to their quarterly scheduling conferences.

(b) *Visits to Naval activities*—(1) *Types of visits*. (i) General visits or Open House are occasions when a ship or station acts as host to the general public. These visits will be conducted in accordance with instructions issued by Fleet and Force Commanders, District Commandants, or other cognizant authority.

(ii) Casual visits are visits to ships or stations by individuals or specific groups, as differentiated from the general public. Details and procedures concerning these visits are a matter of command discretion.

(iii) Tours are occasions when a ship or station is host to a specific group on a scheduled date. Some of the larger shore commands also regularly schedule one or more sightseeing type tours daily during seasons when many vacationers ask to visit the command.

(2) *General rules*. Prior approval for general visiting or Open House at any time other than civic-sponsored public observances and official ceremonies for Armed Forces Day, memorial Day, Independence Day, and Veterans Day, and for observances in overseas areas

of similar significant holidays, will be requested as follows: Fleet units visiting U.S. ports, from Senior Officer present Afloat; fleet units visiting foreign ports, from commander ordering the visit; shore stations and district vessels in the United States, from District Commandants; and overseas shore stations, from the naval area commander.

(c) *Official functions.* (1) Navy units may be authorized by local commanding officers to participate in official government military and civic functions, except in the Washington DC area where OASD(PA) retains authority.

(2) Official government functions include those in which senior officials of the federal government are involved in the performance of their official duties.

(3) Official military functions include social activities held on military installations (or off, when it is certified that suitable facilities are not available on base), which are sponsored by the Navy, have as their principal purpose the promotion of esprit de corps, and are conducted primarily for active duty personnel and their guests.

(4) Official civic functions include such state, county or municipal events as inaugurals, dedications of public buildings and projects, and convening of legislative bodies and ceremonies for officially invited government visitors.

(5) Overseas, similar functions attended by comparable host-country officials in their official capacities might also be considered appropriate for Navy participation.

(d) A parade which is sponsored by the community as a whole (rather than by a single commercial venture) and held on a Sunday or holiday or at a time when shops are closed for business may be a public event for which participation could properly be authorized; representation by individual commercial ventures in such parades need not be a bar to Navy participation as long as the emphasis is planned and placed on the civic rather than commercial aspects. Such participation will be at no additional cost to the government.

(e) *Fund-raising events.* (1) Navy support of fund-raising events must be limited to recognized, joint or other authorized campaigns. Navy support of fund-raising events or projects for a single cause, even though the cause is a member of one of the federated, joint or authorized campaigns, or donates in part to one of several of the recognized campaigns, is not authorized by Department of Defense.

(2) Navy support for a single-cause fund-raising event may be authorized if the event is:

(i) In support of Navy recruiting objectives;

(ii) Supported by a letter indicating the local United Way representative has no objection; and

(iii) Approved by the local Navy Commander as a single-cause charity which has broad local benefit.

[41 FR 29101, July 15, 1976, as amended at 44 FR 6391, Feb. 1, 1979]

### § 705.35 Armed Forces participation in events in the public domain.

(a) Requests for bands, troops, units, teams, exhibits and other Armed Forces participation should be addressed to the nearest military installation. Local commanders have resources which they can commit to appropriate events if mission requirements permit. If no military installation is accessible, or if resources requested are not available locally or require approval by higher authorities, a standard Department of Defense Request Form should be completed. This form is used to evaluate the request, determine appropriateness of the event and compliance with Department of Defense policies, and eliminate repeated correspondence. The request form should be returned to the office or military command from which it was received unless another address is indicated.

(b) Basic criteria governing Armed Forces participation in public events have been developed by the Department of Defense to ensure compliance with public law, to assure equitable distribution of resources to as many appropriate events as possible, and to avoid excessive disruption of primary training and operational missions of the Military Services. the following

general rules and information are included as an aid to you in understanding Department of Defense policies and in planning programs of mutual benefit to the Armed Forces and your community.

(1) When evaluating requests for Armed Forces participation in public events, the interests of the Department of Defense and the public at large, operational requirements of the Military services, and availability of resources are prime considerations. Commitment of resources to specific events must be balanced with the above factors and with requests for similar participation received from other sources.

(2) Department of Defense participation and cooperation must not directly or indirectly:

(i) Endorse or selectively benefit or favor or appear to endorse or selectively benefit or favor any private individual, group, corporation (whether for profit or nonprofit), sect, quasi-religious or ideological movement, fraternal organization, political organization, or commercial venture.

(ii) Be associated with the solicitation of votes in a political election. Sites such as commercial theaters or department stores, churches or fraternal halls; and events such as testimonials to private individuals or sectarian religious services, are generally inappropriate for Armed Forces participation.

(3) Participation by the Armed Forces in any event or activity may be authorized only if admission, seating and all other accommodations and facilities are available to all without regard to race, creed, color or national origin, and only if the sponsoring organization does not exclude any form of discrimination based on race, creed, color or national origin. This does not bar participation in events sponsored by nationally-recognized veteran's organizations when the program is oriented toward the veterans' interests, nor does it bar participation in nonpublic school events when the program is directed toward education or recruiting.

(i) No admission charge may be levied on the public solely to see an Armed Forces demonstration, unit or exhibit. When admission is charged, the Armed Forces activity must not be the sole or primary attraction.

(4) Armed Forces participation is authorized in a fund-raising event only when the sponsor certifies that all net profits in excess of actual operating costs will be donated to one of the consolidated programs recognized by the Federal Services Fund-Raising program. These include such agencies as the United Givers Fund, Community Chests, National Health Agencies (as a group), International Service Agencies and the military aid societies.

(5) When Armed Forces participation in an event is in the mutual interest of the Department of Defense and the sponsor of the event, participation will be authorized at no additional cost to the government. Additional costs to the government—travel and transportation of military personnel, meals and quarters or standard per diem allowance, etc.—will be borne by the sponsor.

(6) Department of Defense policy prohibits payment by the Armed Forces for rental of exhibit space, connection of electricity, or utility or janitorial costs.

(7) The duration of participation by military units in any one event is limited in the interests of proper utilization and equitable distribution of Armed Forces manpower and resources. While an exhibit might be scheduled for the duration of an event, a unit such as a military band is limited to three days.

(8) Armed Forces participation in professional sports events and post-season bowl games will normally be authorized at no additional cost to the government, will emphasize joint Service activity and must support recruiting programs. Participation in beauty contests, fashion shows, pageants, Christmas parades, and motion picture premieres is not authorized since military support would violate policy and appropriateness.

### § 705.36 Government transportation of civilians for public affairs purposes.

(a) *General policy*. (1) Regulations on transportation of civilians vary according to whether:

(i) The civilians are news media representatives or not.

(ii) The travel is local or nonlocal (see paragraph (b) of this section).

(iii) The purpose of the travel is to get to a desired destination or is to observe the Navy at first hand.

(2) Authority for embarkation of individuals in naval vessels and military aircraft is vested in the Chief of Naval Operations by §700.710 of this chapter. Nothing in this part shall be construed as limiting his authority in this regard.

(3) The following policy has been established by DOD for providing all types of Navy transportation to non-Navy civilians.

(i) Military transport facilities shall not be placed in a position of competition with U.S. commercial carriers.

(A) When embarkation of a newsman is necessary for him to obtain news material about a ship, aircraft, cargo or embarked personnel, or when he is invited to report on a matter of special interest to the Navy, it is not considered that the transportation furnished him is in competition with commercial transport.

(B) An exception is also made for short trips between an airport (or other transportation center) and the command. Cars and buses within the resources of the command may be used for meeting guests or taking them to make their travel connections.

(ii) When authorization is requested for travel which is of interest to or will affect more than one command or Service, the approving authority will coordinate the request with all other interested commands, Services and Agencies.

(iii) Travel in connection with any public affairs program arranged by the Navy jointly with another Federal Department or Agency or a foreign government will be authorized only by the Assistant Secretary of Defense (Public Affairs, or those to whom he has delegated this authority. Navy commands desiring authorization of such travel will forward the request to the Chief of Information.

(iv) If a request for travel for nonlocal public affairs purposes is disapproved, sufficient reasons should be provided so that the action is clearly understood by the individual or group concerned.

(b) *Definition of local v. nonlocal travel.* (1) Local travel is travel within the immediate vicinity of the command concerned in connection with a public affairs program of local interest only. (For air travel within the continental U.S., about 150 miles or less is generally considered local.)

(2) Nonlocal travel is that conducted in connection with a public affairs program affecting more than one Service, geographic area or major command, usually of primary concern to higher authority.

(c) *Transportation of news media representatives.* (1) This section applies to media representatives who are embarked for the purpose of news gathering or of traveling to an area in order to cover a news event. It does not apply to:

(i) Correspondents when members of groups embarked as regular cruise guests of the Navy.

(ii) Casual trips by correspondents to ships in port or to shore stations in CONUS. Such visits may be authorized by officers in command or higher authority in accordance with instructions promulgated by the Chief of Naval Operations. Written orders are not required.

(2) *Local travel.* Commanding officers at all levels are authorized (under Defense Department policy) to approve local travel for public affairs purposes within the scope of the mission and responsibilities of their command, if:

(i) Public interest in the public affairs purpose involved is confined primarily to the vicinity of that command.

(ii) The travel is being provided for the benefit of local media and meets a naval public affairs objective.

(iii) Scheduled commercial air transportation is not readily available.

(iv) The aircraft to be used is a helicopter, or multiengine dual piloted aircraft, and is within the resources of the host command on a not-to-interfere basis. This provision does not apply to orientation flights.

(3) *Nonlocal travel.* (i) Requests for nonlocal travel will be submitted to the Chief of Information, who will forward them with his recommendations to the Chief of Naval Operations and/or

the Assistant Secretary of Defense (Public Affairs), as appropriate.

(ii) When the proposed travel is for news coverage of a major emergency nature and the coverage will be impaired or delayed, to the serious detriment of the interests of the Department of Defense, if military transportation is not provided, requests for such travel will be submitted to the Chief of Information, who will forward the request—if approved—to the Assistant Secretary of Defense (Public Affairs). The most expeditious means (including telephone) will be used by commands requesting such emergency travel. Justification will include both the public affairs purpose and the necessity for military carriers.

(4) *Travel between the U.S. and overseas area.* (i) The Chief of Naval Operations may authorize military transportation for correspondents in unusual circumstances, upon recommendations of the Chief of Information and the Defense Department.

(ii) Requests for government transportation to cover specific assignments overseas should be made at least three weeks prior to the date required and should be addressed to the Assistant Secretary of Defense (Public Affairs) via the Chief of Information or Unified Commander, as appropriate. The requests should include:

(A) A statement that the correspondent is a full-time employee, or has a specific assignment, and that the trip is for the purpose of news gathering.

(B) Appropriate date of entry into area, port of entry, method of travel, proposed duration of visit and travel termination date.

(C) Assurance that the correspondent will observe currency control regulations, and sponsoring agency will guarantee financial obligations incurred.

(5) *Embarkation of male correspondents between ports within CONUS.* (i) Male correspondents may be embarked in naval ships for passage between ports within the area of a single Fleet command for the purpose of news gathering at the discretion of the Sea Frontier Commander, Commandants of the Naval Districts, the Chief of naval Air Training, Fleet, Force and Type commanders and flag officers afloat who have been delegated authority to arrange directly with appropriate Fleet, Force and Type commanders for embarkation of civilians on a local cruise basis.

(ii) Invitational travel orders may be issued.

(6) *Embarkation of female correspondents in naval vessels.* (i) Privileges equal to those given male correspondents will be accorded female correspondents whenever practicable.

(ii) Female correspondents may not be embarked overnight in a naval ship without prior approval of the appropriate Fleet Commander-in-Chief. This authority may be delegated to the numbered Fleet Commanders.

(7) *Travel in ships of the Military Sealift Command.* Correspondents may be carried in ships of the Military Sealift Command on either a space-required or space-available basis when travel is in the best interests of the Navy or the Department of Defense.

(i) Space-available travel will be used when practicable. A nominal charge is made by the Military Sealift Command and must be borne by the correspondents.

(ii) Space-required travel may be authorized when sufficiently in the interest of the Navy, and the charge may be borne by the Navy.

(iii) In either case, determination of Navy interests will be made by the Chief of Information, guided by the transportation policy of the Chief of Naval Operations, whose approval of such embarkation is required.

(iv) Requests for such travel will be submitted to the Chief of Information, who will coordinate with the Chief of Naval Operations and/or the Assistant Secretary of Defense (Public Affairs), as appropriate.

(8) Point to point transportation within the continental United States in naval aircraft other than those operated by the Military Airlift Command.

(i) SECNAVINST 4630.2A contains guidance for travel in military aircraft other than those operated by the Military Airlift Command.

(ii) Naval activities desiring to arrange such transportation will address requests via the chain of command to the operational command of the lowest

echelon which has been delegated authority to approve such requests.

(iii) Upon approval of such a request, the naval activity sponsoring the correspondent shall:

(A) Prepare travel orders.

(B) Ensure that any waiver forms, as may be required by governing directives, are executed.

(9) Embarkation of news media representatives of foreign citizenship:

(i) Requests from foreign news media representatives to cruise with units of the U.S. Navy are usually made to the nearest U.S. military installation known to the correspondent, and are often not made in the proper chain of command to the Fleet Commander unless authorized to effect arrangements for an underway cruise.

(A) if the request is received by a command which is not a subordinate of the Fleet Commander concerned, it will be forwarded to the U.S. Naval Attache assigned to the foreign newsman's country. The Attache will then forward the request to the appropriate Fleet Commander, with his recommendations and the result of a brief background check on the newsman and his employer.

(B) If the request is received by a subordinate of the appropriate Fleet Commander, it may be forwarded directly to the latter, but the U.S. Naval Attache in the newsman's country will be given the opportunity to comment on the proposed embarkation.

(ii) Naval commands should not introduce an embarked third-party (*i.e.*, a foreign media representative) into a foreign country other than his own without first obtaining appropriate clearance from the country to be visited. Approval for entry should be forwarded via appropriate command channels to the cognizant U.S. Naval Attache.

(10) *Security considerations.* (i) No media representative known to be affiliated with a group advocating the overthrow of the U.S. government will be permitted aboard naval ships or stations.

(ii) If security review is directed, the reason will be made clear to the correspondent prior to embarkation. News media people refusing to agree to observe security regulations may have their privileges suspended. Failure to observe security regulations will be reported to CHINFO and interested commands.

(d) *Transportation of other civilians.* (1) Although groups normally provide their own transportation to Navy commands, Navy transportation may be authorized when:

(i) Commercial transport is not available.

(ii) A professional group visit has been solicited by the Navy, such as participants in the Naval Academy Information Program (''Blue and Gold'') or educators invited to an Aerospace Education Workshop.

(2) Requests for nonlocal transportation under the above circumstances will be made to the Chief of Naval Operations.

(3) Carrier-on-board-delivery (COD) flights and helicopters flights to ships are considered local transportation.

(4) When units or areas of a Unified Command are involved in the public affairs program in connection with which travel authorization is requested by a Navy command which is not a component of the Unified Command concerned, coordination will be effected by the host command, through command channels, via the Chief of Information, to the Assistant Secretary of Defense (Public Affairs), who—as appropriate—will consult with the Unified Commander concerned.

(e) *Special programs.* (1) Cruises are discussed in Chapter 6, section 0604, para. 1 of the Navy Public Affairs Regulations.

(2) Embarkation of news media representatives, especially on operations and exercises, is discussed in Chapter 4, section 0405, paragraph 4 of the Navy Public Affairs Regulations.

(3) Other programs subject to special requirements or which have had exceptions authorized for them include:

(i) Naval Air Training Command Civilian Orientation Cruise Program, conducted by the Chief of Naval Air Training.

(ii) Joint Civilian Orientation Conference, conducted by the Assistant Secretary of Defense (Public Affairs).

(iii) Orientation flights in government aircraft, conducted in accordance with OPNAVINST 37107H.

(iv) Space-available air transportation may be provided Navy League members if they are invited to accompany a flag officer attending a Navy League convention or regional meeting and if the trip is economically justifiable, based on military travel considerations and not community relations or public affairs reasons. Approval in each instance will be obtained in advance from the Chief of Naval Operations.

(v) Air transportation for the Naval Sea Cadet Corps of the Navy League.

(A) Flights must be in Navy multiengine, transport type craft.

(B) Point-to-point flights on a space-required basis are governed by an annual quota set by the Chief of Naval Operations. Space-available transportation is authorized and will not be charged against this quota if it will not result in delays of takeoffs or a change in the itinerary planned for the primary mission.

(C) Flights must not interfere with operational commitments or training or results in additional expense to the government.

(D) This transportation is not available to other youth programs, including others sponsored by the Navy League.

(f) *Other instructions on transportation of non-Navy civilians*. Details on policy, procedures, and the transportation of certain categories of people will be found in OPNAVINST 5720.2G and DOD Directive 4515.13.

[41 FR 29101, July 15, 1976, as amended at 44 FR 6391, Feb. 1, 1979]

### § 705.37 Public affairs and public service awards.

(a) *General*. (1) A number of public service awards are presented by the Department of Defense and the Navy to business and civic leaders, scientists and other nongovernment civilians. Other awards—military and civilian—are presented to members of the naval establishment.

(2) These awards are of public affairs interest in the locale where they are presented and also in the home towns of those who receive them.

(b) *Department of Defense awards*. (1) The Department of Defense Medal for Distinguished Public Service is presented to individuals. The Department of Defense Meritorious Award honors organizations.

(2) Details, including nominating procedures, are given in SECNAVINST 5061.12.

(c) *Secretary of the Navy awards*. (1) The following awards are presented by the Secretary of the Navy: The Navy Distinguished Public Service Award and Navy Meritorious Public Service Citation to individuals; the Navy Certificate of Commendation to members of special committees and groups; and the Navy Certificate of Merit to organizations and associations.

(2) Details are given in SECNAVINST 5061.12.

(3) Nominations for awards to military personnel are considered by the Board of Decorations and Medals, in accordance with SECNAVINST 1650.24A.

(4) Nominations for honorary awards to Department of the Navy civilian employees are considered by the Distinguished Civilian Service Awards Panel. (See Civilian Manpower Management Instruction 451.)

(d) *Chief of Information awards*—(1) *Certificate of Public Relations Achievement*. (i) This certificate is signed by the Chief of Information. It honors individuals who are not Navy employees, corporations, or associations.

(ii) It was established to fill the need for a civilian award for public relations achievements which, while not meeting the criteria for public service awards presented by the Secretary of the Navy, are of such Navy-wide significance as to merit recognition at the Department level. Examples of these achievements might be a particularly well done feature article about the Navy in a nationally read newspaper or an outstanding contribution to a locally sponsored event, which ultimately gave national or regional recognition to the Navy.

(iii) The achievement for which the certificate is given shall meet the following criteria:

(A) Contribute to accomplishment of the public information objectives of the Navy.

(B) Be the result of a single outstanding project or program.

(C) Have been accomplished within one year of the date of the official letter of nomination.

(iv) Nominations will be submitted through appropriate administrative channels to the Chief of Information, and will include a description of the service rendered, a statement of its relevance to the accomplishment of the public affairs objectives of the Navy and a draft of the recommended citation. To avoid possible embarrassment, nominations shall be marked ''For Official Use Only'' and safeguarded until final action has been taken.

(2) *CHINFO Merit Awards.* (i) These awards, or certificates, are presented quarterly to Navy publications and broadcasts considered to be outstanding or to have shown improvement in meeting professional standards of journalism.

(ii) Publications and broadcasts eligible are those which inform the reader concerning aspects of service life or related matters which contribute to the well-being of naval personnel, their dependents, and civilian employees of the Navy. Civilian enterprise periodicals are included if produced for the exclusive use of a naval installation.

(iii) Nominations are made in two ways:

(A) Selection during regular review periodicals and broadast air-checks received by the Internal Relations Activity.

(B) *Nominations from the field.* Such nominations are informal and may be made by the officer-in-charge, publications editor, broadcast station manager, or public affairs officer to the chief of Information, Navy Department, Washington, DC 20350 (ATTN: OP–0071).

(3) *Other awards pertaining to public affairs/internal relations.* (i) Silver Anvil award is given by the Public Relations Society of America for outstanding public relations programs carried out during the preceding year. Entry blanks and details may be obtained by writing directly to Public Relations Society of America, 845 Third Ave., New York, NY 10022. All Navy entries will be forwarded via the Chief of Information.

(ii) Freedom Foundation Awards of cash and medals are annually given to service personnel for letters on patriotic themes. Details are carried in ship and station publications, or may be obtained by writing to Freedom Foundations, Valley Forge, PA 19481.

(iii) Thomas Jefferson Awards are the prizes in an annual interservice competition sponsored by civilian media through the Department of Defense's Office of Information for the Armed Forces. The contest is open to all Armed Forces media—broadcast and print. Details can be obtained by writing to Office of Information, Department of the Navy, Washington, DC 20350.

(iv) *Navy League Awards.* Several annual awards are presented to naval personnel and civilians who have made a notable contribution to the importance of seapower. The awards are for inspirational leadership, scientific and technical progess, operational competence, literary achievement, etc. Nominations should be forwarded directly to Board of Awards, Navy League of the United States, 818 18th St., NW., Washington, DC 20006.

(v) Nonofficial awards to outstanding Navy students or training units.

(A) Various civilian organizations and private individuals have established awards to be presented to outstanding training units or naval students.

(B) Requests to establish an award for students in the Naval Air Training program should be forwarded to the Chief of Naval Air Training.

(C) Requests to establish an award which will involve more than one school (other than the Naval Air Training Program) will be forwarded to the Chief of Naval Personnel.

(D) All other cases may be decided by the Navy authority at the school concerned.

(E) Directives in the 5061, 1650 and 3590 series issued by pertinent authorities may provide further guidance in individual cases.

(vi) Awards established by a command to honor non-Navy civilians.

(A) Examples of such awards are ''Good Neighbor'' or ''Honorary Crew Member'' certificates.

(B) Established to honor persons who have been helpful to the command,

they are a valuable community relations program. They should not be awarded to persons or organizations with which the command is associated in a commercial or governmental business capacity.

[41 FR 29101, July 15, 1976, as amended at 44 FR 6391, Feb. 1, 1979]

# SUBCHAPTER B—NAVIGATION

## PART 706—CERTIFICATIONS AND EXEMPTIONS UNDER THE INTERNATIONAL REGULATIONS FOR PREVENTING COLLISIONS AT SEA, 1972

Sec.
706.1 Purpose of regulations.
706.2 Certifications of the Secretary of the Navy under Executive Order 11964 and 33 U.S.C. 1605.
706.3 Exemptions by the Secretary of the Navy under Executive Order 11964.

AUTHORITY: 33 U.S.C. 1605.

### § 706.1 Purpose of regulations.

(a) All ships are warned that, when U.S. naval vessels are met in international waters, certain navigational lights and sound-signalling appliances of some naval vessels may vary from the requirements of the International Regulations for Preventing Collisions at Sea, 1972 (33 U.S.C. foll. section 1602 (1982)), as to number, position, range, or arc of visibility of lights, as well as to the disposition and characteristics of sound-signalling appliances. Those differences are necessitated by reason of the special construction or purpose of the naval ships. An example is the aircraft carrier where the two masthead lights are considerably displaced from the center or keel line of the vessel when viewed from ahead. Certain other naval vessels cannot comply with the horizontal separation requirements for masthead lights, and the two masthead lights on even large naval vessels will thus appear to be crowded together when viewed from a distance. Naval vessels may also have unorthodox navigational light arrangements or characteristics when seen either underway or at anchor.

(b) Naval vessels may also be expected to display certain other lights. These lights include, but are not limited to, different colored rotating beacons, different colored fixed and rotary wing aircraft landing signal lights, red aircraft warning lights, and red or blue contour approach lights on replenishment-type ships. These lights may be shown in combination with the navigational lights.

(c) During peacetime naval maneuvers, naval ships, alone or in company, may also dispense with showing any lights, though efforts will be made to display lights on the approach of shipping.

(d) Executive Order 11964 of January 19, 1977, and 33 U.S.C. 1605 provide that the requirements of the International Regulations for Preventing Collisions at Sea, 1972, as to the number, position, range, or arc of visibility of lights or shapes, as well as to the disposition and characteristics of sound-signalling appliances, shall not apply to a vessel of the Navy where the Secretary of the Navy shall find and certify that, by reason of special construction or purpose, it is not possible for such vessel to comply fully with the provisions without interfering with the special function of the vessel.

(e) Executive Order 11964 also provides that the Secretary of the Navy is authorized to exempt, in accordance with Rule 38 of the International Regulations for preventing Collisions at Sea, 1972, any vessel, or class of vessels, the keel of which is laid, or which is at a corresponding stage of construction, before July 15, 1977, from full compliance with the International Regulations, provided that such vessel, or class of vessels, complies with the requirements of the International Regulations for Preventing Collisions at Sea, 1960.

(f) This part consolidates and codifies certifications and exemptions granted by the Secretary of the Navy under Executive Order 11964 and 33 U.S.C. 1605. It has been determined that, because of their special construction or purpose, the vessels and classes of vessels listed in this part cannot comply fully with all of the requirements of the International Regulations for Preventing Collisions at Sea, 1972.

[42 FR 36434, July 14, 1977, as amended at 42 FR 48876, Sept. 26, 1977; 45 FR 43165, June 26, 1980; 52 FR 4770, Feb. 17, 1987]

### § 706.2 Certifications of the Secretary of the Navy under Executive Order 11964 and 33 U.S.C. 1605.

The Secretary of the Navy hereby finds and certifies that each vessel listed in this section is a naval vessel of special construction or purpose, and that, with respect to the position of the navigational lights listed in this section, it is not possible to comply fully with the requirements of the provisions enumerated in the International Regulations for Preventing Collisions at Sea, 1972, without interfering with the special function of the vessel. The Secretary of the Navy further finds and certifies that the navigational lights in this section are in the closest possible compliance with the applicable provisions of the International Regulations for Preventing Collisions at Sea, 1972.

TABLE ONE

| Vessel | Number | Distance in meters of forward masthead light below minimum required height. § 2(a)(i) Annex I |
|---|---|---|
| USS DOLPHIN | AGSS 555 | 0.8 |
| USS ZUMWALT | DDG 1000 | 2.55 |
| USS MC INERNY | FFG 8 | 1.6 |
| USS CLARK | FFG 11 | 1.6 |
| USS GEORGE PHILIP | FFG 12 | 1.6 |
| USS SAMUEL ELIOT MORISON | FFG 13 | 1.6 |
| USS SIDES | FFG 14 | 1.6 |
| USS ESTOCIN | FFG 15 | 1.6 |
| USS JOHN A. MOORE | FFG 19 | 1.6 |
| USS BOONE | FFG 28 | 1.6 |
| USS STEPHEN W. GROVES | FFG 29 | 1.6 |
| USS JOHN L. HALL | FFG 32 | 1.6 |
| USS JARRETT | FFG 33 | 1.6 |
| USS UNDERWOOD | FFG 36 | 1.6 |
| USS CROMMELIN | FFG 37 | 1.6 |
| USS CURTS | FFG 38 | 1.6 |
| USS DOYLE | FFG 39 | 1.6 |
| USS HALYBURTON | FFG 40 | 1.6 |
| USS MCCLUSKY | FFG 41 | 1.6 |
| USS KLAKRING | FFG 42 | 1.6 |
| USS THACH | FFG 43 | 1.6 |
| USS DEWERT | FFG 45 | 1.6 |
| USS RENTZ | FFG 46 | 1.6 |
| USS NICHOLAS | FFG 47 | 1.6 |
| USS VANDEGRIFT | FFG 48 | 1.6 |
| USS ROBERT G. BRADLEY | FFG 49 | 1.6 |
| USS TAYLOR | FFG 50 | 1.6 |
| USS GARY | FFG 51 | 1.6 |
| USS CARR | FFG 52 | 1.6 |
| USS HAWES | FFG 53 | 1.6 |
| USS FORD | FFG 54 | 1.6 |
| USS ELROD | FFG 55 | 1.6 |
| USS SIMPSON | FFG 56 | 1.6 |
| USS REUBEN JAMES | FFG 57 | 1.6 |
| USS SAMUEL B. ROBERTS | FFG 58 | 1.6 |

TABLE ONE—Continued

| Vessel | Number | Distance in meters of forward masthead light below minimum required height. § 2(a)(i) Annex I |
|---|---|---|
| USS KAUFFMAN | FFG 59 | 1.6 |
| USS RODNEY M. DAVIS | FFG 60 | 1.6 |
| USS INGRAHAM | FFG 61 | 1.37 |
| USS FREEDOM | LCS 1 | 5.99 |
| USS INDEPENDENCE | LCS 2 | 4.14 |
| USS FORT WORTH | LCS 3 | 5.965 |
| USS CORONADO | LCS 4 | 4.20 |
| USS MILWAUKEE | LCS 5 | 6.75 |
| USS JACKSON | LCS 6 | 4.91 |
| USS DETROIT | LCS 7 | 6.80 |
| USS MONTGOMERY | LCS 8 | 4.91 |
| USS OGDEN | LPD 5 | 4.15 |
| USS DULUTH | LPD 6 | 4.4 |
| USS DUBUQUE | LPD 8 | 4.2 |
| USS DENVER | LPD 9 | 4.4 |
| USS JUNEAU | LPD 10 | 4.27 |
| USS NASHVILLE | LPD 13 | 4.38 |
| USS TRIPOLI | LPH 10 | 3.3 |
| LCAC (class) | LCAC 1 through LCAC 100 | [1] 6.51 |
| LCAC (class) | LCAC 1 through LCAC 100 | 7.84 (Temp.)[2] |
| USS INCHON | MCS 12 | 3.0 |
| NR–1 | NR 1 | 2.7 |
| USS SEAWOLF | SSN 21 | 4.62 |
| USS CONNECTICUT | SSN 22 | 4.62 |
| USS JIMMY CARTER | SSN 23 | 4.32 |
| USS PARCHE | SSN 683 | 3.58 |
| USS KAMEHAMEHA | SSN 642 | 3.58 |
| USS MENDEL RIVERS | SSN 686 | 2.40 |
| USS LOS ANGELES | SSN 688 | 6.10 |
| USS PHILADELPHIA | SSN 690 | 6.10 |
| USS MEMPHIS | SSN 691 | 6.10 |
| USS BREMERTON | SSN 698 | 3.49 |
| USS JACKSONVILLE | SSN 699 | 3.35 |
| USS DALLAS | SSN 700 | 3.5 |
| USS LA JOLLA | SSN 701 | 3.5 |
| USS CITY OF CORPUS CHRISTI | SSN 705 | 3.5 |
| USS ALBUQUERQUE | SSN 706 | 3.5 |
| USS PORTSMOUTH | SSN 707 | 3.5 |
| USS MINNEAPOLIS-ST. PAUL | SSN 708 | 3.5 |
| USS HYMAN G. RICKOVER | SSN 709 | 3.5 |
| USS AUGUSTA | SSN 710 | 3.5 |
| USS SAN FRANCISCO | SSN 711 | 3.5 |
| USS HOUSTON | SSN 713 | 3.5 |
| USS NORFOLK | SSN 714 | 3.5 |
| USS BUFFALO | SSN 715 | 3.5 |
| USS SALT LAKE CITY | SSN 716 | 3.5 |
| USS OLYMPIA | SSN 717 | 3.5 |
| USS HONOLULU | SSN 718 | 3.5 |
| USS PROVIDENCE | SSN 719 | 3.5 |
| USS PITTSBURGH | SSN 720 | 3.5 |
| USS CHICAGO | SSN 721 | 3.5 |
| USS KEY WEST | SSN 722 | 3.5 |
| USS OKLAHOMA CITY | SSN 723 | 3.5 |
| USS LOUISVILLE | SSN 724 | 3.5 |
| USS HELENA | SSN 725 | 3.5 |
| USS NEWPORT NEWS | SSN 750 | 3.5 |
| USS SAN JUAN | SSN 751 | 3.5 |
| USS PASADENA | SSN 752 | 3.5 |
| USS ALBANY | SSN 753 | 3.5 |
| USS TOPEKA | SSN 754 | 3.5 |

TABLE ONE—Continued

| Vessel | Number | Distance in meters of forward masthead light below minimum required height. § 2(a)(i) Annex I |
|---|---|---|
| USS MIAMI | SSN 755 | 3.5 |
| USS SCRANTON | SSN 756 | 3.5 |
| USS ALEXANDRIA | SSN 757 | 3.5 |
| USS ASHEVILLE | SSN 758 | 3.5 |
| USS JEFFERSON CITY | SSN 759 | 3.4 |
| USS ANNAPOLIS | SSN 760 | 3.5 |
| USS SPRINGFIELD | SSN 761 | 3.5 |
| USS COLUMBUS | SSN 762 | 3.5 |
| USS SANTA FE | SSN 763 | 3.5 |
| USS BOISE | SSN 764 | 3.5 |
| USS MONTPELIER | SSN 765 | 3.5 |
| USS CHARLOTTE | SSN 766 | 3.5 |
| USS HAMPTON | SSN 767 | 3.5 |
| USS HARTFORD | SSN 768 | 3.5 |
| USS TOLEDO | SSN 769 | 3.5 |
| USS TUCSON | SSN 770 | 3.5 |
| USS COLUMBIA | SSN 771 | 3.5 |
| USS GREENEVILLE | SSN 772 | 3.5 |
| USS CHEYENNE | SSN 773 | 3.5 |
| USS VIRGINIA | SSN 774 | 2.9 |
| USS TEXAS | SSN 775 | 2.90 |
| USS HAWAII | SSN 776 | 2.90 |
| USS NORTH CAROLINA | SSN 777 | 2.90 |
| USS NEW HAMPSHIRE | SSN 778 | 2.90 |
| USS NEW MEXICO | SSN 779 | 2.76 |
| USS MISSOURI | SSN 780 | 2.76 |
| USS CALIFORNIA | SSN 781 | 2.76 |
| USS MISSISSIPPI | SSN 782 | 2.76 |

TABLE ONE—Continued

| Vessel | Number | Distance in meters of forward masthead light below minimum required height. § 2(a)(i) Annex I |
|---|---|---|
| USS MINNESOTA | SSN 783 | 2.76 |
| USS NORTH DAKOTA | SSN 784 | 2.76 |
| USS JOHN WARNER | SSN 785 | 2.76 |
| USS ILLINOIS | SSN 786 | 2.76 |
| USS WASHINGTON | SSN 787 | 2.76 |
| USS HENRY M. JACKSON | SSBN 730 | 3.70 |
| USS ALABAMA | SSBN 731 | 3.70 |
| USS ALASKA | SSBN 732 | 3.70 |
| USS NEVADA | SSBN 733 | 3.70 |
| USS TENNESSEE | SSBN 734 | 3.70 |
| USS PENNSYLVANIA | SSBN 735 | 3.70 |
| USS WEST VIRGINIA | SSBN 736 | 3.70 |
| USS KENTUCKY | SSBN 737 | 3.70 |
| USS MARYLAND | SSBN 738 | 3.70 |
| USS NEBRASKA | SSBN 739 | 3.70 |
| USS RHODE ISLAND | SSBN 740 | 3.70 |
| USS MAINE | SSBN 741 | 3.70 |
| USS WYOMING | SSBN 742 | 3.70 |
| USS LOUISIANA | SSBN 743 | 3.70 |
| USS OHIO | SSGN 726 | 3.70 |
| USS MICHIGAN | SSGN 727 | 3.70 |
| USS FLORIDA | SSGN 728 | 3.70 |
| USS GEORGIA | SSGN 729 | 3.70 |

[1] The permanent masthead light is 5.26 meters athwartship to port of centerline, 5.49 meters above the main deck.

[2] The temporary masthead light is 3.98 meters athwartship to starboard of centerline, 4.16 meters above the main deck.

TABLE TWO

| Vessel | Number | Masthead lights, distance to stbd of keel in meters; Rule 21(a) | Forward anchor light, distance below flight dk in meters; § 2(K), Annex I [6] | Forward anchor light, number of; Rule 30(a)(i) | AFT anchor light, distance below flight dk in meters; Rule 21(e), Rule 30(a)(ii) [6] | AFT anchor light, number of; Rule 30(a)(ii) | Side lights, distance below flight dk in meters; § 2(g), Annex I | Side lights, distance forward of forward masthead light in meters; § 3(b), Annex I | Side lights, distance inboard of ship's sides in meters; § 3(b), Annex I |
|---|---|---|---|---|---|---|---|---|---|
| CFPM (class) | CFPM–1 through CFPM–2 | 2.32 | ..... | ..... | ..... | ..... | ..... | 2.01 | [5] 5.73 |
| CSP (class) | CSP–101 through CSP–182 | 1.62 | ..... | ..... | ..... | ..... | ..... | ..... | 3.93 |
| USS KITTY HAWK | CV 63 | 27.8 | ..... | 1 | ..... | 1 | 0.2 | ..... | ..... |
| USS CONSTELLATION | CV 64 | 28.2 | ..... | 1 | ..... | 1 | 0.4 | ..... | ..... |
| USS JOHN F. KENNEDY | CV 67 | 27.5 | ..... | 1 | 9.0 | 2 | 0.4 | ..... | ..... |
| USS ENTERPRISE | CVN 65 | 28.0 | ..... | ..... | ..... | ..... | 0.4 | ..... | ..... |
| USS NIMITZ | CVN 68 | 31.0 | ..... | ..... | ..... | ..... | 0.7 | ..... | ..... |
| USS DWIGHT D. EISENHOWER | CVN 69 | 31.0 | ..... | ..... | ..... | ..... | 0.2 | ..... | ..... |
| USS CARL VINSON | CVN 70 | 30.1 | ..... | 1 | ..... | 1 | 0.53 | ..... | ..... |
| USS THEODORE ROOSEVELT | CVN 71 | 30.0 | ..... | ..... | ..... | ..... | 0.43 | ..... | ..... |
| USS ABRAHAM LINCOLN | CVN 72 | 30.0 | ..... | ..... | ..... | ..... | 0.6 | ..... | ..... |
| USS GEORGE WASHINGTON | CVN 73 | 30.0 | ..... | ..... | ..... | ..... | 0.6 | ..... | ..... |
| USS JOHN C. STENNIS | CVN 74 | 30.0 | ..... | ..... | ..... | ..... | 0.6 | ..... | ..... |
| USS HARRY S. TRUMAN | CVN 75 | 30.02 | ..... | 1 | ..... | 1 | 0.46 | ..... | ..... |
| USS RONALD REAGAN | CVN 76 | 31.09 | ..... | ..... | ..... | ..... | 0.56 | ..... | ..... |
| USS GEORGE H. W. BUSH | CVN 77 | 31.09 | ..... | ..... | ..... | ..... | 0.46 | ..... | ..... |
| USS GERALD R. FORD | CVN 78 | 31.57 | ..... | ..... | ..... | ..... | 0.13 | ..... | ..... |
| USS TARAWA | LHA 1 | 10.0 | ..... | 1 | ..... | 1 | 2.4 | 71.0 | ..... |
| USS SAIPAN | LHA 2 | 10.1 | ..... | 1 | ..... | 1 | 2.8 | 72.1 | ..... |
| USS BELLEAU WOOD | LHA 3 | 10.0 | ..... | ..... | ..... | ..... | 2.7 | 72.4 | ..... |
| USS NASSAU | LHA 4 | 10.0 | ..... | ..... | ..... | ..... | 2.7 | 72.4 | ..... |
| USS PELELIU | LHA 5 | 10.13 | ..... | 4 | ..... | ..... | 2.64 | 70.05 | ..... |
| USS AMERICA | LHA 6 | 9.00 | ..... | ..... | ..... | ..... | 2.8 | 89.3 | ..... |
| USS WASP | LHD 1 | 9.0 | ..... | ..... | ..... | ..... | 2.8 | 89.0 | ..... |
| USS ESSEX | LHD 2 | ..... | ..... | ..... | ..... | ..... | 3.1 | 91.1 | ..... |
| USS KEARSARGE | LHD 3 | 8.9 | ..... | ..... | ..... | ..... | 3.0 | 91 | ..... |
| USS BOXER | LHD 4 | ..... | ..... | ..... | ..... | ..... | 3.0 | 90.9 | ..... |
| USS BATAAN | LHD 5 | ..... | ..... | ..... | ..... | ..... | 2.9 | 98.6 | ..... |
| USS BONHOMME RICHARD | LHD 6 | 9.0 | ..... | ..... | ..... | ..... | 2.9 | 89.6 | ..... |
| USS IWO JIMA | LHD 7 | ..... | ..... | ..... | ..... | ..... | 2.97 | 88.80 | ..... |
| USS MAKIN ISLAND | LHD 8 | 8.97 | ..... | ..... | ..... | ..... | 3.08 | 89.52 | ..... |
| USS TRIPOLI | LPH 10 | 10.6 | ..... | 1 | 2.2 | 2 | 0.4 | 47.5 | ..... |
| LCAC (class) | LCAC 1 through LCAC 100 | 5.26 (Perm.) [2] | ..... | ..... | ..... | ..... | ..... | ..... | [3] 1.5 |
| LCAC (class) | LCAC 1 through LCAC 100 | 3.98 (Temp.) [4] | ..... | ..... | ..... | ..... | ..... | ..... | [3] 1.5 |
| USS INCHON | MCS 12 | 10.6 | ..... | 1 | 2.2 | 2 | 0.4 | 47.5 | ..... |
| SLWT (class) | SLWT 1 | 1.62 | ..... | ..... | ..... | ..... | ..... | ..... | [5] 3.93 |
| SLWT (class) | SLWT 2 | 1.62 | ..... | ..... | ..... | ..... | ..... | ..... | [5] 3.93 |

TABLE TWO—Continued

| Vessel | Number | Masthead lights, distance to stbd of keel in meters; Rule 21(a) | Forward anchor light, distance below flight dk in meters; § 2(K), Annex I [6] | Forward anchor light, number of; Rule 30(a)(i) | AFT anchor light, distance below flight dk in meters; Rule 21(e), Rule 30(a)(ii) [6] | AFT anchor light, number of; Rule 30(a)(ii) | Side lights, distance below flight dk in meters; § 2(g), Annex I | Side lights, distance forward of forward masthead light in meters; § 3(b), Annex I | Side lights, distance inboard of ship's sides in meters; § 3(b), Annex I |
|---|---|---|---|---|---|---|---|---|---|
| SLWT (class) | SLWT 3 | 1.62 | ..... | ..... | ..... | ..... | ..... | ..... | [5]3.93 |
| SLWT (class) | SLWT–6 | 1.62 | ..... | ..... | ..... | ..... | ..... | ..... | 3.93 |
| SLWT (class) | SLWT–8 through SLWT–19 | 1.62 | ..... | ..... | ..... | ..... | ..... | ..... | 3.93 |
| SLWT (class) | SLWT–22 through SLWT–24 | 1.62 | ..... | ..... | ..... | ..... | ..... | ..... | 3.93 |
| SLWT (class) | SLWT–26 through SLWT–65 | 1.62 | ..... | ..... | ..... | ..... | ..... | ..... | 3.93 |
| USS BREMERTON | SSN 698 | 0.41 | ..... | ..... | ..... | ..... | ..... | ..... | ..... |
| USS DALLAS | SSN 700 | 0.41 | ..... | ..... | ..... | ..... | ..... | ..... | ..... |
| USS SAN FRANCISCO | SSN 711 | 0.41 | ..... | ..... | ..... | ..... | ..... | ..... | ..... |
| USS NORFOLK | SSN 714 | 0.41 | ..... | ..... | ..... | ..... | ..... | ..... | ..... |
| USS PROVIDENCE | SSN 719 | 0.41 | X | X | X | X | X | X | X |
| USS PITTSBURGH | SSN 720 | 0.41 | ..... | ..... | ..... | ..... | ..... | ..... | ..... |
| USS CHICAGO | SSN 721 | 0.41 | ..... | ..... | ..... | ..... | ..... | ..... | ..... |
| USS KEY WEST | SSN 722 | 0.41 | ..... | ..... | ..... | ..... | ..... | ..... | ..... |
| USS OKLAHOMA CITY | SSN 723 | 0.41 | ..... | ..... | ..... | ..... | ..... | ..... | ..... |
| USS LOUISVILLE | SSN 724 | 0.41 | ..... | ..... | ..... | ..... | ..... | ..... | ..... |
| USS HELENA | SSN 725 | 0.41 | ..... | ..... | ..... | ..... | ..... | ..... | ..... |
| USS NEWPORT NEWS | SSN 750 | 0.41 | ..... | ..... | ..... | ..... | ..... | ..... | ..... |
| WT (class) | WT–1 through WT–4 | 2.32 | ..... | ..... | ..... | ..... | ..... | 2.01 | [5]5.73 |
| USV | 11MUC0601, 11MUC0602, 11MUC0603, 11MUC0604 | 0.40 | ..... | ..... | ..... | ..... | ..... | ..... | ..... |

[1] [Reserved]
[2] The permanent masthead light is 5.26 meters athwartship to port of centerline, at frame 3, 5.49 meters above the main deck.
[3] The sidelights are on top of the port and starboard deckhouses 3.28 meters above the hull.
[4] The temporary masthead light is 3.98 meters athwartship to starboard of centerline, 4.16 meters above the main deck.
[5] Port sidelight only.
[6] On the following ships the arc of visibility of the after masthead light required by Rule 23(a)(ii) and Annex I, section 2(f) may be obstructed from the right ahead on certain naval ships as follows: USS MAKIN ISLAND (LHD 8)—5°17′.

TABLE THREE

| Vessel | No. | Masthead lights arc of visibility; rule 21(a) | Side lights arc of visibility; rule 21(b) | Stern light arc of visibility; rule 21(c) | Side lights distance inboard of ship's sides in meters 3(b) annex 1 | Stern light, distance forward of stern in meters; rule 21(c) | Forward anchor light, height above hull in meters; 2(K) annex 1 | Anchor lights relationship of aft light to forward light in meters 2(K) annex 1 |
|---|---|---|---|---|---|---|---|---|
| USS GERALD R. FORD. | CVN 78 | ..... | 115.6 | ..... | ..... | ..... | ..... | ..... |
| USS ZUMWALT ..... | DDG 1000 | ..... | ..... | ..... | ..... | ..... | 5.3 | 2.99 below |
| USS PELELIU ..... | LHA 5 | 214.5 | ..... | ..... | ..... | ..... | ..... | ..... |
| USS SAN ANTONIO ... | LPD 17 | ..... | ..... | ..... | ..... | ..... | ..... | 1.3 below |
| USS NEW ORLEANS | LPD 18 | ..... | ..... | ..... | ..... | ..... | ..... | 2.36 below |
| USS MESA VERDE .... | LPD 19 | ..... | ..... | ..... | ..... | ..... | ..... | 1.42 below |
| USS GREEN BAY ..... | LPD 20 | ..... | ..... | ..... | ..... | ..... | ..... | 1.29 below |
| USS NEW YORK ..... | LPD 21 | ..... | ..... | ..... | ..... | ..... | ..... | 1.75 below |
| USS SAN DIEGO ..... | LPD 22 | ..... | ..... | ..... | ..... | ..... | ..... | 1.88 below |
| USS ANCHORAGE .... | LPD 23 | ..... | ..... | ..... | ..... | ..... | ..... | 1.19 below |
| USS ARLINGTON ..... | LPD 24 | ..... | ..... | ..... | ..... | ..... | ..... | 1.62 below |
| USS SOMERSET ..... | LPD 25 | ..... | ..... | ..... | ..... | ..... | ..... | 1.64 below |
| USS JOHN P MURTHA. | LPD 26 | ..... | ..... | ..... | ..... | ..... | ..... | 1.72 below |
| USS ASHLAND ..... | LSD 48 | ..... | ..... | ..... | ..... | ..... | ..... | 2.60 below |
| USS CYCLONE ..... | PC 1 | ..... | ..... | ..... | ..... | [1] 25.5 | 3.0 | 1.0 |
| USS TEMPEST ..... | PC 2 | ([2]) | ..... | ..... | ..... | [1] 28.3 | 3.0 | 1.1 below |
| USS HURRICANE ..... | PC 3 | ([2]) | ..... | ..... | ..... | [1] 28.5 | 3.0 | 1.1 below |
| USS MONSOON ..... | PC 4 | ([2]) | ..... | ..... | ..... | [1] 28.3 | 3.0 | 1.1 below |
| USS TYPHOON ..... | PC 5 | ([2]) | ..... | ..... | ..... | [1] 28.5 | 3.0 | 1.1 below |
| USS SIROCCO ..... | PC 6 | ([2]) | ..... | ..... | ..... | [1] 28.5 | 3.0 | 1.1 below |
| USS SQUALL ..... | PC 7 | ([2]) | ..... | ..... | ..... | [1] 28.5 | 3.0 | 1.1 below |
| USS CHINOOK ..... | PC 9 | ([2]) | ..... | ..... | ..... | [1] 28.5 | 3.0 | 1.1 below |
| USS FIREBOLT ..... | PC 10 | ([2]) | ..... | ..... | ..... | [1] 28.5 | 3.0 | 1.1 below |
| USS WHIRLWIND ..... | PC 11 | ([2]) | ..... | ..... | ..... | [1] 28.5 | 3.0 | 1.1 below |
| USS THUNDERBOLT | PC 12 | ([2]) | ..... | ..... | ..... | [1] 28.5 | 3.0 | 1.1 below |
| USS SHAMAL ..... | PC 13 | ..... | ..... | ..... | ..... | [1] 28.26 | 3.01 | 1.1 below |
| USS TORNADO ..... | PC 14 | ..... | ..... | ..... | ..... | [1] 27.8 | 3.01 | 1.1 below |
| USS DOLPHIN ..... | AGSS 555 | 227.5½ | 119½ | 191½ | 2.1 | 10.8 | 1.8 | 0.5 above |
| NR–1 ..... | NR 1 | 238.5½ | 114° | 136.5° | 1.5 | 4.1 | 2.1 | |
| USS SEAWOLF ..... | SSN 21 | 225° | 111.5° | 205° | 5.1 | 10.7 | 2.8 | 1.8 below |
| USS CONNECTICUT | SSN 22 | 232° | 112.8° | 207° | 5.1 | 10.7 | 2.8 | 1.63 below |
| USS JIMMY CARTER | SSN 23 | ..... | ..... | 211° | 5.12 | 10.7 | 2.8 | 1.63 below |
| USS KAMEHAMEHA .. | SSN 642 | 236° | 117° | 252° | 3.8 | 7.6 | 2.1 | same height |
| USS PARCHE ..... | SSN 683 | 232° | 112.5° | 209° | 4.1 | 6.8 | 2.2 | 0.2 below |
| USS L. MENDEL RIVERS. | SSN 686 | 236° | 113° | 252° | 3.8 | 5.2 | 3.4 | 1.4 below |
| USS LOS ANGELES .. | SSN 698 | 236° | 115° | 252° | 4.2 | 6.1 | 2.0 | 1.6 below |
| USS PHILADELPHIA .. | SSN 690 | 238° | 115° | 252° | 4.2 | 6.1 | 2.0 | 1.6 below |
| USS MEMPHIS ..... | SSN 691 | 236° | 115° | 252° | 4.3 | 6.1 | 2.0 | 1.6 below |
| USS BREMERTON ..... | SSN 698 | ..... | ..... | 209° | 4.2 | 6.1 | 3.5 | 1.7 below |
| USS JACKSONVILLE | SSN 699 | ..... | ..... | 211° | 4.2 | 6.1 | 3.5 | 1.7 below |
| USS DALLAS ..... | SSN 700 | ..... | ..... | ..... | 4.1 | 6.5 | 3.4 | 1.7 below |
| USS LA JOLLA ..... | SSN 701 | ..... | ..... | ..... | 4.2 | 6.1 | 3.5 | 1.7 below |
| USS CITY OF CORPUS CHRISTI. | SSN 705 | ..... | ..... | 209° | 4.2 | 6.1 | 3.5 | 1.7 below |
| USS ALBUQUERQUE | SSN 706 | ..... | 114° | ..... | 4.2 | 6.1 | 3.5 | 1.7 below |
| USS PORTSMOUTH .. | SSN 707 | ..... | ..... | 209° | 4.2 | 6.1 | 3.5 | 1.7 below |
| USS MINNEAPOLIS-ST. PAUL. | SSN 708 | ..... | ..... | 209° | 4.2 | 6.2 | 3.5 | 1.7 below |
| USS HYMAN G. RICKOVER. | SSN 709 | ..... | ..... | 209° | 4.2 | 6.1 | 3.4 | 1.7 below |
| USS AUGUSTA ..... | SSN 710 | ..... | ..... | 209° | 4.2 | 6.1 | 3.4 | 1.7 below |
| USS SAN FRANCISCO. | SSN 711 | ..... | ..... | ..... | 4.1 | 6.5 | 3.4 | 1.7 below |
| USS HOUSTON ..... | SSN 713 | ..... | ..... | 209° | 4.3 | 6.1 | 3.4 | 1.7 below |
| USS NORFOLK ..... | SSN 714 | ..... | ..... | 209° | 4.3 | 6.1 | 3.4 | 1.7 below |
| USS BUFFALO ..... | SSN 715 | ..... | ..... | 209° | 4.2 | 6.1 | 3.5 | 1.7 below |
| USS SALT LAKE CITY | SSN 716 | ..... | ..... | 209° | 4.2 | 6.1 | 3.5 | 1.7 below |
| USS OLYMPIA ..... | SSN 717 | ..... | ..... | 209° | 4.2 | 6.1 | 3.4 | 1.7 below |
| USS HONOLULU ..... | SSN 718 | ..... | ..... | 209° | 4.2 | 6.1 | 3.4 | 1.7 below |
| USS PROVIDENCE .... | SSN 719 | ..... | ..... | 209° | 4.2 | 6.1 | 3.4 | 1.7 below |
| USS PITTSBURGH .... | SSN 720 | ..... | ..... | 209° | 4.2 | 6.1 | 3.4 | 1.7 below |

TABLE THREE—Continued

| Vessel | No. | Masthead lights arc of visibility; rule 21(a) | Side lights arc of visibility; rule 21(b) | Stern light arc of visibility; rule 21(c) | Side lights distance inboard of ship's sides in meters 3(b) annex 1 | Stern light, distance forward of stern in meters; rule 21(c) | Forward anchor light, height above hull in meters; 2(K) annex 1 | Anchor lights relationship of aft light to forward light in meters 2(K) annex 1 |
|---|---|---|---|---|---|---|---|---|
| USS CHICAGO | SSN 721 | | | 209° | 4.3 | 6.1 | 3.4 | 1.7 below |
| USS KEY WEST | SSN 722 | | | 209° | 4.2 | 6.1 | 3.4 | 1.7 below |
| USS OKLAHOMA CITY. | SSN 723 | | | 209° | 4.3 | 6.1 | 3.4 | 1.7 below |
| USS LOUISVILLE | SSN 724 | | 113° | 209° | 4.2 | 6.1 | 3.5 | 1.7 below |
| USS HELENA | SSN 725 | | | 207° | 4.2 | 6.2 | 3.5 | 1.7 below |
| USS NEWPORT NEWS. | SSN 750 | | | 209° | 4.3 | 6.1 | 3.4 | 1.7 below |
| USS SAN JUAN | SSN 751 | 229° | 113° | 208° | 4.2 | 6.1 | 3.5 | 1.7 below |
| USS PASADENA | SSN 752 | 255° | 112.5° | 206° | 4.2 | 6.1 | 3.5 | 1.7 below |
| USS ALBANY | SSN 753 | 225° | 112.5° | 209° | 4.3 | 6.1 | 3.4 | 1.7 below |
| USS TOPEKA | SSN 754 | | | 206° | 4.2 | 6.2 | 3.5 | 1.7 below |
| USS MIAMI | SSN 755 | | | 206° | 4.2 | 6.2 | 3.5 | 1.7 below |
| USS SCRANTON | SSN 756 | | | 209° | 4.3 | 6.1 | 3.4 | 1.7 below |
| USS ALEXANDRIA | SSN 757 | | | 205° | 4.2 | 6.2 | 3.5 | 1.7 below |
| USS ASHEVILLE | SSN 758 | | | 209° | 4.3 | 6.1 | 3.4 | 1.7 below |
| USS JEFFERSON CITY. | SSN 759 | | | 209° | 4.3 | 6.1 | 3.4 | 1.7 below |
| USS ANNAPOLIS | SSN 760 | | | 205° | 4.2 | 6.2 | 3.5 | 1.7 below |
| USS SPRINGFIELD | SSN 761 | | | 205° | 4.2 | 6.2 | 3.5 | 1.7 below |
| USS COLUMBUS | SSN 762 | | | 205° | 4.2 | 6.2 | 3.5 | 1.7 below |
| USS SANTA FE | SSN 763 | | | 205° | 4.2 | 6.2 | 3.5 | 1.7 below |
| USS BOISE | SSN 764 | | | 209° | 4.3 | 6.1 | 3.4 | 1.7 below |
| USS MONTPELIER | SSN 765 | | | 209° | 4.3 | 6.1 | 3.4 | 1.7 below |
| USS CHARLOTTE | SSN 766 | | | 209° | 4.3 | 6.1 | 3.4 | 1.7 below |
| USS HAMPTON | SSN 767 | | | 209° | 4.3 | 6.1 | 3.4 | 1.7 below |
| USS HARTFORD | SSN 768 | | | 205° | 4.2 | 6.2 | 3.5 | 1.7 below |
| USS TOLEDO | SSN 769 | | | 209° | 4.4 | 6.1 | 3.4 | 1.7 below |
| USS TUCSON | SSN 770 | | | 209° | 4.4 | 6.1 | 3.4 | 1.7 below |
| USS COLUMBIA | SSN 771 | | | 205° | 4.2 | 6.2 | 3.5 | 1.7 below |
| USS GREENEVILLE | SSN 772 | | | 209° | 4.4 | 6.1 | 3.4 | 1.7 below |
| USS CHEYENNE | SSN 773 | | | 209° | 4.4 | 6.1 | 3.4 | 1.7 below |
| USS VIRGINIA | SSN 774 | | | 205° | 4.37 | 11.05 | 2.8 | 0.30 below |
| USS TEXAS | SSN 775 | | | 210.2° | 4.37 | 11.05 | 2.8 | 0.30 below |
| USS HAWAII | SSN 776 | | | 205° | 4.37 | 11.05 | 2.8 | 0.30 below |
| USS NORTH CAROLINA. | SSN 777 | | | 205.6° | 4.37 | 11.05 | 2.8 | 0.30 below |
| USS NEW HAMPSHIRE. | SSN 778 | | | 205.6° | 4.37 | 11.05 | 2.8 | 0.30 below |
| USS NEW MEXICO | SSN 779 | | | 206.4° | 4.37 | 11.05 | 2.8 | 0.30 below |
| USS MISSOURI | SSN 780 | | | 210.5° | 4.37 | 11.05 | 2.8 | 0.30 below |
| USS CALIFORNIA | SSN 781 | | | 205.1° | 4.37 | 11.05 | 2.8 | 0.30 below |
| USS MISSISSIPPI | SSN 782 | | | 209.0° | 4.37 | 11.05 | 2.8 | 0.30 below |
| USS MINNESOTA | SSN 783 | | | 205.1° | 4.37 | 11.05 | 2.8 | 0.30 below |
| USS NORTH DAKOTA | SSN 784 | | | 210.0° | 4.37 | 11.05 | 2.8 | 0.30 below |
| USS JOHN WARNER | SSN 785 | | | 206.4° | 4.37 | 11.05 | 2.8 | 0.30 below |
| USS ILLINOIS | SSN 786 | | | 205.0° | 4.37 | 11.05 | 2.8 | 0.30 below |
| USS WASHINGTON | SSN 787 | | | 206.8° | 4.37 | 11.05 | 2.8 | 0.30 below |
| USS HENRY M. JACKSON. | SSBN 730 | | | 209° | 5.3 | 9.0 | 3.8 | 4.0 below |
| USS ALABAMA | SSBN 731 | | | 209° | 5.3 | 9.0 | 3.8 | 4.0 below |
| USS ALASKA | SSBN 732 | | | 209° | 5.3 | 9.0 | 3.8 | 4.0 below |
| USS NEVADA | SSBN 733 | | | 209° | 5.3 | 9.0 | 3.8 | 4.0 below |
| USS TENNESSEE | SSBN 734 | | | 209° | 5.3 | 9.0 | 3.8 | 4.0 below |
| USS PENNSYLVANIA | SSBN 735 | | | 211.5° | 5.3 | 9.0 | 3.8 | 4.0 below |
| USS WEST VIRGINIA | SSBN 736 | | | 211.5° | 5.3 | 9.0 | 3.8 | 4.0 below |
| USS KENTUCKY | SSBN 737 | | | 209° | 5.3 | 9.0 | 3.8 | 4.0 below |
| USS MARYLAND | SSBN 738 | | | 209° | 5.3 | 9.0 | 3.8 | 4.0 below |
| USS NEBRASKA | SSBN 739 | | | 209° | 5.3 | 9.0 | 3.8 | 4.0 below |
| USS RHODE ISLAND | SSBN 740 | | | 209° | 5.3 | 9.0 | 3.8 | 4.0 below |
| USS MAINE | SSBN 741 | | | 209° | 5.3 | 9.0 | 3.8 | 4.0 below |
| USS WYOMING | SSBN 742 | | | 209° | 5.3 | 9.0 | 3.8 | 4.0 below |
| USS LOUISIANA | SSBN 743 | | | 209° | 5.3 | 9.0 | 3.8 | 4.0 below |
| USS OHIO | SSGN 726 | 225° | 112.5° | 209° | 5.3 | 9.0 | 3.8 | 4.0 below |
| USS MICHIGAN | SSGN 727 | 225° | 112.5° | 209° | 5.3 | 9.0 | 3.8 | 4.0 below |

TABLE THREE—Continued

| Vessel | No. | Masthead lights arc of visibility; rule 21(a) | Side lights arc of visibility; rule 21(b) | Stern light arc of visibility; rule 21(c) | Side lights distance inboard of ship's sides in meters 3(b) annex 1 | Stern light, distance forward of stern in meters; rule 21(c) | Forward anchor light, height above hull in meters; 2(K) annex 1 | Anchor lights relationship of aft light to forward light in meters 2(K) annex 1 |
|---|---|---|---|---|---|---|---|---|
| USS FLORIDA | SSGN 728 | | | 209° | 5.3 | 9.0 | 3.8 | 4.0 below |
| USS GEORGIA | SSGN 729 | 225° | 112.5° | 209° | 5.3 | 9.0 | 3.8 | 4.0 below |
| YTB (class) | YTB 769 | | | | 2.77 | 14.02 | | |
| KEOKUK | YTB 771 | | | | 3.11 | 13.00 | | |
| YTB 781 | YTB 781 | | | | 2.56 | 13.41 | | |
| YTB (class) | YTB 789 | | | | 2.50 | 14.99 | | |
| YTB 806 | YTB 806 | | | | 2.79 | 10.97 | | |
| YTB 812 | YTB 812 | | | | 3.03 | 14.02 | | |
| YTB 813 | YTB 813 | | | | 2.63 | 19.2 | | |
| YTB 820 | YTB 820 | | | | 3.08 | 14.20 | | |
| SHABONEE | YTB 833 | | | | 2.77 | 13.34 | | |
| YTB 835 | YTB 835 | | | | 3.00 | 14.02 | | |

[1] Only when towing
[2] Lower forward masthead light (used for towing) is partially blocked at angles plus or minus 8.5 degrees off centerline; this light is used only when tow exceeds 200 meters from the stern of the ship to aft end of tow.

## TABLE FOUR

1. Ships other than aircraft carrier types (CV, CVN, LHA, LHD, and LPH) may not simultaneously exhibit the masthead lights required by Rule 27(b)(iii) and the lights required by Rule 27(b)(i) for vessels restricted in their ability to maneuver when such simultaneous exhibition will present a hazard to their own safe operations. In those instances, the lights required by Rule 27(b)(i) will be exhibited. Ships conducting flight operations also may not exhibit the stern light required by Rule 27(b)(iii).

2. To provide all-round visibility, the lights required by Rules 27 (a) and (b) will consist of two lights, one light port and one light starboard on the mast or superstructure at each location in the vertical array.

3. The second masthead light required by Rule 23(a)(ii) and the lights and shapes required by Rules 24, 27, and 30(d)(i) are not displayed by submarines.

4. On mine warfare type ships the masthead lights will not always be above and clear of the minesweeping lights, as is required by Annex I, Section 2(f). The positions of the masthead lights with relation to the minesweeping lights are as follows:

| Vessel | MSO No. | Relationship of forward masthead light to all minesweeping lights | Relationship of after masthead light to lower minesweeping lights | Relationship of after masthead light to upper minesweeping lights |
|---|---|---|---|---|
| MSB | 15 | below | | |
| MSB | 16 | do | | |
| MSB | 25 | do | | |
| MSB | 28 | do | | |
| MSB | 29 | do | | |
| MSB | 41 | do | | |
| MSB | 51 | do | | |
| MSB | 52 | do | | |

5. The masthead light required by Rule 23(a)(i) and Annex I, Paragraph 3(d), is not located in the forward part of the vessel on the CFPM Class, CSP Class, SLWT Class, and WT Class.

6. On the following ships the arc of visibility of the after masthead light required by Rule 23(a)(ii) and Annex I, section 2(f) may be obstructed from the right ahead on certain naval ships as follows: USS MAKIN ISLAND (LHD 8)—5°17′.

7. On the following ships the arc of visibility of the forward masthead light required by Rule 23(a)(i) may be obstructed through 1.6° arc of visibility at the points 021° and 339° relative to the ship's head.

| | |
|---|---|
| USS MCINERNEY | FFG 8 |
| USS CLARK | FFG 11 |
| USS GEORGE PHILIP | FFG 12 |

| | |
|---|---|
| USS SAMUEL ELIOT MORISON | FFG 13 |
| USS SIDES | FFG 14 |
| USS ESTOCIN | FFG 15 |
| USS JOHN A. MOORE | FFG 19 |
| USS BOONE | FFG 28 |
| USS STEPHEN W. GROVES | FFG 29 |
| USS JOHN L. HALL | FFG 32 |
| USS JARRETT | FFG 33 |
| USS UNDERWOOD | FFG 36 |
| USS CROMMELIN | FFG 37 |
| USS CURTS | FFG 38 |
| USS DOYLE | FFG 39 |
| USS HALYBURTON | FFG 40 |
| USS MCCLUSKY | FFG 41 |
| USS KLAKRING | FFG 42 |
| USS THACH | FFG 43 |
| USS DEWERT | FFG 45 |
| USS RENTZ | FFG 46 |
| USS NICHOLAS | FFG 47 |
| USS VANDERGRIFT | FFG 48 |
| USS ROBERT G. BRADLEY | FFG 49 |
| USS TAYLOR | FFG 50 |
| USS GARY | FFG 51 |
| USS CARR | FFG 52 |
| USS HAWES | FFG 53 |
| USS FORD | FFG 54 |
| USS ELROD | FFG 55 |
| USS SIMPSON | FFG 56 |
| USS REUBEN JAMES | FFG 57 |
| USS SAMUEL B. ROBERTS | FFG 58 |
| USS KAUFFMAN | FFG 59 |
| USS RODNEY M. DAVIS | FFG 60 |
| USS INGRAHAM | FFG 61 |

8. Sidelights on the following ships do not comply with Annex 1, Section 3(b):

| Vessel | Number | Distance of sidelights forward of masthead light in meters |
|---|---|---|
| USS MCINERNEY | FFG 8 | 2.75 |
| USS CLARK | FFG 11 | 2.75 |
| USS GEORGE PHILIP | FFG 12 | 2.75 |
| USS SAMUEL ELIOT MORISON | FFG 13 | 2.75 |
| USS SIDES | FFG 14 | 2.75 |
| USS ESTOCIN | FFG 15 | 2.75 |
| USS JOHN A. MOORE | FFG 19 | 2.75 |
| USS BOONE | FFG 28 | 2.75 |
| USS STEPHEN W. GROVES | FFG 29 | 2.75 |
| USS JOHN L. HALL | FFG 32 | 2.75 |
| USS JARRETT | FFG 33 | 2.69 |
| USS UNDERWOOD | FFG 36 | 2.75 |
| USS CROMMELIN | FFG 37 | 2.75 |
| USS CURTS | FFG 38 | 2.75 |
| USS DOYLE | FFG 39 | 2.75 |
| USS HALYBURTON | FFG 40 | 2.75 |
| USS MCCLUSKY | FFG 41 | 2.75 |
| USS KLAKRING | FFG 42 | 2.75 |
| USS THACH | FFG 43 | 2.75 |
| USS DEWERT | FFG 45 | 2.75 |
| USS RENTZ | FFG 46 | 2.75 |
| USS NICHOLAS | FFG 47 | 2.75 |
| USS VANDEGRIFT | FFG 48 | 2.75 |
| USS ROBERT G. BRADLEY | FFG 49 | 2.75 |
| USS TAYLOR | FFG 50 | 2.75 |
| USS GARY | FFG 51 | 2.75 |
| USS CARR | FFG 52 | 2.75 |
| USS HAWES | FFG 53 | 2.75 |
| USS FORD | FFG 54 | 2.75 |
| USS ELROD | FFG 55 | 2.75 |
| USS SIMPSON | FFG 56 | 2.75 |
| USS REUBEN JAMES | FFG 57 | 2.75 |
| USS SAMUEL B. ROBERTS | FFG 58 | 2.75 |
| USS KAUFFMAN | FFG 59 | 2.75 |
| USS RODNEY M. DAVIS | FFG 60 | 2.75 |
| USS INGRAHAM | FFG 61 | 2.19 |

9. On LCAC-class amphibious vessels, full compliance with Rules 21(a), 21(b), and 22(b), and Annex I, section 2(a)(i), 72 COLREGS, cannot be obtained. Tables One and Two of section 706.2 provide the dimensions of closest possible compliance of LCAC-class amphibious vessels with the aforementioned rules. The following paragraph details the specific dimensions of closest possible compliance and the basis for certification by the Secretary of the Navy that full compliance with the aforementioned rules is not obtainable.

In LCAC-class amphibious vessels, there are permanent and temporary masts. The permanent masthead light is located 5.26 meters athwartship to port of centerline 5.49 meters above the hull. The temporary masthead light is located 3.98 meters athwartship to starboard of centerline, 4.16 meters in height above the hull. The temporary masthead light is displayed in lieu of the permanent masthead light only when LCAC-class amphibious vessels are operating with amphibious assault vessels. When operating in this mode, the sidelights are displayed at a height greater than three-quarters of the height of the temporary masthead light. The sidelights are located on top of the port and starboard deckhouses to permit the required unobstructed arcs of visibility and are 3.28 meters above the hull, resulting in a vertical separation between those lights and the temporary masthead light of 0.78 meters. Because of the minimal vertical separation between the sidelights and the temporary masthead light and the luminous intensity of the temporary light, the sidelights on these vessels may not be distinguishable by the naked eye at the 2-mile range required by Rule 22(b).

The arc of visibility of the temporary masthead light required by rule 21(a) may be obstructed at the following angles relative to the LCAC's heading, from 37.00 degrees thru 90.00 degrees up to a distance of 112.5 meters from the craft and from 276.75 degrees thru 277.25 degrees.

10. [Reserved]

11. On USS DOLPHIN (AGSS 555) the masthead light will be visible at a distance of 4.3 nautical miles and the sidelights will be visible at a distance of 2 nautical miles.

12.–13. [Reserved]

14. The following harbor tugs are equipped with a hinged mast. When the mast is in the lowered position as during a towing alongside or pushing operation, the two masthead

lights required by Rule 24(c), and the all around lights required by Rule 27(b)(i) will not be shown; however, an auxiliary masthead light not meeting with Annex I, section 2(a)(i) height requirement will be exhibited.

| Vessel No. | Distance in meters of aux. masthead light below minimum required height. Annex I, sec. 2(a)(i) |
|---|---|
| YTB 769 | 3.86 |
| YTB 771 | 3.89 |
| YTB 781 | 3.66 |
| YTB 789 | 3.30 |
| YTB 806 | 3.58 |
| YTB 812 | 4.04 |
| YTB 813 | 6.15 |
| YTB 820 | 3.30 |
| YTB 833 | 3.68 |
| YTB 835 | 4.04 |

15. Task (restricted maneuverability) lights on the following ships do not comply with Annex I, section 3(c).

| Vessel | Number | Horizontal distance from the fore and aft centerline of the vessel in the athwartship direction |
|---|---|---|
| USS ARLEIGH BURKE | DDG 51 | 1.85 meters |
| USS BARRY | DDG 52 | 1.94 meters |
| USS JOHN PAUL JONES | DDG 53 | 1.89 meters |
| USS CURTIS WILBUR | DDG 54 | 1.90 meters |
| USS STOUT | DDG 55 | 1.90 meters |
| USS JOHN S. MCCAIN | DDG 56 | 1.88 meters |
| USS MITSCHER | DDG 57 | 1.93 meters |
| USS LABOON | DDG 58 | 1.90 meters |
| USS RUSSELL | DDG 59 | 1.91 meters |
| USS PAUL HAMILTON | DDG 60 | 1.88 meters |
| USS RAMAGE | DDG 61 | 1.91 meters |
| USS FITZGERALD | DDG 62 | 1.90 meters |
| USS STETHEM | DDG 63 | 1.91 meters |
| USS CARNEY | DDG 64 | 1.90 meters |
| USS BENFOLD | DDG 65 | 1.90 meters |
| USS GONZALES | DDG 66 | 1.90 meters |
| USS COLE | DDG 67 | 1.90 meters |
| USS THE SULLIVANS | DDG 68 | 1.87 meters |
| USS MILIUS | DDG 69 | 1.93 meters |
| USS HOPPER | DDG 70 | 1.83 meters |
| USS ROSS | DDG 71 | 1.96 meters |
| USS MAHAN | DDG 72 | 1.90 meters |
| USS DECATUR | DDG 73 | 1.87 meters |
| USS MCFAUL | DDG 74 | 1.91 meters |
| USS DONALD COOK | DDG 75 | 1.90 meters |
| USS HIGGINS | DDG 76 | 1.92 meters |
| USS O'KANE | DDG 77 | 1.92 meters |
| USS PORTER | DDG 78 | 1.92 meters |
| USS OSCAR AUSTIN | DDG 79 | 1.89 meters |
| USS ROOSEVELT | DDG 80 | 1.90 meters |
| USS WINSTON S. CHURCHILL. | DDG 81 | 1.87 meters |
| USS HOWARD | DDG 83 | 1.88 meters |
| USS LASSEN | DDG 82 | 1.93 meters |
| USS BULKELEY | DDG 84 | 1.90 meters |
| USS MCCAMPBELL | DDG 85 | 1.85 meters |
| USS SHOUP | DDG 86 | 1.90 meters |
| USS MASON | DDG 87 | 1.87 meters |
| USS PREBLE | DDG 88 | 1.93 meters |
| USS MUSTIN | DDG 89 | 1.93 meters |
| USS CHAFEE | DDG 90 | 1.90 meters |
| USS PINCKNEY | DDG 91 | 1.87 meters |
| USS MOMSEN | DDG 92 | 1.88 meters |
| USS CHUNG-HOON | DDG 93 | 1.95 meters |
| USS NITZE | DDG 94 | 1.90 meters |
| USS JAMES E. WILLIAMS | DDG 95 | 1.89 meters |
| USS BAINBRIDGE | DDG 96 | 1.90 meters |
| USS HALSEY | DDG 97 | 1.93 meters |
| USS FORREST SHERMAN | DDG 98 | 1.87 meters |
| USS FARRAGUT | DDG 99 | 1.84 meters |
| USS KIDD | DDG 100 | 1.89 meters |
| USS GRIDLEY | DDG 101 | 1.86 meters |
| USS SAMPSON | DDG 102 | 1.88 meters |
| USS TRUXTUN | DDG 103 | 1.86 meters |
| USS STERETT | DDG 104 | 1.88 meters |
| USS DEWEY | DDG 105 | 1.85 meters |
| USS STOCKDALE | DDG 106 | 1.90 meters |
| USS GRAVELY | DDG 107 | 1.83 meters |
| USS WAYNE E. MEYER | DDG 108 | 1.84 meters |
| USS JASON DUNHAM | DDG 109 | 1.89 meters |
| USS WILLIAM P. LAWRENCE | DDG 110 | 1.86 meters |
| USS SPRUANCE | DDG 111 | 1.90 meters |
| USS MICHAEL MURPHY | DDG 112 | 1.90 meters |
| USS ZUMWALT | DDG 1000 | FWD Lower: [1] 0.31 meters FWD Middle: [1] 0.31 meters FWD Upper: [1] 0.29 meters AFT Lower: [1] 1.04 meters AFT Middle: [1] 1.05 meters AFT Upper: [1] 1.06 meters |
| USS INDEPENDENCE | LCS 2 | 1.31 meters |
| USS CORONADO | LCS 4 | 0.18 meters |
| USS JACKSON | LCS 6 | Upper—0.10 meters Middle—1.31 meters Lower—1.31 meters |
| USS MONTGOMERY | LCS 8 | 1.31 meters |

[1] On DDG 1000, the ship does not have a traditional mast. To achieve the effect of a "single, all-around light," multiple sets of task lights are embedded into each of the four faces of the ship's superstructure. Except when viewing the ship from dead ahead, dead astern or broadside, two deckhouse surfaces are visible; consequently, two sets of task lights are visible simultaneously. Because the deckhouse surfaces are sloped, unless the lights are viewed dead-on, the three task lights do not present as being in a vertical line.

16. On the following ships, the arc of visibility of the forward masthead light, required by rule 21(a), may be obstructed at the following angles relative to ship's heading:

| Vessel | Number | Obstruction angle relative ship's headings |
|---|---|---|
| USS ARLEIGH BURKE | DDG 51 | 100.00 thru 112.50° |
| USS JOHN PAUL JONES | DDG 53 | 103.29 thru 112.50° |
| USS CURTIS WILBUR | DDG 54 | 102.61 thru 112.50° |
| USS JOHN S. MCCAIN | DDG 56 | 102.53 thru 112.50° |
| USS MITSCHER | DDG 57 | 109.66 thru 112.50° |
| USS RUSSELL | DDG 59 | 103.66 thru 112.50° |
| USS RAMAGE | DDG 61 | 103.66 thru 112.50° |
| USS FITZGERALD | DDG 62 | 108.30 thru 112.50° |
| USS STETHEM | DDG 63 | 108.5 thru 112.50° |
| USS GONZALES | DDG 66 | 101.69 thru 112.50° |
| USS COLE | DDG 67 | 101.83 thru 112.50° |
| USS HOPPER | DDG 70 | 102.25 thru 112.50° |
| USS ROSS | DDG 71 | 104.05 thru 112.50° |
| USS MAHAN | DDG 72 | 102.11 thru 112.50° |
| USS MCFAUL | DDG 74 | 102.00 thru 112.50E° |
| USS DONALD COOK | DDG 75 | 108.78 thru 112.50° |
| USS HIGGINS | DDG 76 | 108.60 thru 112.50° |
| USS O'KANE | DDG 77 | 102.00 thru 112.50° |
| USS PORTER | DDG 78 | 108.43 thru 112.50° |
| USS OSCAR AUSTIN | DDG 79 | 107.94 thru 112.50° |
| USS ROOSEVELT | DDG 80 | 109.34 thru 112.50° |
| USS WINSTON S. CHURCHILL | DDG 81 | 103.72 thru 112.50° |
| USS LASSEN | DDG 82 | 109.11 thru 112.50° |
| USS HOWARD | DDG 83 | 109.11 thru 112.50° |
| USS BULKELEY | DDG 84 | 109.60 thru 112.50° |
| USS MCCAMPBELL | DDG 85 | 108.61 thru 112.50° |
| USS SHOUP | DDG 86 | 190.46 thru 112.50° |
| USS MASON | DDG 87 | 108.03 thru 112.50° |
| USS PREBLE | DDG 88 | 109.20 thru 112.50° |
| USS MUSTIN | DDG 89 | 107.83 thru 112.50° |
| USS CHAFEE | DDG 90 | 108.88 thru 112.50° |
| USS PINCKNEY | DDG 91 | 107.07 thru 112.50° |
| USS MOMSEN | DDG 92 | 108.10 thru 112.50° |
| USS CHUNG-HOON | DDG 93 | 108.38 thru 112.50° |
| USS NITZE | DDG 94 | 108.75 thru 112.50° |
| USS JAMES E. WILLIAMS | DDG 95 | 108.79 thru 112.50° |
| USS BAINBRIDGE | DDG 96 | 108.75 thru 112.50° |
| USS HALSEY | DDG 97 | 107.00 thru 112.50° |
| USS FORREST SHERMAN | DDG 98 | 105.59 thru 112.50° |
| USS FARRAGUT | DDG 99 | 109.12 thru 112.50° |
| USS KIDD | DDG 100 | 107.67 thru 112.50° |
| USS GRIDLEY | DDG 101 | 107.25 thru 112.50° |
| USS SAMPSON | DDG 102 | 107.27 thru 112.50° |
| USS TRUXTUN | DDG 103 | 110.02 thru 112.50° |
| USS STERETT | DDG 104 | 106.82 thru 112.50° |
| USS DEWEY | DDG 105 | 109.52 thru 112.50° |
| USS STOCKDALE | DDG 106 | 107.08 thru 112.50° |
| USS GRAVELY | DDG 107 | 108.66 thru 112.50° |
| USS WAYNE E. MEYER | DDG 108 | 106.71 thru 112.50° |
| USS JASON DUNHAM | DDG 109 | 107.09 thru 112.50° |
| USS WILLIAM P. LAWRENCE | DDG 110 | 107.86 thru 112.50° |
| USS SPRUANCE | DDG 111 | 107.48 thru 112.50° |
| USS MICHAEL MURPHY | DDG 112 | 109.60 thru 112.50° |
| USS INDEPENDENCE | LCS 2 | 71 thru 73°<br>76 thru 78°<br>287 thru 289° |
| USS CORONADO | LCS 4 | 71 thru 73°<br>76 thru 78°<br>287 thru 289° |
| USS JACKSON | LCS 6 | 71 thru 73°<br>76 thru 78°<br>287 thru 289° |
| USS MONTGOMERY | LCS 8 | 71 thru 73°<br>76 thru 78°<br>287 thru 289° |
| USV | 11MUCO601, 11MUCO602, 11MUC0603, 11MUC0604. | 271 thru 278° |

17. The second masthead light required by Rule 23(a)(ii) will not be displayed on the PC 1 Class.

18. On the following mine warfare type ships, the arc of visibility of the lower all-round minesweep lights required by Rule 27(f), may be obstructed through the following angles relative to the ship's heading:

| Vessel | Number | Obscured angles relative to ship's heading | |
|---|---|---|---|
| | | Port | STBD |
| OSPREY | MHC 51 | 59.5° to 78.3° | 281.7° to 300.5° |
| HERON | MHC 52 | 59.5° to 78.3° | 281.7° to 300.5° |
| PELICAN | MHC 53 | 59.5° to 78.3° | 281.7° to 300.5° |
| ROBIN | MHC 54 | 59.5° to 78.3° | 281.7° to 300.5° |
| ORIOLE | MHC 55 | 65.0° to 75.6° | 284.1° to 294.6° |
| CORMORANT | MHC 57 | 59.5° to 78.3° | 281.7° to 300.5° |
| BLACK HAWK | MHC 58 | 65.0° to 75.6° | 284.1° to 294.6° |
| USS FALCON | MHC 59 | 65.0° to 75.6° | 284.1° to 294.6° |
| CARDINAL | MHC 60 | 65.0° to 75.6° | 284.1° to 294.6° |

19. Sidelights on the following ships do not comply with Annex I, Section 2 (g):

| Vessel | Number | Distance in meters of sidelights above maximum allowed height. |
|---|---|---|
| USS ZUMWALT | DDG 1000 | 2.55 PORT<br>2.52 STBD |
| USS OGDEN | LPD 5 | 3.40 |
| USS DUBUQUE | LPD 8 | 1.2 |
| USS DENVER | LPD 9 | 4.9 |
| USS JUNEAU | LPD 10 | 1.6 |
| USS NASHVILLE | LPD 13 | 5.37 |

20. On the following ships, the all-round task lights (not under command or restricted in ability to maneuver) required by Rule 27(a) and (b) are unable to be mounted in a vertical line. Instead, the lights deviate from a vertical line by the indicated amount.

| Vessel | Number | Angle in degrees of task lights off vertical as viewed from directly ahead or astern |
|---|---|---|
| USS SAN ANTONIO | LPD 17 | 10 |
| USS NEW ORLEANS. | LPD 18 | 10 |
| USS MESA VERDE | LPD 19 | 10 |
| USS GREEN BAY | LPD 20 | 10 |
| USS NEW YORK | LPD 21 | 10 |
| USS SAN DIEGO | LPD 22 | 10 |
| USS ANCHORAGE | LPD 23 | 10 |
| USS ARLINGTON | LPD 24 | 10 |
| USS SOMERSET | LPD 25 | 10 |
| USS JOHN P MURTHA. | LPD 26 | 10 |

21. On the following ships, the forward towing light array and Restricted Maneuvering light array do not meet the vertical spacing requirements described by Annex I, paragraph 2(i)(i).

| Vessel | Forward towing light array, vertical spacing (meters) | Restricted maneuvering light array, vertical spacing (meters) |
|---|---|---|
| CFPM–1 through CFPM–2 | 1.00 | 1.00 |
| WT–1 through WT–4 | 1.00 | 1.00 |

22. On the following ships the vertical separation of the task lights do not meet the vertical spacing requirements described by Annex I, 2(i)(iii).

| Vessel | No. | Vertical separation of the task light array is not equally spaced, the separation between the middle and lower task light exceed the separation between the upper and middle light by |
|---|---|---|
| USS THEODORE ROOSEVELT. | CVN 71 | 0.18 meter |
| USS HARRY S. TRUMAN. | CVN 75 | 0.18 meter |
| USS ZUMWALT | DDG 1000 | FWD: 0.01 meter<br>AFT: 0.178 meter<br>PORT: 0.64 meter<br>STBD: 0.01 meter |
| USS FREEDOM | LCS 1 | 0.39 meter |
| USS FORT WORTH. | LCS 3 | 0.41 meter |
| USS PELELIU | LHA 5 | 0.18 meter |

23. On the following ships the verticality of the restricted maneuvering light array do not meet verticality requirements described in Rule 27(b)(i).

| Vessel | Number | Verticality of lights, when viewed directly from the port or starboard, the lower task light is out of alignment with the upper and middle task light in meters by: | Verticality of lights, when viewed directly from the bow or stern, the lower task light is with out of alignment the upper and middle task light in meters by: |
|---|---|---|---|
| USV | 11MUCO601 | 0.85 | |
| | 11MUCO602 | 0.85 | |
| | 11MUCO603 | 0.85 | |
| | 11MUCO604 | 0.85 | |

| Vessel | Number | Verticality of lights, when viewed directly from the port or starboard, the lower task light is out of alignment with the upper and middle task light in meters by: | Verticality of lights, when viewed directly from the bow or stern, the lower task light is with out of alignment the upper and middle task light in meters by: |
|---|---|---|---|
| USS FORT WORTH | LCS 3 | | 0.21 |

24. On the following ships the vertical separation of the Restricted Maneuvering Light Array lights do not meet requirements described in Annex I, paragraph 2(i)(ii).

| Vessel | Number | Restricted maneuvering light array, vertical spacing in meters |
|---|---|---|
| USV | 11MUCO601, 11MUCO602, 11MUC0603, 11MUC0604 | 0.49 |

25. On the following ships the masthead light is located 0.81 meters below the submarine identification lights and does not meet the requirement described by Annex I, 2(f)(i).

| Vessel | No. | Distance in meters of masthead light below the submarine identification lights |
|---|---|---|
| USS VIRGINIA | SSN 774 | 0.81 |
| USS TEXAS | SSN 775 | 0.81 |
| USS HAWAII | SSN 776 | 0.81 |
| USS NORTH CAROLINA | SSN 777 | 0.81 |
| USS NEW HAMPSHIRE | SSN 778 | 0.81 |
| USS NEW MEXICO | SSN 779 | 0.81 |
| USS MISSOURI | SSN 780 | 0.81 |
| USS CALIFORNIA | SSN 781 | 0.81 |
| USS MISSISSIPPI | SSN 782 | 0.81 |
| USS MINNESOTA | SSN 783 | 0.81 |
| USS NORTH DAKOTA | SSN 784 | 2.76 |
| USS JOHN WARNER | SSN 785 | 0.81 |
| USS ILLINOIS | SSN 786 | 0.81 |
| USS WASHINGTON | SSN 787 | 0.81 |

26. On the following ships the arc of visibility required by Rule 30(a) and Rule 21(e), for the forward and after lights may be obstructed through the following angles relative to the ship's heading due to the ship's sail.

| Vessel | No. | Obstruction angle relative to ship's heading | |
|---|---|---|---|
| | | Forward anchor light | Aft anchor light |
| USS VIRGINIA | SSN 774 | 172° to 188° | 359° to 1° |
| USS TEXAS | SSN 775 | 172° to 188° | 359° to 1° |
| USS HAWAII | SSN 776 | 172° to 188° | 359° to 1° |
| USS NORTH CAROLINA | SSN 777 | 172° to 188° | 359° to 1° |
| USS NEW HAMPSHIRE | SSN 778 | 172° to 188° | 359° to 1° |
| USS NEW MEXICO | SSN 779 | 172° to 188° | 359° to 1° |
| USS MISSOURI | SSN 780 | 172° to 188° | 359° to 1° |
| USS CALIFORNIA | SSN 781 | 172° to 188° | 359° to 1° |
| USS MISSISSIPPI | SSN 782 | 172° to 188° | 359° to 1° |
| USS MINNESOTA | SSN 783 | 172° to 188° | 359° to 1° |
| USS NORTH DAKOTA | SSN 784 | 172° to 188° | 359° to 1° |
| USS JOHN WARNER | SSN 785 | 172° to 188° | 359° to 1° |
| USS ILLINOIS | SSN 786 | 172° to 188° | 359° to 1° |
| USS WASHINGTON | SSN 787 | 172° to 188° | 359° to 1° |

TABLE FIVE

| Vessel | No. | Masthead lights not over all other lights and obstructions. annex I, sec. 2(f) | Forward masthead light not in forward quarter of ship. annex I, sec. 3(a) | After masthead light less than ½ ship's length aft of forward masthead light. annex I, sec. 3(a) | Percentage horizontal separation attained |
|---|---|---|---|---|---|
| USS FLINT | AE 32 | | | X | 98 |
| USS SHASTA | AE 33 | | | X | 98 |
| USS NIAGARA FALLS | AFS 3 | | | X | 97.9 |
| USS CONCORD | AFS 5 | | | X | 97 |
| USS SAN JOSE | AFS 7 | | | X | 98.1 |
| USS LA SALLE | AGF 3 | | | X | 54 |
| USS CORONADO | AGF 11 | | | X | 55 |
| USS TICONDEROGA | CG 47 | | X | X | 38.3 |
| USS YORKTOWN | CG 48 | | X | X | 38.0 |
| USS VINCENNES | CG 49 | | X | X | 38 |
| USS VALLEY FORGE | CG 50 | | X | X | 38 |
| USS THOMAS S. GATES | CG 51 | | X | X | 38 |
| USS BUNKER HILL | CG 52 | | X | X | 36.98 |
| USS MOBILE BAY | CG 53 | | X | X | 36.8 |
| USS ANTIETAM | CG 54 | | X | X | 36.8 |
| USS LEYTE GULF | CG 55 | | X | X | 36.9 |
| USS SAN JACINTO | CG 56 | | X | X | 38 |
| USS LAKE CHAMPLAIN | CG 57 | | X | X | 36.9 |
| USS PHILIPPINE SEA | CG 58 | | X | X | 36.8 |
| USS PRINCETON | CG 59 | | | | 36.9 |
| USS NORMANDY | CG 60 | | X | X | 38 |
| USS MONTEREY | CG 61 | | X | X | 38 |
| USS CHANCELLORSVILLE | CG 62 | | X | X | 36.8 |
| USS COWPENS | CG 63 | | X | X | 38 |
| USS GETTYSBURG | CG 64 | | X | X | 38 |
| USS CHOSIN | CG 65 | | X | X | 38 |
| USS HUE CITY | CG 66 | | X | X | 38 |
| USS SHILOH | CG 67 | | X | X | 38 |
| USS ANZIO | CG 68 | | X | X | 38 |
| USS VICKSBURG | CG 69 | N/A | X | X | 38 |
| USS LAKE ERIE | CG 70 | N/A | X | X | 38 |
| USS CAPE ST. GEORGE | CG 71 | N/A | X | X | 38 |
| USS VELLA GULF | CG 72 | N/A | X | X | 38 |
| USS PORT ROYAL | CG 73 | N/A | X | X | 38 |
| USS KITTY HAWK | CV 63 | | X | | |
| USS CONSTELLATION | CV 64 | | X | | |
| USS ENTERPRISE | CVN 65 | | X | | |
| USS NIMITZ | CVN 68 | | X | | |
| USS DWIGHT D. EISENHOWER | CVN 69 | | X | | |
| USS CARL VINSON | CVN 70 | | X | | |
| USS THEODORE ROOSEVELT | CVN 71 | | X | | |
| USS ABRAHAM LINCOLN | CVN 72 | | X | | |
| USS GEORGE WASHINGTON | CVN 73 | | X | | |
| USS JOHN C. STENNIS | CVN 74 | | X | | |
| USS HARRY S. TRUMAN | CVN 75 | | X | | |
| USS RONALD REAGAN | CVN 76 | | X | | |
| USS GEORGE H. W. BUSH | CVN 77 | | X | | |
| USS GERALD R. FORD | CVN 78 | | X | | |
| USS SPRUANCE | DD 963 | | X | X | 46 |
| USS PAUL F. FOSTER | DD 964 | | X | X | 46.4 |
| USS KINKAID | DD 965 | | X | X | 46.4 |
| USS HEWITT | DD 966 | | X | X | 46.4 |
| USS ELLIOT | DD 967 | | X | X | 46.4 |
| USS PETERSON | DD 969 | | X | X | 46.4 |
| USS ARTHUR W. RADFORD | DD 968 | | X | X | 46.4 |
| USS CARON | DD 970 | | X | X | 46.4 |
| USS DAVID R. RAY | DD 971 | | X | X | 46.4 |
| USS OLDENDORF | DD 972 | N/A | X | X | 45 |
| USS JOHN YOUNG | DD 973 | | X | X | 46 |
| USS O'BRIEN | DD 975 | | X | X | 46.1 |
| USS BRISCOE | DD 977 | | X | X | 46.4 |
| USS STUMP | DD 978 | | X | X | 46 |
| USS MOOSBRUGGER | DD 980 | | X | X | 46 |
| USS JOHN HANCOCK | DD 981 | | X | X | 46.4 |

TABLE FIVE—Continued

| Vessel | No. | Masthead lights not over all other lights and obstructions. annex I, sec. 2(f) | Forward masthead light not in forward quarter of ship. annex I, sec. 3(a) | After masthead light less than ½ ship's length aft of forward masthead light. annex I, sec. 3(a) | Percentage horizontal separation attained |
|---|---|---|---|---|---|
| USS NICHOLSON | DD 982 | ..... | X | X | 46.4 |
| USS CUSHING | DD 985 | ..... | X | X | 46 |
| USS O'BANNON | DD 987 | ..... | X | X | 46 |
| USS THORN | DD 988 | ..... | X | X | 46 |
| USS DEYO | DD 989 | ..... | X | X | 46 |
| USS FIFE | DD 991 | ..... | X | X | 48 |
| USS FLETCHER | DD 992 | ..... | X | X | 46 |
| USS HAYLER | DD 997 | N/A | X | X | 44 |
| USS ARLEIGH BURKE | DDG 51 | X | X | X | 19.0 |
| USS BARRY | DDG 52 | ..... | X | X | 14.7 |
| USS JOHN PAUL JONES | DDG 53 | X | X | X | 18.9 |
| USS CURTIS WILBUR | DDG 54 | X | X | X | 19.6 |
| USS STOUT | DDG 55 | ..... | X | X | 20.3 |
| USS JOHN S. McCAIN | DDG 56 | X | X | X | 19.8 |
| USS MITSCHER | DDG 57 | ..... | X | X | 12.4 |
| USS LABOON | DDG 58 | X | X | X | 20.3 |
| USS RUSSELL | DDG 59 | X | X | X | 20.6 |
| USS PAUL HAMILTON | DDG 60 | ..... | X | X | 21.2 |
| USS RAMAGE | DDG 61 | X | X | X | 19.2 |
| USS FITZGERALD | DDG 62 | X | X | X | 21.2 |
| USS STETHEM | DDG 63 | X | X | X | 20.9 |
| USS CARNEY | DDG 64 | ..... | X | X | 14.4 |
| USS BENFOLD | DDG 65 | X | X | X | 14.8 |
| USS GONZALES | DDG 66 | X | X | X | 20.4 |
| USS COLE | DDG 67 | X | X | X | 14.0 |
| USS The SULLIVANS | DDG 68 | ..... | X | X | 21.2 |
| USS MILIUS | DDG 69 | ..... | X | X | 14.7 |
| USS HOPPER | DDG 70 | X | X | X | 20.4 |
| USS ROSS | DDG 71 | X | X | X | 20.6 |
| USS MAHAN | DDG 72 | X | X | X | 13.9 |
| USS DECATUR | DDG 73 | N/A | X | X | 15.0 |
| USS MCFAUL | DDG 74 | X | X | X | 13.9 |
| USS DONALD COOK | DDG 75 | X | X | X | 14.8 |
| USS HIGGINS | DDG 76 | X | X | X | 14.8 |
| USS O'KANE | DDG 77 | X | X | X | 14.0 |
| USS PORTER | DDG 78 | X | X | X | 14.4 |
| USS OSCAR AUSTIN | DDG 79 | X | X | X | 14.7 |
| USS ROOSEVELT | DDG 80 | X | X | X | 14.6 |
| USS WINSTON S. CHURCHILL | DDG 81 | X | X | X | 14.0 |
| USS LASSEN | DDG 82 | X | X | X | 14.5 |
| USS HOWARD | DDG 83 | X | X | X | 14.6 |
| USS BULKELEY | DDG 84 | X | X | X | 14.7 |
| USS MCCAMPBELL | DDG 85 | X | X | X | 14.6 |
| USS SHOUP | DDG 86 | X | X | X | 14.6 |
| USS MASON | DDG 87 | X | X | X | 14.5 |
| USS PREBLE | DDG 88 | X | X | X | 14.7 |
| USS MUSTIN | DDG 89 | X | X | X | 14.4 |
| USS CHAFEE | DDG 90 | X | X | X | 14.6 |
| USS PINCKNEY | DDG 91 | X | X | X | 14.4 |
| USS MOMSEN | DDG 92 | X | X | X | 14.5 |
| USS CHUNG-HOON | DDG 93 | X | X | X | 14.4 |
| USS NITZE | DDG 94 | X | X | X | 14.5 |
| USS JAMES E. WILLIAMS | DDG 95 | X | X | X | 14.6 |
| USS BAINBRIDGE | DDG 96 | X | X | X | 14.5 |
| USS HALSEY | DDG 97 | X | X | X | 14.3 |
| USS FORREST SHERMAN | DDG 98 | X | X | X | 14.1. |
| USS FARRAGUT | DDG 99 | X | X | X | 14.5 |
| USS KIDD | DDG 100 | X | X | X | 14.4. |
| USS GRIDLEY | DDG 101 | X | X | X | 14.5. |
| USS SAMPSON | DDG 102 | X | X | X | 14.5 |
| USS TRUXTUN | DDG 103 | X | X | X | 14.6 |
| USS STERETT | DDG 104 | X | X | X | 14.5 |
| USS DEWEY | DDG 105 | X | X | X | 14.5 |
| USS STOCKDALE | DDG 106 | X | X | X | 14.5 |
| USS GRAVELY | DDG 107 | X | X | X | 14.6 |

TABLE FIVE—Continued

| Vessel | No. | Masthead lights not over all other lights and obstructions. annex I, sec. 2(f) | Forward masthead light not in forward quarter of ship. annex I, sec. 3(a) | After masthead light less than ½ ship's length aft of forward masthead light. annex I, sec. 3(a) | Percentage horizontal separation attained |
|---|---|---|---|---|---|
| USS WAYNE E. MEYER | DDG 108 | X | X | X | 14.5 |
| USS JASON DUNHAM | DDG 109 | X | X | X | 14.5 |
| USS WILLIAM P. LAWRENCE | DDG 110 | X | X | X | 14.7 |
| USS SPRUANCE | DDG 111 | X | X | X | 14.9 |
| USS MICHAEL MURPHY | DDG 112 | X | X | X | 14.5 |
| USS ZUMWALT | DDG 1000 | X | X | X | 76.94 |
| USS BLUE RIDGE | LCC 19 | N/A | N/A | X | 84 |
| USS MOUNT WHITNEY | LCC 20 | | | X | 84 |
| USS FREEDOM | LCS 1 | | X | X | 23 |
| USS INDEPENDENCE | LCS 2 | | X | X | 15.2 |
| USS FORT WORTH | LCS 3 | | X | X | 23 |
| USS CORONADO | LCS 4 | | X | X | 16.5 |
| USS MILWAUKEE | LCS 5 | | X | X | 22.3 |
| USS JACKSON | LCS 6 | | X | X | 18.6 |
| USS DETROIT | LCS 7 | | X | X | 23.0 |
| USS MONTGOMERY | LCS 8 | | X | X | 17.9 |
| USS TARAWA | LHA 1 | | X | X | 13 |
| USS SAIPAN | LHA 2 | | X | X | 10.2 |
| USS BELLEAU WOOD | LHA 3 | | X | X | 13 |
| USS NASSAU | LHA 4 | | X | X | 13 |
| USS PELELIU | LHA 5 | | X | X | 13 |
| USS AMERICA | LHA 6 | | X | X | 31.6 |
| USS WASP | LHD 1 | | X | X | 41 |
| USS ESSEX | LHD 2 | | X | X | 39 |
| USS KEARSARGE | LHD 3 | | X | X | 39.5 |
| USS BOXER | LHD 4 | | X | X | 39.3 |
| USS BATAAN | LHD 5 | | X | X | 39.7 |
| USS BONHOMME RICHARD | LHD 6 | | X | X | 39.8 |
| USS IWO JIMA | LHD 7 | | X | X | 41.5 |
| USS MAKIN ISLAND | LHD 8 | | X | X | 40.9 |
| USS AUSTIN | LPD 4 | | | X | 37 |
| USS OGDEN | LPD 5 | N/A | N/A | X | 56.6 |
| USS DULUTH | LPD 6 | N/A | N/A | X | 56.8 |
| USS CLEVELAND | LPD 7 | | | X | 49 |
| USS DUBUQUE | LPD 8 | | | X | 57 |
| USS DENVER | LPD 9 | N/A | N/A | X | 54.7 |
| USS JUNEAU | LPD 10 | N/A | N/A | X | 54.8 |
| USS SHREVEPORT | LPD 12 | | | X | 49 |
| USS NASHVILLE | LPD 13 | | N/A | X | 54.7 |
| USS TRENTON | LPD 14 | | | X | 41 |
| USS PONCE | LPD 15 | | | X | 55 |
| USS SAN ANTONIO | LPD 17 | | | X | 71.0 |
| USS NEW ORLEANS | LPD 18 | | | X | 70.7 |
| USS MESA VERDE | LPD 19 | | | X | 70.9 |
| USS GREENBAY | LPD 20 | | | X | 70.9 |
| USS NEW YORK | LPD 21 | | | X | 71.0 |
| USS SAN DIEGO | LPD 22 | | | X | 71 |
| USS ANCHORAGE | LPD 23 | | | X | 71 |
| USS ARLINGTON | LPD 24 | | | X | 71 |
| USS SOMERSET | LPD 25 | | | X | 71 |
| USS JOHN P MURTHA | LPD 26 | | | X | 71 |
| USS TRIPOLI | LPH 10 | | X | X | 12 |
| USS ANCHORAGE | LSD 36 | | | X | 46 |
| USS PORTLAND | LSD 37 | | | X | 46 |
| USS MOUNT VERNON | LSD 39 | | | X | 46 |
| USS WHIDBEY ISLAND | LSD 41 | | | X | 65 |
| USS GERMANTOWN | LSD 42 | | | X | 65 |
| USS FORT McHENRY | LSD 43 | | | X | 64 |
| USS GUNSTON HALL | LSD 44 | | | X | 64 |
| USS COMSTOCK | LSD 46 | | | X | 64 |
| USS TORTUGA | LSD 46 | | | X | 64 |
| USS RUSHMORE | LSD 47 | | | X | 64 |
| USS ASHLAND | LSD 48 | | | X | 63.6 |
| USS HARPERS FERRY | LSD 49 | | | X | 63.9 |
| USS CARTER HALL | LSD 50 | | | X | 63.9 |

TABLE FIVE—Continued

| Vessel | No. | Masthead lights not over all other lights and obstructions. annex I, sec. 2(f) | Forward masthead light not in forward quarter of ship. annex I, sec. 3(a) | After masthead light less than ½ ship's length aft of forward masthead light. annex I, sec. 3(a) | Percentage horizontal separation attained |
|---|---|---|---|---|---|
| USS OAK HILL | LSD 51 | | | X | 63.9 |
| USS PEARL HARBOR | LSD 52 | | | X | 63.9 |
| USS FREDERICK | LST 1184 | | | X | 90 |
| USS CAYUGA | LST 1186 | | | X | 89 |
| USS SAN BERNARDINO | LST 1189 | | | X | 89 |
| USS LA MOURE COUNTY | LST 1194 | | | X | 88 |
| USS HARLAN COUNTY | LST 1196 | | | X | 89 |
| USS BARNSTABLE COUNTY | LST 1197 | | | X | 88 |
| USS AVENGER | MCM 1 | | | X | 63 |
| USS DEFENDER | MCM 2 | | | X | 62 |
| USS SENTRY | MCM 3 | | | X | 62 |
| USS CHAMPION | MCM 4 | | | X | 64 |
| USS GUARDIAN | MCM 5 | | | X | 63 |
| USS DEVASTATOR | MCM 6 | | | X | 64 |
| USS PATRIOT | MCM 7 | | | X | 64 |
| USS SCOUT | MCM 8 | | | X | 64 |
| USS PIONEER | MCM 9 | | | | 64 |
| USS WARRIOR | MCM 10 | | | X | 64 |
| USS GLADIATOR | MCM 11 | | | X | 64 |
| USS ARDENT | MCM 12 | | | X | 64 |
| USS DEXTROUS | MCM 13 | | | X | 64 |
| USS CHIEF | MCM 14 | | | X | 64 |
| USS INCHON | MCS 12 | | X | X | 11 |
| USNS KILAUEA | T-AE 26 | | | X | 94.1 |

[42 FR 36434, July 14, 1977]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 706.2, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at *www.fdsys.gov*.

## § 706.3 Exemptions by the Secretary of the Navy under Executive Order 11964.

The Secretary of the Navy hereby exempts, in accordance with Rule 38 of the International Regulations for Preventing Collisions at Sea, 1972, the vessels and classes of vessels listed in this section, from full compliance with the Regulations, where an exemption is allowed by, and for the periods specified in, Rule 38. The Secretary of the Navy further finds that the vessels and classes of vessels listed have had their keels laid or are in corresponding stages of construction before July 15, 1977, and that such vessels and classes of vessels comply with the requirements of the International Regulations for Preventing Collisions at Sea, 1960.

TABLE ONE

[The following vessels and classes of vessels, less than 150 meters in length, are permanently exempted pursuant to rule 38(d)(i) from repositioning of masthead lights resulting from the prescriptions of Annex I, section 3(a)]

| Vessel or class |
|---|
| USNS HAYES (T-AG-195) |
| T-AGOR 3 Class |
| T-AGS 26 Class |
| T-AOG 77 Class |
| T-ATF 166 Class |
| DDG 2 Class |
| FF 1040 Class |
| FF 1052 Class |
| FFG 7 Class |
| LCU 1610 Class |
| LCU 1648 Class |
| USS DOLPHIN (AGSS 555) |
| SSN 594 Class |
| SSN 637 Class |
| SSN 688 Class |
| SSBN 726 Class |
| YFU (Ex-LCU 1466 Class) |

[42 FR 36434, July 14, 1977, as amended at 55 FR 27818, July 9, 1990; 60 FR 22506, May 8, 1995; 65 FR 79742, Dec. 20, 2000]

# PART 707—SPECIAL RULES WITH RESPECT TO ADDITIONAL STATION AND SIGNAL LIGHTS

Sec.
707.1 Purpose of regulations.
707.2 Man overboard lights.
707.3 Yard arm signaling lights.
707.4 Aircraft warning lights.
707.5 Underway replenishment contour lights.
707.6 Minesweeping station keeping lights.
707.7 Submarine identification light.
707.8 Special operations lights.
707.9 Convoy operations stern light.
707.10 Wake illumination light.
707.11 Flight operations lights.
707.12 Amphibious operations lights.

AUTHORITY: 33 U.S.C. 182 and 1606, E.O. 11964.

SOURCE: 42 FR 61596, Dec. 6, 1977, unless otherwise noted.

## § 707.1 Purpose of regulations.

All ships are warned that when U.S. naval vessels are met in international and inland waters, some of the navigational lights displayed by them may be special lights for naval purposes. When used, they may be displayed simultaneously with the ordinary navigational lights required by the International Regulations for Preventing Collisions at Sea, 1972, or the Inland Navigational Rules. The lights are located and characterized in such a fashion that, as far as possible, they cannot be mistaken for any light authorized by either set of rules. This part publishes the special rules with respect to these additional station and signal lights promulgated by the Secretary of the Navy for vessels of the Navy.

## § 707.2 Man overboard lights.

Naval vessels may display, as a means of indicating man overboard, two pulsating, all round red lights in the vertical line located on a mast from where they can best be seen.

## § 707.3 Yard arm signaling lights.

Naval vessels may display, as a means of visual signaling, white all round lights at the ends of the yard arms. These lights will flash in varying sequences to convey the intended signal.

## § 707.4 Aircraft warning lights.

Naval vessels may display, as a means of indicating the presence of an obstruction to low flying aircraft, one all round red light on each obstruction.

## § 707.5 Underway replenishment contour lights.

Naval vessels may display, as a means of outlining the contour of the delivery ship during nighttime underway replenishment operations, either red or blue lights at delivery-ship-deck-edge extremities.

[42 FR 61596, Dec. 6, 1977, as amended at 44 FR 27991, May 14, 1979]

## § 707.6 Minesweeping station keeping lights.

Naval vessels engaged in minesweeping operations may display, as an aid in maintaining prescribed intervals and bearings, two white lights in a vertical line visible from 070° through 290° relative.

## § 707.7 Submarine identification light.

Submarines may display, as a distinctive means of identification, an intermittent flashing amber beacon with a sequence of operation of one flash per second for three (3) seconds followed by a three (3) second off-period. The light will be located where it can best be seen, as near as practicable, all around the horizon. It shall not be located less than two (2) feet above or below the masthead lights.

[48 FR 4284, Jan. 31, 1983]

## § 707.8 Special operations lights.

Naval vessels may dispay, as a means of coordinating certain special operations, a revolving beam colored red, green, or amber, located on either yard arm or the mast platform from where it can best be seen all around the horizon.

## § 707.9 Convoy operations stern light.

Naval vessels may display, during periods of convoy operations, a blue light located near the stern with the same characteristics as, but in lieu of, the normal white stern light.

### § 707.10 Wake illumination light.

Naval vessels may display a white spot light located near the stern to illuminate the wake.

### § 707.11 Flight operations lights.

Naval vessels engaged in night flight operations may display various arrangements of light systems containing combinations of different colored lights as a means of assisting in the launch and recovery of aircraft and enhancing flight safety. These light systems will be located at various points on the vessels, depending on the vessel type and the nature of the flight operations being conducted.

### § 707.12 Amphibious operations lights.

Naval vessels engaged in night amphibious operations may display various arrangements of light systems containing combinations of different colored lights as a means of assisting in the launch and recovery of assault craft and enhancing the safety of the amphibious operation. These light systems will be located at various points on the vessel, depending on the vessel type and the nature of the amphibious operations being conducted.

# SUBCHAPTER C—PERSONNEL

## PART 716—DEATH GRATUITY

### Subpart A—Provisions Applicable to the Navy and the Marine Corps

Sec.
716.1 Principal rule.
716.2 Definitions.
716.3 Special situations.
716.4 Eligible survivors.
716.5 Delegation of authority.
716.6 Death occurring after active service.
716.7 Payment of the death gratuity.
716.8 Payments excluded.
716.9 Erroneous payment.

### Subpart B—Provisions Applicable to the Navy

716.10 Procedures.

### Subpart C—Provisions Applicable to the Marine Corps

716.11 Procedures.

AUTHORITY: Sec. 301, 80 Stat. 379, 1(32)(A), 72 Stat. 1452; 5 U.S.C. 301, 10 U.S.C. 1475–1480, Pub. L. 89–554.

SOURCE: 24 FR 7523, Sept. 18, 1959, unless otherwise noted.

## Subpart A—Provisions Applicable to the Navy and the Marine Corps

### § 716.1 Principal rule.

Under title 10 U.S.C., section 1475, the Secretary of the Navy shall have a death gratuity paid immediately upon official notification of the death of a member of the naval service who dies while on active duty, active duty for training, or inactive duty training. The death gratuity shall equal six months' basic pay (plus special, incentive, and proficiency pay) at the rate to which the deceased member was entitled on the date of his death but shall not be less than $800 nor more than $3,000. A kind of special pay included is the 25% increase in pay to which a member serving on a naval vessel in foreign waters is entitled under 10 U.S.C. 5540 when retained beyond expiration of enlistment because such retention was essential to the public interest.

### § 716.2 Definitions.

For the purposes of this part, terms are defined as follows:

(a) *Member of the naval service*. This term includes:

(1) A person appointed, enlisted, or inducted into the Regular Navy, Regular Marine Corps, Naval Reserve or Marine Corps Reserve, and includes a midshipman at the United States Naval Academy;

(2) Enlisted members of the Fleet Reserve and Fleet Marine Corps Reserve and retired members;

(3) A member of the Naval Reserve Officers Training Corps when ordered to annual training duty for 14 days or more, and while performing authorized travel to and from that duty; and

(4) Any person while en route to or from, or at a place for final acceptance for entry upon active duty in the naval service who has been ordered or directed to go to that place, and who has been provisionally accepted for such duty.

(b) *Active duty*. This term is defined as (1) full-time duty performed by a member of the naval service, other than active duty for training, or (2) as a midshipman at the United States Naval Academy, and (3) authorized travel to or from such duty or service.

(c) *Active duty for training*. Such term means:

(1) Full-time duty performed by a member of a Reserve component of the naval service for training purposes;

(2) Annual training duty performed for a period of 14 days or more by a member of the Naval Reserve Officers Training Corps; and

(3) Authorized travel to or from such duty.

(d) *Inactive-duty training*. Such term is defined as any of the training, instruction, appropriate duties, or equivalent training, instruction, duty, appropriate duties, or hazardous duty performed with or without compensation by a member of a Reserve component prescribed by the Secretary of the Navy pursuant to sections 206, 309, and

1002 of title 37 U.S.C. or any other provision of law. The term does not include:

(1) Work or study performed by a member of a Reserve component in connection with correspondence courses in which he is enrolled, or

(2) Attendance at an educational institution in an inactive status under the sponsorship of the Navy or Marine Corps.

[24 FR 7523, Sept. 16, 1959, as amended at 37 FR 6471, Mar. 30, 1972; 44 FR 25647, May 2, 1979]

### § 716.3 Special situations.

(a) *Service without pay*. Any member of a Reserve component who performs active duty, active duty for training, or inactive-duty training without pay shall, for purposes of a death gratuity payment, be considered as being entitled to basic pay, including special pay and incentive pay if appropriate, while performing such duties.

(b) *Death occurring while traveling to and from active duty for training and inactive-duty training*. Any member of a Reserve component who, when authorized or required by competent authority, assumes an obligation to perform active duty for training or inactive-duty training and who dies from an injury incurred on or after January 1, 1957 while proceeding directly to or directly from such active duty for training or inactive-duty training, shall be deemed to have been on active duty for training or inactive-duty training as the case may be.

(c) *Hospitalization*. A member of a Reserve component who suffers disability while on active duty, active duty for training, or inactive-duty training, and who is placed in a new status while he is receiving hospitalization or medical care (including out-patient care) for such disability, shall be deemed, for purposes of death gratuity payment to have continued on active duty, active duty for training, or inactive-duty training, as the case may be, in the event of his death in such status.

(d) *Discharge or release from a period of active duty*. A person who is discharged or released from active duty (other than for training) is considered to continue on that duty during the period of time required for that person to go to his home by the most direct route. That period may not end before midnight of the day on which the member is discharged or released.

[24 FR 7523, Sept. 18, 1959, as amended at 25 FR 7792, Aug. 16, 1960]

### § 716.4 Eligible survivors.

(a) The death gratuity shall be paid to or for the living survivor or survivors of the deceased member first listed below:

(1) The lawful spouse. (For purpose of this part, a man or woman shall be considered to be the spouse if legally married to the member at the time of the member's death.)

(2) His children (without regard to their age or marital status) in equal shares.

(3) Parent(s), brother(s) or sister(s) or any combination of them, when designated by the deceased member.

(4) Undesignated parents in equal shares.

(5) Undesignated brothers and sisters in equal shares. In paragraphs (a)(2), (3) and (4), respectively, of this section, the terms ''child'' and ''parent'' have the meanings assigned to them by title 10 U.S.C. section 1477 and the term ''parents'' includes persons in loco parentis as indicated by that section. The terms ''brother'' and ''sister'' in paragraphs (a) (3) and (5) of this section include brothers and sisters of the half blood and those through adoption.

(b) *Designation of payee by service member*. Where the service member has designated a beneficiary and is not survived by a spouse, child, or children, the payment will be made to the specific person designated by him provided the designee falls within the class of beneficiaries permitted as set forth in paragraph (a)(3) of this section. If more than one person is so designated on the Record of Emergency, payment will be made in equal shares unless the member designated a proportionate share to each beneficiary. Frivolous designations, such as one per centum to a particular beneficiary, should not be made.

(c) *Death of survivor prior to receipt of gratuity*. (1) If a survivor dies before receiving payment, or if a designated beneficiary predeceases the member

(and there is no other designated beneficiary) such amount shall be paid to the then living survivor or survivors listed first under paragraph (a) of this section.

(2) In case one of the beneficiaries (parents or brothers or sisters) designated by a member, pursuant to paragraph (a)(3) of this section, to receive death gratuity payment dies prior to the member's death, or after his death but prior to the time payment is made, the share which would have been paid to the deceased designee may be paid to the other person or persons designated.

[24 FR 7523, Sept. 18, 1959, as amended at 37 FR 6471, Mar. 30, 1972]

### §716.5 Delegation of authority.

(a) Pursuant to the authority contained in title 10 U.S.C., section 1479, as to deaths described in section 1475 thereof, the Secretary of the Navy has delegated to commanding officers of naval commands, installations, or districts, with respect to naval personnel, and to Marine Corps commanding generals and officers in command of regiments, battalions or equivalent units and of separate or detached commands who have custody of service records, with respect to Marine Corps personnel, authority to certify for the payment of death gratuity the lawful spouse or designated beneficiary(ies) of the deceased service member who was residing with him at or near his place of duty at the time of his death, except in cases in which a doubt may exist as to the identity of the legal beneficiary. Disbursing officers are authorized to make payment of the death gratuity upon receipt of certification from the Commanding Officer.

(b) The Secretary of the Navy has delegated authority to the Chief of Naval Personnel as to naval personnel, and to the Commandant of the Marine Corps (Code MSPA–1) as to Marine Corps personnel, the authority to certify the beneficiary(ies) for receipt of payment of death gratuity in all appropriate cases of payment of death gratuity under the Servicemen's and Veterans' Survivor Benefits Act (now reenacted in 10 U.S.C. 1475–1480), including, but not limited to:

(1) Cases in which a doubt may exist as to the identity of the legal beneficiary; and

(2) Cases in which the widow or designated beneficiary(ies) of the deceased service member was not residing with him at or near his place of duty at the time of his death.

[24 FR 7523, Sept. 18, 1959, as amended at 44 FR 25647, May 2, 1979]

### §716.6 Death occurring after active service.

(a) Under title 10 U.S.C., section 1476, the death gratuity will be paid in any case where a member or former member dies on or after January 1, 1957, during the 120-day period which begins on the day following the date of his discharge or release from active duty, active duty for training, on inactive duty training, if the Administrator of Veterans' Affairs determines that:

(1) The decedent was discharged or released, as the case may be, from the service under conditions other than dishonorable from the last period of the duty or training performed; and

(2) Death resulted from disease or injury incurred or aggravated while on such active duty or active duty for training; or while performing authorized travel to or from such duty; or

(3) Death resulted from injury incurred or aggravated while on such inactive-duty training or while traveling directly to or from such duty or training.

(b) For purposes of computing the amount of the death gratuity in such instances, the deceased person shall be deemed to be entitled on the date of his death to basic pay (plus any special, incentive and proficiency pay) at the rate to which he was entitled on the last day he performed such active duty, active duty for training, or inactive duty training. A kind of special pay included is a pay increase under 10 U.S.C. 5540; see §716.1.

(c) The Department of the Navy is precluded from making payment of the death gratuity pending receipt of the determinations described in paragraph (a) of this section. In view of this, commands should insure that the medical records and reports of investigations by fact-finding bodies be submitted to the Navy Department at the earliest

possible date. The Veterans' Administration is promptly notified of all deaths of this category reported, and upon the request of that agency all pertinent data is forwarded.

### § 716.7 Payment of the death gratuity.

(a) *Claim certification and voucher for the death gratuity payment.* The Comptroller General of the United States has approved DD Form 397 as the form to be used hereafter for claim certification and voucher for the death gratuity payment.

(b) *Active duty deaths (Navy).* To effect immediate payment of death gratuity the following actions will be taken:

(1) The commanding officer will ascertain that the deceased member died while on active duty, active duty for training, or inactive-duty training, and will obtain the name, relationship, and address of the eligible survivor from the Service Record of the deceased. The Dependency Application/Record of Emergency Data (NAVPERS 1070/602) or Record of Emergency Data (DD Form 93), will normally contain this information. In addition, in the case of enlisted personnel, the Application for Dependents Allowance (BAQ [Basic Allowance for Quarters]), NAVPERS Form 668, may serve as a source of corroboration. He will, with the cooperation of the disbursing officer, initiate preparation of a Claim Certification and Voucher for Death Gratuity Payment, DD Form 397, in original and five copies, completing blocks 5 through 14 inclusive, and the administrative statement in block 18. The administrative statement in block 18 will be signed by the commanding officer or acting commanding officer.

(2) The disbursing officer will, upon receipt of the DD Form 397, draw a check to the order of the eligible survivor named in block 5, complete blocks 2, 3, 4, and the check payment data portion of block 18.

(3) Under arrangements made by the commanding officer, the check and the original and one copy of the voucher, DD Form 397, will be delivered to the payee. The payee will be required to complete block 15, sign in block 17a, and have two witnesses complete block 17 on the original voucher at the time the check is delivered. Under no circumstances will the check be delivered to the payee until this action has been accomplished. The payee will retain the copy of the voucher, DD Form 397, and the signed original voucher will be returned by hand to the disbursing officer by the person designated to deliver the check.

[24 FR 7523, Sept. 18, 1959, as amended at 44 FR 25647, May 2, 1979]

### § 716.8 Payments excluded.

(a) No payment shall be made if the deceased member suffered death as a result of lawful punishment for a crime or for a military or naval offense, except when death was so inflicted by any hostile force with which the Armed Forces of the United States have engaged in armed conflict.

(b) No payment will be made to a survivor implicated in the homicide of the deceased in the absence of evidence clearly absolving such survivor of any felonious intent.

(c) Unless the laws of the place where a minor beneficiary resides provide that such a payment would grant a valid acquittance of the Government's obligation to make a payment of death gratuity to or for a minor, a death gratuity of more than $1,000 may not be paid in whole or in part to a parent as natural guardian of a minor or to any other person who is not a legal guardian appointed by the civil court to manage the minor's financial affairs.

[24 FR 7523, Sept. 18, 1959, as amended at 37 FR 6471, Mar. 30, 1972; 44 FR 25647, May 2, 1979]

### § 716.9 Erroneous payment.

Where through administrative mistake of fact or law, payment of the death gratuity is made to a person clearly not entitled thereto, and it is equally clear that another person is entitled to the death gratuity, the Chief of Naval Personnel (Pers–732) or the Commandant of the Marine Corps (Code MSPA–1), as appropriate, will certify payment to the proper payee, irrespective of recovery of the erroneous payment. On the other hand, where a payment of the death gratuity has been made to an individual on the basis of representations of record made

by the deceased member as to his marital and dependency status, and the Government otherwise has no information which would give rise to doubt that such status is as represented, the payment is not to be regarded as ''erroneous.'' The Government has a good acquittance in such cases even though it may subsequently develop that the payee is not the proper statutory payee of the gratuity and no second payment is authorized.

[24 FR 7523, Sept. 18, 1959, as amended at 44 FR 25647, May 2, 1979]

## Subpart B—Provisions Applicable to the Navy

### § 716.10 Procedures.

(a) *Action by commanding officers.* See § 716.7(b)—(1) *Immediate payment—Eligible beneficiary residing with deceased member.* Commanding officers, in order to expedite the payment of the death gratuity, will, upon official notification of death, ascertain the duty status of the deceased, and determine the eligibility of the spouse or designated beneficiary who was residing with the deceased member on or near his duty station at the time of his death. The services of a staff or district legal officer will be utilized as required. Every effort should be made to effect prompt payment (within 24 hours, if possible). It is the intent that determinations of entitlement by commands in the field will be confined largely to spouses and parents designated by the service member who were living with him at the time of his death.

(2) *Questionable cases.* If entitlement to the death gratuity payment is questionable after seeking advice of the staff or district legal officer, such case will be forwarded promptly to the Chief of Naval Personnel (Pers–732) with a brief statement relative to the facts which raised the issue of doubt. Every effort will be made to expedite action by a review of the official records of the decedent in the Bureau of Naval Personnel and the Family Allowance Activity at Cleveland, Ohio. Those cases wherein the service member was in a deserter status, absent without leave, or in the custody of civil authorities at the time of death, wherein guardianship must be provided for the protection of the decedent's children, or wherein a technicality exists which makes immediate certification legally unsound, will be considered questionable.

(3) *Exception.* Where the entitlement of the survivor who is living with the deceased at the time of his death is questionable and such survivor is in dire financial circumstances, the Chief of Naval Personnel (Pers-G23) shall be requested by message to make an adjudication of entitlement. If it is determined that the survivor is entitled to the payment, the commanding officer will be authorized by message to execute DD Form 397.

(b) *Action by Casualty Assistance Calls Program (CACP) officers; Potential beneficiary not residing with member*—(1) *Widow(er).* The CACP officer, on his or her initial visit to a widow(er), determines, propriety permitting, whether there is an urgent need for financial assistance. If there is an urgent need for financial assistance, the CACP officer should obtain DD Form 397 from any military disbursing office and, on his or her second visit to the widow(er), have him or her sign it and obtain the signatures of two witnesses on the form. It should be noted that the following procedure is confined to cases in which the decedent's eligible survivor for the death gratuity is a widow(er), and efforts to effect immediate payment in accordance with the intent of the governing statute are appropriate. In such cases, the CACP officer, upon learning that a widow(er), not residing with his or her spouse at or near the spouse's duty station, is in urgent need of financial assistance, shall advise the Chief of Naval Personnel (Pers-732) of the need by message. The CACP officer shall send a copy of this message to the decedent's duty station, if known. Upon receipt, the disbursing officer will furnish the Navy Finance Center, Cleveland, Ohio 44199, with the decedent's basic monthly pay [plus any special (see § 716.1), incentive, and proficiency pay] in the event the pay account has not been forwarded previously to that center sufficiently early to have reached there. The CACP officer shall also send a copy of his message to the Navy Finance Center

with the request that payment of the death gratuity be made upon receipt of the certification of beneficiary entitlement from the Chief of Naval Personnel (Pers-732).

(2) *Navy Relief*. In cases where there is immediate need prior to receipt of the death gratuity, the Navy Relief Society will be contacted by the Casualty Assistance Calls Program officer.

(c) *Action by the Chief of Naval Personnel*. (1) In all cases where death gratuity is not authorized to be paid locally and in cases where authority exists to pay locally but entitlement is questionable (see paragraph (a)(2) of this section), the Chief of Naval Personnel (Pers–732) will expedite adjudication of claims. As indicated in paragraph (b)(1) of this section CACP officers will refer cases of urgent financial need to the Chief of Naval Personnel (Pers–732) by message for action.

(2) If a minor is entitled to a death gratuity under 10 U.S.C. 1477 not exceeding $1,000, such death gratuity may be paid to the father or mother as natural guardian on behalf of the minor, provided a legally appointed guardian has not been appointed, upon substantiation by a sworn (notarized) statement of the natural guardian:

(i) That no legal guardian has been appointed and that such an appointment is not contemplated;

(ii) The relationship of the natural guardian to the minor;

(iii) That the minor is in the actual custody of the natural guardian;

(iv) That an amount paid to the natural guardian will be held for, or applied to, the use and benefit of the minor.

If the death gratuity to which a minor is entitled exceeds $1,000, the appointment of a legal guardian on behalf of the minor is requested. Certification of the minor eligible to receive the death gratuity is made by the Chief of Naval Personnel (Pers–732) and payment is effected by the Navy Finance Center, Cleveland, OH 44199;

(d) *Cross-servicing procedure*. Payment of the death gratuity may be made by a disbursing officer who is maintaining the pay record of a member of another service, provided the command to which the member is attached and which maintains his service record is in the immediate vicinity and certificates the beneficiary eligible to receive payment on the proper voucher (DD Form 397). Otherwise the pay record will be sent to the Army Finance Center, Air Force Finance Center, Commandant of the Marine Corps (Code CDB), the Navy Finance Center, of the Commandant, U.S. Coast Guard, as appropriate.

[24 FR 7523, Sept. 18, 1959, as amended at 44 FR 25647, May 2, 1979; 45 FR 43165, June 26, 1980]

## Subpart C—Provisions Applicable to the Marine Corps

### § 716.11 Procedures.

(a) *Action*. Commanding officers will direct immediate payment of the gratuity where the deceased member's spouse was, in fact, residing with the member on or near the station of duty at the time of the member's death while on active duty, active duty for training, or inactive-duty training. Every effort should be made to effect such payment promptly (within 24 hours, if possible). In cases where the eligible survivor residing with the member on or near the duty station is other than a spouse, commanding officers may direct the payment of death gratuity when the case can be properly determined, and an urgent need exists for immediate payment. Proper determination is imperative.

(b) *Qualifications*. (1) Where any doubt exists as to the legal recipient of the gratuity, the case will be referred to the Commandant of the Marine Corps (Code MSPA–1) for determination.

(2) [Reserved]

[24 FR 7523, Sept. 18, 1959, as amended at 44 FR 25648, May 2, 1979]

# PART 718—MISSING PERSONS ACT

Sec.

718.1 General provisions.
718.2 Allotments.
718.3 Transportation of dependents.
718.4 Delegations.

### § 718.1 General provisions.

(a) Under the provisions of the Missing Persons Act, as amended, a finding

of presumptive death is made by the Secretary of the Navy when a survey of all available sources of information indicates beyond doubt that the presumption of continuance of life has been overcome. When a finding of presumptive death is made, a man's pay accounts are closed as of the day following the expiration of the 12 months' absence or a longer period when justified, and the various benefits, such as the six months' gratuity, become payable. A finding of presumptive death concerning an officer or enlisted man of the Navy means simply that as of the date thereof he is for the purposes of Naval administration no longer alive. It does not mean that death occurred on that or on any other certain date.

(b) Findings of presumptive death are never made when the ''missing'' status has not continued for at least 12 months. Whenever, subsequent to the expiration of the 12th month, cumulative or other evidence establishes by its preponderance that a ''missing'' person is no longer alive, a prompt finding of presumptive death will be made. Also, such a finding will be made whenever justified by the lapse of time beyond the 12 months' absence without specific information being received.

(c) The Secretary of the Navy, or such subordinate as he may designate, has authority to make all determinations necessary in the administration of the act, and for the purposes of the act determinations so made shall be conclusive as to death or finding or death, as to any other status dealt with by the act, and as to any essential date including that upon which evidence or information is received in the Department. The determination of the Secretary of the Navy, or of such subordinate as he may designate, is conclusive as to whether information received concerning any person is to be construed and acted upon as an official report of death. When any information deemed to establish conclusively the death of any person is received in the department, action shall be taken thereon as an official report of death, notwithstanding any prior action relating to death or other status of such person. Under the foregoing provisions a determination of death is made prior to the expiration of 12 months when the evidence received is considered to establish conclusively the fact of death and settlement of accounts is made to the date established as the date of receipt of evidence on which the fact of death is established.

(Sec. 301, 80 Stat. 379; 5 U.S.C. 301. Interpret or apply 80 Stat. 112–117, 248–254; 5 U.S.C. 5561–5568, 37 U.S.C. 551–558)

[17 FR 5390, June 14, 1952]

### § 718.2 Allotments.

During such period as a person is in a status of missing, missing in action, interned in a foreign country, captured by a hostile force, beleaguered by a hostile force, or besieged by a hostile force, allotments from his pay and allowances may be initiated, continued, discontinued, increased, decreased, suspended or resumed in behalf of his dependents and for such other purposes as are justified by the circumstances and are in the interests of the person or of the Government.

(R.S. 161, sec. 5031, 70A Stat. 278, as amended; 5 U.S.C. 22, 10 U.S.C. 5031, 50 U.S.C. App. 1013–1015)

[26 FR 12658, Dec. 29, 1961]

### § 718.3 Transportation of dependents.

(a) Whenever a person in active service is officially reported as dead, injured, (Only when the anticipated period of hospitalization or treatment is expected to be of prolonged duration as shown by a statement of the commanding officer at the receiving hospital), missing for a period of 29 days or more, interned in a foreign country, or captured by a hostile force, his dependents, household and personal effects including one privately owned motor vehicle may be moved (including packing, crating, drayage, temporary storage, and unpacking of household and personal effects) to the official residence of record for any such person or to the residence of his dependent, next of kin, or other person entitled to receive custody of the effects in accordance with the provisions of paragraph (d) of this section; or, upon application by such dependent, next of kin, heir or legal representative, or other person determined in accordance with paragraph (d) of this section, or upon the

person's application if injured, to such location as may have been determined in advance or as may be subsequently approved, except that a reasonable relationship must exist between the condition and circumstances of the dependents and the destination to which transportation is requested. In the case of a person in an injured status, transportation of his dependents or household and personal effects may be authorized only when the hospitalization or treatment of the injured person will be of prolonged duration. Payment in money of amounts equal to such commercial transportation costs or a monetary allowance in lieu of transportation as authorized by law for the whole or such part of the travel for which transportation in kind is not furnished, may be authorized, when such travel has been completed.

(b) When the Secretary of the Navy or his designee determines that an emergency exists and that such sale would be in the best interests of the Government, he may provide for the disposition of the motor vehicles and other bulky items of such household and personal effects of the person by public or private sale. Prior to any such sale, and if practicable, a reasonable effort shall be made to determine the desires of the interested persons. The net proceeds received from such sale shall be transmitted to the owner, next of kin, heir or legal representative, or other person determined in accordance with paragraph (d) of this section; but if there be no such persons or if such persons or their addresses are not ascertainable within one year from the date of sale, the net proceeds may be covered into the Treasury as miscellaneous receipts.

(c) The Secretary of the Navy or his designee is authorized to store the household and personal effects of the person until such time as proper disposition can be made. The cost of such storage and transportation, including packing, crating, drayage, temporary storage, and unpacking of household and personal effects, will be charged against appropriations currently available.

(d) The following provisions apply to the determination of the ''other person'' or persons referred to in paragraphs (a) and (b) of this section who may receive the effects or proceeds.

(1) If no duly appointed legal representative of the owner of the personal effects makes demand upon the Department of the Navy for the effects, the determination by naval authorities as to the next of kin or heirs of the owner of the personal effects may be made on the basis of the following:

(i) Personnel records; or

(ii) Other documents applicable to the case; or

(iii) Title 10 U.S.C., section 2771, to the extent that it prescribes an order of precedence among next of kin or heirs, namely, the widow or widower of the owner; if no widow or widower, then the child or children of the owner and descendants of deceased children, by representation; if none of the above, the parents of the owner or the survivor of them; or if none of the above, other persons determined to be eligible under the laws of the domicile of the owner.

(2) Such determination should be regarded as administrative rather than legal, as the determination does not vest title to effects or proceeds in the next of kin, heirs, or legal representative to whom the effects are delivered. Therefore, delivery of the personal effects to other than the owner will be made subject to the following advisory note which should be written on a copy of the inventory or in a letter:

> Delivery of the personal effects into the custody of other than the owner thereof, by the Department of the Navy, does not in any way vest title to the effects in the recipient. Delivery of the effects to the recipient is made so that distribution may be made in accordance with the laws of the state in which the owner of the effects was legally domiciled or to restore the effects to the owner in the event of his return from a missing status.

(3) When it is impracticable to divide the personal effects of a person into equal shares, and two or more persons within a class, as provided in 10 U.S.C. section 2771, are entitled to receive the effects but cannot agree among themselves as to which one of them shall receive the effects, then all of the effects will be retained by either the Personal Effects Distribution Center at Norfolk,

VA, or the Personal Effects Distribution Center at Oakland, CA, for a period of two years from the date of death of the member. At the expiration of the two-year period such effects will be sold.

(R.S. 161, sec. 5031, 70A Stat. 278, as amended; 5 U.S.C. 22, 10 U.S.C. 5031, 50 U.S.C. App. 1013–1015; Pub. L. 89–554, 80 Stat. 379 (5 U.S.C. 301)

[26 FR 12659, Dec. 29, 1961, as amended at 37 FR 6472, Mar. 30, 1972; 44 FR 22456, Apr. 16, 1979]

### § 718.4 Delegations.

The Secretary of the Navy has delegated to the Director, Personal Services Division, Bureau of Naval Personnel with respect to personnel in the Navy, and to the Head, Personal Affairs Branch Manpower Department (Code MSPA), United States Marine Corps, with respect to personnel in the Marine Corps, authority to make all determinations to administer the act.

(Pub. L. 89–554, 80 stat. 379 (5 U.S.C. 301))

[17 FR 5391, June 14, 1952, as amended at 19 FR 7959, Dec. 2, 1954; 44 FR 22456, Apr. 16, 1979]

# PART 719—REGULATIONS SUPPLEMENTING THE MANUAL FOR COURTS-MARTIAL

## Subparts A–B [Reserved]

## Subpart C—Trial Matters

Sec.

719.112 Authority to grant immunity from prosecution.
719.113–719.114 [Reserved]
719.115 Release of information pertaining to accused persons; spectators at judicial sessions.

## Subpart D [Reserved]

## Subpart E—Miscellaneous Matters

719.138 Fees of civilian witnesses.
719.139–719.141 [Reserved]
719.142 Suspension of counsel.
719.143 Petition for new trial under 10 U.S.C. 873.
719.144 Application for relief under 10 U.S.C. 869, in cases which have been finally reviewed.
719.145–719.150 [Reserved]
719.151 Furnishing of advice and counsel to accused placed in pretrial confinement.
719.155 Application under 10 U.S.C. 874(b) for the substitution of an administrative form of discharge for a punitive discharge or dismissal.

AUTHORITY: 3 U.S.C. 301; 5 U.S.C. 301; 10 U.S.C. 815, 5013, 5148; 32 CFR 700.206 and 700.1202.

## Subparts A–B [Reserved]

## Subpart C—Trial Matters

### § 719.112 Authority to grant immunity from prosecution.

(a) *General.* In certain cases involving more than one participant, the interests of justice may make it advisable to grant immunity, either transactional or testimonial, to one or more of the participants in the offense in consideration for their testifying for the Government or the defense in the investigation and/or the trial of the principal offender. Transactional immunity, as that term is used in this section, shall mean immunity from prosecution for any offense or offenses to which the compelled testimony relates. Testimonial immunity, as that term is used in this section, shall mean immunity from the use, in aid of future prosecution, of testimony or other information compelled under an order to testify (or any information directly or indirectly derived from such testimony or other information). The authority to grant either transactional or testimonial immunity to a witness is reserved to officers exercising general court-martial jurisdiction. This authority may be exercised in any case whether or not formal charges have been preferred and whether or not the matter has been referred for trial. The approval of the Attorney General of the United States on certain orders to testify may be required, as outlined below.

(b) *Procedure.* The written recommendation that a certain witness be granted either transactional or testimonial immunity in consideration for testimony deemed essential to the Government or to the defense shall be forwarded to an officer competent to convene a general court-martial for the witness for whom immunity is requested, *i.e.*, any officer exercising general court-martial jurisdiction. Such

recommendation will be forwarded by the trial counsel or defense counsel in cases referred for trial, the pretrial investigating officer conducting an investigation upon preferred charges, the counsel or recorder of any other fact-finding body, or the investigator when no charges have yet been preferred. The recommendation shall state in detail why the testimony of the witness is deemed so essential or material that the interests of justice cannot be served without the grant of immunity. The officer exercising general court-martial jurisdiction shall act upon such request after referring it to his staff judge advocate for consideration and advice. If approved, a copy of the written grant of immunity must be served upon the accused or his defense counsel within a reasonable time before the witness testifies. Additionally, if any witness is expected to testify in response to a promise of leniency, the terms of the promise of leniency must be reduced to writing and served upon the accused or his defense counsel in the same manner as a grant of immunity.

(c) *Civilian witnesses.* Pursuant to 18 U.S.C. 6002 and 6004, if the testimony or other information of a civilian witness at a court-martial may be necessary in the public interest, and if the civilian witness has refused or is likely to refuse to testify or provide other information on the basis of a privilege against self-incrimination, then the approval of the Attorney General of the United States, or his designee, must be obtained prior to the execution or issuance of an order to testify to such civilian witness. The cognizant officer exercising general court-martial jurisdiction may obtain the approval of the Attorney General in such a circumstance by directing a message or letter requesting the assistance of the Judge Advocate General (Code 20) in the form prescribed in paragraph (e) of this section.

(d) *Cases involving national security.* In all cases involving national security or foreign relations of the United States, the cognizant officer exercising general court-martial jurisdiction shall forward any proposed grant of immunity to the Judge Advocate General for the purpose of consultation with the Department of Justice. See section 0126 of the Manual of the Judge Advocate General regarding relations between the Departments of Defense and Justice. The cognizant officer exercising general court-martial jurisdiction may obtain approval by the Attorney General of a proposed grant of immunity by directing a letter requesting the assistance of the Judge Advocate General (Code 20) in the form prescribed in paragraph (e) of this section.

(e) *Content of immunity requests.* In all cases in which approval of the Attorney General of the United States is required prior to the issuance of a grant of immunity, whether under paragraph (c) or (d) of this section, the cognizant officer exercising general court-martial jurisdiction shall forward by message or letter the proposed order to testify and grant of immunity to the Judge Advocate General (Code 20). The order to testify should be substantially in the form set forth in appendix A-1-i(3) of the Manual of the Judge Advocate General. Requests for assistance shall be in writing, should allow at least three weeks for consideration, and must contain the following information:

(1) Name, citation, or other identifying information of the proceeding in which the order is to be used.

(2) Name of the witness for whom the immunity is requested.

(3) Name of the employer or company with which a witness is associated or the military unit or organization to which a witness is assigned.

(4) Date and place of birth, if known, of the witness.

(5) FBI or local police file number, if any, and if known.

(6) Whether any State or Federal charges are pending against the witness and the nature of the charges.

(7) Whether the witness is currently incarcerated, under what conditions, and for what length of time.

(8) A brief resume of the background of the investigation or proceeding before the agency or department.

(9) A concise statement of the reasons for the request, including:

(i) What testimony the witness is expected to give;

(ii) How this testimony will serve the public interest;

(iii) Whether the witness:

(A) Has invoked the privilege against self-incrimination; or

(B) Is likely to invoke the privilege;

(iv) If paragraph (e)(9)(iii)(B) of this section is applicable, then why it is anticipated that the prospective witness will invoke the privilege.

(10) An estimate as to whether the witness is likely to testify in the event immunity is granted.

(f) *Post-testimony procedure*. After a witness immunized in accordance with paragraphs (c) and (d) of this section has testified, the following information should be provided to the United States Department of Justice, Criminal Division, Immunity Unit, Washington, DC 20530, via the Judge Advocate General (Code 20).

(1) Name, citation, or other identifying information, of the proceeding in which the order was requested.

(2) Date of the examination of the witness.

(3) Name and residence address of the witness.

(4) Whether the witness invoked the privilege.

(5) Whether the immunity order was used.

(6) Whether the witness testified pursuant to the order.

(7) If the witness refused to comply with the order, whether contempt proceedings were instituted, or are contemplated, and the result of the contempt proceeding, if concluded. A verbatim transcript of the witness' testimony, authenticated by the military judge, should be provided to the Judge Advocate General at the conclusion of the trial. No testimony or other information given by a civilian witness pursuant to such an order to testify (or any information directly or indirectly derived from such testimony or other information) may be used against him in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

(g) *Review*. Under some circumstances, the officer granting immunity to a witness may be disqualified from taking reviewing action on the record of the trial before which the witness granted immunity testified. A successor in command not participating in the grant of immunity would not be so disqualified under those circumstances.

(h) *Form of grant*. In any case in which a military witness is granted transactional immunity, the general court-martial convening authority should execute a written grant, substantially in the form set forth in appendix section A-1-i(1) of the Manual of the Judge Advocate General. In any case in which a military witness is granted testimonial immunity, the general court-martial convening authority should execute a written grant substantially in the form set forth in appendix section A-1-i(2) of the Manual of the Judge Advocate General.

[56 FR 57803, Nov. 14, 1991]

### §§ 719.113–719.114 [Reserved]

### § 719.115 Release of information pertaining to accused persons; spectators at judicial sessions.

(a) *Release of information*—(1) *General*. There are valid reasons for making information available to the public concerning the administration of military justice. The task of striking a fair balance among the protection of individuals accused of offenses, improper or unwarranted publicity pertaining to their cases, public understanding of the problems of controlling misconduct in the military service, and the workings of military justice requires the exercise of sound judgment by those responsible for administering military justice and by representatives of the press and other news media. At the heart of all guidelines pertaining to the furnishing of information concerning an accused or the allegations against him is the mandate that no statements or other information shall be furnished to news media for the purpose of influencing the outcome of an accused's trial, or which could reasonably be expected to have such an effect.

(2) *Applicability of regulations*. These regulations apply to all persons who may obtain information as the result of duties performed in connection with the processing of accused persons, the investigation of suspected offenses, the imposition of nonjudicial punishment, or the trial of persons by court-martial. These regulations are applicable

from the time of apprehension, the preferral of charges, or the commencement of an investigation directed to make recommendations concerning disciplinary action, until the imposition of nonjudicial punishment, completion of trial (court-martial sessions) or disposition of the case without trial. These regulations also prescribe guidelines for the release or dissemination of information to public news agencies, to other public news media, or to other persons or agencies for unofficial purposes.

(3) *Release of information.* (i) As a general matter, release of information pertaining to accused persons should not be initiated by persons in the naval service. Information of this nature should be released only upon specific request therefor, and, subject to the following guidelines, should not exceed the scope of the inquiry concerned.

(ii) Except in unusual circumstances, information which is subject to release under the regulation should be released by the cognizant public affairs officer; requests for information received from representatives of news media should be referred to the public affairs office for action. When an individual is suspected or accused of an offense, care should be taken to indicate that the individual is alleged to have committed or is suspected or accused of having committed an offense, as distinguished from stating or implying that the accused has committed the offense or offenses.

(4) *Information subject to release.* On inquiry, the following information concerning a person accused or suspected of an offense or offenses may generally be released except as provided in paragraph (6) of this section:

(i) The accused's name, grade, age, unit, regularly assigned duties, duty station, and sex.

(ii) The substance of the offenses of which the individual is accused or suspected.

(iii) The identity of the victim of any alleged or suspected offense, except the victim of a sexual offense.

(iv) The identity of the apprehending and investigative agency, and the identity of accused's counsel, if any.

(v) The factual circumstances immediately surrounding the apprehension of the accused, including the time and place of apprehension, resistance, pursuit, and use of weapons.

(vi) The type and place of custody, if any.

(vii) Information which has become a part of the record of proceedings of the court-martial in open session.

(viii) The scheduling of any stage in the judicial process.

(ix) The denial by the accused of any offense or offenses of which he may be accused or suspected (when release of such information is approved by the counsel of the accused).

(5) *Prohibited information.* The following information concerning a person accused or suspected of an offense or offenses generally may not be released, except as provided in paragraph (a)(6) of this section.

(i) Subjective opinions, observations, or comments concerning the accused's character, demeanor at any time (except as authorized in paragraph (4)(v) of this section), or guilt of the offense or offenses involved.

(ii) The prior criminal record (including other apprehensions, charges or trials) or the character or reputation of the accused.

(iii) The existence or contents of any confession, admission, statement, or alibi given by the accused, or the refusal or failure of the accused to make any statement.

(iv) The performance of any examination or test, such as polygraph examinations, chemical tests, ballistics tests, etc., or the refusal or the failure of the accused to submit to an examination or test.

(v) The identity, testimony, or credibility of possible witnesses, except as authorized in paragraph (4)(iii), of this section.

(vi) The possibility of a plea of guilty to any offense charged or to a lesser offense and any negotiation or any offer to negotiate respecting a plea of guilty.

(vii) References to confidential sources or investigative techniques or procedures.

(viii) Any other matter when there is a reasonable likelihood that the dissemination of such matter will affect the deliberations of an investigative body or the findings or sentence of a court-martial or otherwise prejudice

the due administration of military justice either before, during, or after trial.

(6) *Exceptional cases.* The provisions of this section are not intended to restrict the release of information designed to enlist public assistance in apprehending an accused or suspect who is a fugitive from justice or to warn the public of any danger that a fugitive accused or suspect may present. Further, since the purpose of this section is to prescribe generally applicable guidelines, there may be exceptional circumstances which warrant the release of information prohibited under paragraph (a)(5) of this section or the nonrelease of information permitted under paragraph (a)(4) of this section. Attention should be given to the Secretary of the Navy instructions implementing the Freedom of Information Act (5720.42 series) and the Privacy Act (5211.5C series). Consultation with the command judge advocate, if one is assigned, or with the cognizant Naval Legal Service Office concerning interpretation and application of these instructions is encouraged.

(b) *Spectators.* (1) The sessions of courts-martial shall be open to the public, which includes members of both the military and civilian communities. In order to maintain the dignity and decorum of the proceedings or for other good cause, the military judge may reasonably limit the number of spectators in, and the means of access to, the courtroom, exclude specific persons from the courtroom, and close a session. Video and audio recording and taking of photographs, except for the purpose of preparing the record of trial, in the courtroom during the proceedings and radio or television broadcasting of proceedings from the courtroom shall not be permitted. The military judge may, as a matter of discretion, permit contemporaneous closed-circuit video or audio transmission to permit viewing or hearing by an accused removed from the courtroom or by spectators when courtroom facilities are inadequate to accommodate a reasonable number of spectators.

(2) *At pretrial investigations.* Consistent with Rules for Courts-Martial 405(h)(3), Manual for Courts-Martial, the Convening Authority or investigating officer may direct that all or part of an Article 32 investigation under 10 U.S.C. 832 be held in closed session and that all persons not connected with the hearing be excluded therefrom. The decision to exclude spectators may be based on the need to protect classified information, to prevent disclosure of matters that will be inadmissible in evidence at a subsequent trial by Courts-Martial and are of such a nature as to interfere with a fair trial by an impartial tribunal, or consistent with appellate case law, for a reason deemed appropriate by the commander ordering the investigation or the investigating officer. The reasons for closing an Article 32 investigation, and any objections thereto, shall be memorialized and included as an attachment to the report of investigation. Ordinarily, the proceedings of a pretrial investigation should be open to spectators. In cases dealing with classified information, the investigating officer will ensure that any part of a pretrial investigation (e.g., rights advisement) that does not involve classified information will remain open to spectators.

[38 FR 5997, Mar. 6, 1973, as amended at 47 FR 49644, Nov. 2, 1982; 50 FR 23800, June 6, 1985; 69 FR 20540, Apr. 16, 2004]

## Subpart D [Reserved]

## Subpart E—Miscellaneous Matters

### §719.138 Fees of civilian witnesses.

(a) *Method of Payment.* The fees and mileage of a civilian witness shall be paid by the disbursing officer of the command of a convening authority or appointing authority or by the disbursing officer at or near the place where the tribunal sits or where a deposition is taken when such disbursing officer is presented a properly completed public voucher for such fees and mileage, signed by the witness and certified by one of the following:

(1) Trial counsel or assistant trial counsel of the court-martial;

(2) Summary court officer;

(3) Counsel for the court in a court of inquiry;

(4) Recorder or junior member of a board to redress injuries to property, or

(5) Military or civil officer before whom a deposition is taken.

The public voucher must be accompanied by a subpoena or invitational orders (Joint Travel Regulations, vol. 2, chap. 6), and by a certified copy of the order appointing the court-martial, court of inquiry, or investigation. If, however, a deposition is taken before charges are referred for trial, the fees and mileage of the witness concerned shall be paid by the disbursing officer at or near the place where the deposition is taken upon presentation of a public voucher, properly completed as hereinbefore prescribed, and accompanied by an order from the officer who authorized the taking of the deposition, subscribed by him and directing the disbursing officer to pay to the witness the fees and mileage supported by the public voucher. When the civilian witness testifies outside the United States, its territories and possessions, the public voucher must be accompanied by a certified copy of the order appointing the court-martial, court of inquiry, or investigation, and by an order from the convening authority or appointing authority, subscribed by him and directing the disbursing officer to pay to the witness the fees and mileage supported by the public voucher.

(b) *Obtaining money for advance tender or payment.* Upon written request by one of the officers listed in paragraph (a) of this section, the disbursing officer under the command of the convening or appointing authority, or the disbursing officer nearest the place where the witness is found, will, at once, provide any of the persons listed in paragraph (a) of this section, or any other officer or person designated for the purpose, the required amount of money to be tendered or paid to the witness for mileage and fees for one day of attendance. The person so receiving the money for the purpose named shall furnish the disbursing officer concerned with a proper receipt.

(c) *Reimbursement.* If an officer charged with serving a subpoena pays from his personal funds the necessary fees and mileage to a witness, taking a receipt therefor, he is entitled to reimbursement upon submitting to the disbursing officer such receipt, together with a certificate of the appropriate person named in paragraph (a) of this section, to the effect that the payment was necessary.

(d) *Certificate of person before whom deposition is taken.* The certificate of the person named in paragraph (a) of this section, before whom the witness gave his deposition, will be evidence of the fact and period of attendance of the witness and the place from which summoned.

(e) *Payment of accrued fees.* The witness may be paid accrued fees at his request at any time during the period of attendance. The disbursing officer will make such interim payment(s) upon receipt of properly executed certificate(s). Upon his discharge from attendance, the witness will be paid, upon the execution of a certificate, a final amount covering unpaid fees and travel, including an amount for return travel. Payment for return travel will be made upon the basis of the actual fees and mileage allowed for travel to the court, or place designated for taking a deposition.

(f) *Computation.* Travel expenses shall be determined on the basis of the shortest usually traveled route in accordance with official schedules. Reasonable allowance will be made for unavoidable detention.

(g) *Nontransferability of accounts.* Accounts of civilian witnesses may not be transferred or assigned.

(h) *Signatures.* Signatures of witnesses signed by mark must be witnessed by two persons.

(i) *Rates for civilian witnesses prescribed by law*—(1) *Civilian witnesses not in Government employ.* A civilian not in Government employ, who is compelled or required to testify as a witness before a Naval tribunal at a specified place or to appear at a place where his deposition is to be taken for use before a court or fact-finding body, will receive fees, subsistence, and mileage as provided in 28 U.S.C. 1821. Witness and subsistence fees are not prorated. Instead any fractional part of a calendar day expended in attendance or qualifying for subsistence entitles the witness to payment for a full day. Further, nothing in this paragraph shall be construed as authorizing the payment of attendance fees to witnesses for:

(i) Attendance or travel which is not performed either as a direct result of being compelled to testify pursuant to a subpoena or as a direct result of invitational orders; or

(ii) For travel which is performed prior to being duly summoned as a witness; or

(iii) For travel returning to their places of residence if the travel from their places of residence does not qualify for payment under this paragraph.

(2) *Civilian witnesses in Government employ*. When summoned as a witness, a civilian in the employ of the Government shall be paid as authorized by Joint Travel Regulations.

(j) *Supplemental construction of section*. Nothing in this paragraph shall be construed as permitting or requiring the payment of fees to those witnesses not requested or whose testimony is determined not to meet the standards of relevancy and materiality set forth in accordance with MCM, 1984, R.C.M. 703.

(k) *Expert witnesses*. (1) The convening authority will authorize the employment of an expert witness and will fix the limit of compensation to be paid such expert on the basis of the normal compensation paid by United States attorneys for attendance of a witness of such standing in United States courts in the area involved. Information concerning such normal compensation may be obtained from the nearest officer exercising general court-martial jurisdiction having a judge advocate assigned in other than an additional duty, temporary duty, or temporary additional duty capacity. Convening authorities at overseas commands will adhere to fees paid such witnesses in the Hawaiian area and may obtain information as to the limit of such fees from the Commander, Naval Base, Pearl Harbor. See paragraph (l) of this section for fees payable to foreign nationals.

(2) The provisions of paragraph (i) of this section are applicable to expert witnesses. However, the expert witness fee prescribed by the convening authority will be paid in lieu of ordinary attendance fees on those days the witness is required to attend the court.

(3) An expert witness employed in strict accordance with MCM, 1984, R.C.M. 703(d), may be paid compensation at the rate prescribed in advance by the official empowered to authorize his employment (11 Comp. Gen. 504). In the absence of such authorization, no fees other than ordinary witness fees may be paid for the employment of an individual as an expert witness. After an expert witness has testified pursuant to such employment, the certificate of one of the officers listed in subsection a above, when presented to the disbursing officer, shall also enclose a certified copy of the authorization of the convening authority.

(l) Payment of witness fees to foreign nationals: Officers exercising general court-martial jurisdiction in areas other than a State of the United States shall establish rates of compensation for payment of foreign nationals who testify as witnesses, including expert witnesses, at courts-martial convened in such areas.

[38 FR 5997, Mar. 6, 1973, as amended at 47 FR 49644, Nov. 2, 1982; 50 FR 23801, June 6, 1985]

### §§ 719.139–719.141 [Reserved]

### § 719.142 Suspension of counsel.

(a) *Report of Allegations of Misconduct or Disability*. When information comes to the attention of a member of a court-martial, a military judge, trial or defense counsel, staff judge advocate, member of the Navy-Marine Corps Court of Military Review or other directly interested or concerned party that a judge advocate or civilian who is acting or is about to act as counsel before a proceeding conducted under the UCMJ or MCM is or has been unable to discharge properly all the duties of his or her position by reason of mental or physical disability or has been engaged in professional or personal misconduct of such a serious nature as to demonstrate that he or she is lacking in integrity or is failing to meet the ethical standards of the profession or is otherwise unworthy or unqualified to perform the duties of a judge advocate or attorney, such information should be reported to the commanding officer of that judge advocate or, in the case of civilian counsel, to the officer exercising general court-martial jurisdiction over the command

convening the proceedings or to the Judge Advocate General.

(b) *Form of report.* The report shall:

(1) Be in writing, under oath or affirmation, and made and signed by the individual reporting the information.

(2) State that the individual reporting the information has personal knowledge or belief or has otherwise received reliable information indicating that:

(i) The counsel is, or has been, unable to discharge properly all the duties of his or her office by reason of mental or physical disability; or

(ii) The counsel is or has been engaged in professional or personal misconduct of such a serious nature as to demonstrate that he or she is lacking in integrity or is failing to meet the ethical standards of the profession; or

(iii) The counsel is unworthy or unqualified to perform his or her duties;

(3) Set forth the grounds of the allegation together with all relevant facts; and

(4) Be forwarded to the appropriate authority as set forth in paragraph (a).

(c) *Consideration of the Report*—(1) *Action by the Commanding Officer of a judge advocate.* Upon receipt of the report, the commanding officer:

(i) Shall dismiss any report relating to the performance of a judge advocate more properly appealed under law or any report that is frivolous, unfounded, or vague and return it to the reporting individual;

(ii) May make further inquiry into the report at his or her discretion to determine the merits of the report. The commanding officer may appoint an officer to investigate informally the allegations of the report to determine whether further action is warranted. Any officer so appointed should be a judge advocate senior in rank to the judge advocate being investigated;

(iii) May take appropriate action to address and dispose of the matter being mindful of such measures as warning, counseling, caution, instruction, proceedings in contempt, therapy, and other punitive or administrative action; or

(iv) Shall, if the commanding officer is of the opinion that evidence of disability or professional or personal misconduct exists, and that remedial measures short of suspension or decertification are not appropriate or will not be effective, forward the original complaint, a written report of the inquiry or investigation, all other relevant information, and his or her comments and recommendations to the officer in the chain of command exercising general court-martial authority.

(2) *Action by officer exercising general court-martial authority.* (i) Upon receipt of a report of an allegation of misconduct or disability of a counsel, the officer exercising general court-martial convening authority:

(A) May take the action authorized by subsections (c)(1)(i), (ii) or (iii); or

(B) Shall, if he or she considers that evidence of disability or professional or personal misconduct exists and that other remedial measures short of suspension or decertification are not appropriate or will not be effective, appoint a board of officers to investigate the matter and to report its findings and its recommendations. This board shall be comprised of at least three officers, each an Article 27(b), Uniform Code of Military Justice, certified judge advocate. If practicable, each of the officers of the board should be senior to the judge advocate under investigation. If the counsel is a member of the Marine Corps, a majority of the members of the board should be Marine Corps judge advocates. The senior officer of the board shall cause notice to be given to the counsel, judge advocate or civilian (respondent), informing him or her of the misconduct or other disqualification alleged and affording him or her the opportunity to appear before the board for a hearing. The respondent shall be permitted at least ten (10) days' notice prior to the hearing. Failure to appear on a set date after notice shall constitute waiver of appearance, absent good cause shown. The respondent shall be generally afforded the rights of a party as set out in section 0304 of this Manual, except that, in the event the judge advocate respondent wishes to have military counsel appointed, he or she shall not have the right to select or identify a particular military counsel. A civilian respondent may not be represented by military counsel, but may be represented by civilian counsel at no expense to the

Government. Upon ascertaining the relevant facts after notice and hearing, a written report of the findings and recommendations of the board shall be made to the officer who convened the board. In all cases, a written copy of the board's findings and recommendations shall be provided to the respondent. The respondent shall be given an opportunity to comment on the report in writing.

(ii) Upon receipt of the report of the board of investigation, the officer exercising general court-martial authority shall:

(A) Return the report to the board for further investigation, if the investigation is determined to be incomplete; or

(B) Forward the report of the board of investigation to the Judge Advocate General together with comments and recommendations concerning suspension of the counsel involved.

(3) *Action by the Judge Advocate General.* (i) Upon receipt of a report of an allegation of misconduct or disability of a counsel, the Judge Advocate General:

(A) May take the action authorized by subsections (c)(1)(i), (ii), or (iii);

(B) May appoint a board of officers for investigation and hearing in accordance with subsections (c)(2)(i)(B) or

(C) May request the officer exercising general court-martial jurisdiction over the command of the respondent (if judge advocate counsel) or over the proceedings (if civilian counsel) to take the matter for investigation and hearing in accordance with subsection (c)(2)(i)(B).

(ii) Upon receipt of the report of the investigating board, the Judge Advocate General:

(A) May determine whether the respondent is to be suspended or decertified and, if so, whether for a stated term or indefinitely;

(B) May determine that the findings of the board do not warrant further action; or

(C) May return the report to the sending officer with appropriate instructions for further inquiry or action. The Judge Advocate General may, sua sponte, or upon petition of the respondent, modify or revoke any prior order of suspension or dismissal of a report. Further, if the Judge Advocate General suspends counsel, the Judge Advocates General of the other armed forces will be notified.

(d) *Grounds justifying suspension of counsel or suspension or decertification of a Judge Advocate.* (1) Suspension or decertification is to be employed only after it has been established that a counsel has been unable to discharge properly all the duties of his or her office by reason of mental or physical disability or has been engaged in professional or personal misconduct of such a serious nature as to demonstrate that he or she is lacking in integrity or is failing to meet the ethical standards of the profession or is otherwise unworthy or unqualified to perform the duties of a counsel Action to suspend or decertify should not be initiated because of personal prejudice or hostility toward counsel, nor should such action be initiated because counsel has initiated an aggressive, zealous or novel defense, or the apparent misconduct stems from inexperience or lack of instruction.

(2) Specific grounds for suspension or decertification include, but are not limited to, the following:

(i) Demonstrated incompetence while acting as counsel before, during or after a court-martial.

(ii) Preventing or obstructing justice, including the deliberate use of frivolous or unwarranted dilatory tactics.

(iii) Fabricating papers or other evidence.

(iv) Tampering with a witness.

(v) Abusive conduct toward the court-martial, the Navy-Marine Corps Court of Military Review, the military judge, or opposing counsel.

(vi) Flagrant or repeated violations of any specific rules of conduct prescribed for counsel in the Manual for Courts-Martial.

(vii) Conviction of an offense involving moral turpitude or conviction for violation of article 48, UCMJ.

(viii) Disbarment by a State Bar, Federal Court, or the United States Court of Military Appeals.

(ix) Suspension as counsel by the Judge Advocate General of the Navy, Army, or Air Force or the General Counsel of the Department of Transportation.

(x) Flagrant or repeated violations of the *Uniform Rules of Practice Before Navy-Marine Corps Courts-Martial* as outlined in appendix A–1-p(1) of the Manual of the Judge Advocate General.

(xi) Flagrant or repeated violations of the provisions of section 0134 of this Manual of the Judge Advocate General dealing with the *Release of Information Pertaining to Accused Persons; Spectators at Judicial Sessions*.

(xii) Failure to meet the rules set forth in the ABA Code of Professional Responsibility and the ABA Standards on *Fair Trial and Free Press* and *The Prosecution Function and the Defense Function*. In view of the unique mission and personal requirements of the military, many of the rules and principles of the ABA Code or Standards are not applicable to the military lawyer. Accordingly, the rules are to be used as a guide only, and a failure to comply with the specific wording of a rule is not to be construed as a violation of the rule where common sense would indicate to a reasonable person that there is a distinction between the civilian context, which the codes were drafted to embrace, and the unique concerns of the military setting, where the codes serve as a general guide.

[50 FR 23801, June 6, 1985]

### § 719.143 Petition for new trial under 10 U.S.C. 873.

(a) *Statutory provisions*. 10 U.S.C. 873, provides, ''At any time within 2 years after approval by the convening authority of a court-martial sentence, the accused may petition the Judge Advocate General for a new trial on the grounds of newly discovered evidence or fraud on the court. If the accused's case is pending before a Court of Military Review or before the Court of Military Appeals, that Judge Advocate General shall refer the petition to the appropriate court for action. Otherwise the Judge Advocate General shall act upon the petition.''

(b) *Submission procedures:* At any time within 2 years after approval by the convening authority of a court-martial sentence, the accused may petition the Judge Advocate General for a new trial on the ground of newly discovered evidence or fraud on the court-martial. The petition for new trial may be submitted by the accused personally, or by accused's counsel, regardless of whether the accused has been separated from the service. A petition may not be submitted after the death of the accused.

(c) *Contents of petitions:* The form and contents of petitions for new trial are specified in MCM, 1984, R.C.M. 1210(c). The petition for a new trial shall be written and shall be signed under oath or affirmation by the accused, by a person possessing the power of attorney of the accused for that purpose, or by a person with the authorization of an appropriate court to sign the petition as the representative of the accused. The petition shall contain the following information, or an explanation why such matters are not included:

(1) The name, service number, and current address of the accused;

(2) The date and location of the trial;

(3) The type of court-martial and the title or position of the convening authority;

(4) The request for the new trial;

(5) The sentence or a description thereof as approved or affirmed, with any later reduction thereof by clemency or otherwise,

(6) A brief description of any finding or sentence believed to be unjust;

(7) A full statement of the newly discovered evidence or fraud on the court-martial which is relied upon for the remedy sought;

(8) Affidavits pertinent to the matters in subsection (6)i; and

(9) Affidavit of each person whom the accused expects to present as a witness in the event of a new trial. Each affidavit should set forth briefly the relevant facts within the personal knowledge of the witness.

(d) *Who may act on petition*. If the accused's case is pending before a Court of Military Review or the Court of Military Appeals, the Judge Advocate General shall refer the petition to the appropriate court for action. Otherwise, the Judge Advocate shall act on the petition.

(e) *Ground for new trial*. A new trial may be granted only on grounds of newly discovered evidence or fraud on the court-martial.

(1) A new trial shall not be granted on the grounds of newly discovered evidence unless the petition shows that;

(i) The evidence was discovered after the trial,

(ii) The evidence is not such that it would have been discovered by the petitioner at the time of trial in the exercise of due diligence; and

(iii) The newly discovered evidence, if considered by a court-martial in the light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused.

(2) No fraud on the court-martial warrants a new trial unless it had a substantial contributing effect on a finding of guilty or the sentence adjudged.

(f) *Action on the petition.* (1) The authority considering the petition may cause such additional investigation to be made and such additional information to be secured as that authority believes appropriate. Upon written request, and in his discretion, the authority considering the petition may permit oral argument on the matter.

(2) When a petition is considered by the Judge Advocate General, any hearing may be before the Judge Advocate General or before an officer or officers designated by the Judge Advocate General.

(3) If the Judge Advocate General believes meritorious grounds for relief under Article 74, Uniform Code of Military Justice have been established but that a new trial is not appropriate, the Judge Advocate General may act under article 74, Uniform Code of Military Justice, if authorized, or transmit the petition and related papers to the Secretary concerned with a recommendation.

(4) The Judge Advocate may also, in cases which have been finally reviewed but have not been reviewed by a Court of Military Review, act under article 69, Uniform Code of Military Justice.

[50 FR 23803, June 6, 1985]

### § 719.144 Application for relief under 10 U.S.C. 869, in cases which have been finally reviewed.

(a) *Statutory provisions.* 10 U.S.C. 869 provides in pertinent part, ''The findings or sentence, or both, in a court-martial case not reviewed under subsection (a) or under section 866 of this title (article 66) may be modified or set aside, in whole or in part, by the Judge Advocate General on the ground of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence. If such a case is considered upon application of the accused, the application must be filed in the Office of the Judge Advocate General by the accused on or before the last day of the two-year period beginning on the date the sentence is approved under section 860(c) of this title (article 60(c)), unless the accused establishes good cause for failure to file within that time.''

(b) *Time limitations.* In order to be considered by the Judge Advocate General, an application for relief must be placed in military channels if the applicant is on active duty, or be deposited in the mail if the applicant is no longer on active duty, on or before the last day of the two-year period beginning on the date the sentence is approved by the convening authority. An application not filed in compliance with these time limits may be considered if the Judge Advocate General determines, in his or her sole discretion, that ''good cause'' for failure to file within the time limits has been established by the applicant.

(c) *Submission procedures.* Applications for relief may be submitted to the Judge Advocate General by letter. If the accused is on active duty, the application shall be submitted via the applicant's commanding officer, and the command that convened the court, and the command that reviewed the case under 10 U.S.C. 864(a) or (b). If the original record of trail is held by the command that reviewed the case under 10 U.S.C. 864(a) or (b), it shall be forwarded as an enclosure to the endorsement. If the original record of trial has been filed in the National Personnel Records Center, the endorsement will include all necessary retrieval data (accession number, box number, and shelf location) obtained from the receipt returned from the National Personnel Records Center to the sending activity. This endorsement shall also include information and specific comment on the grounds for relief asserted in the application, and an opinion on

the merits of the application. If the applicant is no longer on active duty, the application may be submitted directly to the Judge Advocate General.

(d) *Contents of applications.* All applications for relief shall contain:

(1) Full name of the applicant;

(2) Social Security number and branch of service, if any;

(3) Present grade if on active duty or retired, or ''civilian'' or ''deceased'' as applicable;

(4) Address at time the application is forwarded;

(5) Date of trial;

(6) Place of trial;

(7) Command title of the organization at which the court-martial was convened (convening authority);

(8) Command title of the officer exercising review authority in accordance with 10 U.S.C. 864 over the applicant at the time of trial, if applicable;

(9) Type of court-martial which convicted the applicant, and sentence adjudged;

(10) General grounds for relief which must be one or more of the following:

(i) Newly discovered evidence;

(ii) Fraud on the court;

(iii) Lack of jurisdiction over the accused or the offense;

(iv) Error prejudicial to the substantial rights of the accused;

(v) Appropriateness of the sentence;

(11) An elaboration of the specific prejudice resulting from any error cited. (Legal authorities to support the applicant's contentions may be included, and the format used may take the form of a legal brief if the applicant so desires.);

(12) Any other matter which the applicant desires to submit;

(13) Relief requested; and

(14) Facts and circumstances to establish ''good cause'' for a failure to file the application within the time limits prescribed in paragraph (b) of this section, if applicable; and

(15) If the application is signed by a person other than the applicant pursuant to subsection e, an explanation of the circumstances rendering the applicant incapable of making application. The applicant's copy of the record of trial will *not* be forwarded with the application for relief, unless specifically requested by the Judge Advocate General.

(e) *Signatures on applications.* Unless incapable of making application, the applicant shall personally sign the application under oath before an official authorized to administer oaths. If the applicant is incapable of making application, the application may be signed under oath and submitted by the applicant's spouse, next of kin, executor, guardian or other person with a proper interest in the matter. In this regard, one is considered incapable of making application for purposes of this section when unable to sign the application under oath due to physical or mental incapacity.

[50 FR 23804, June 6, 1985]

### §§ 719.145–719.150 [Reserved]

### § 719.151 Furnishing of advice and counsel to accused placed in pretrial confinement.

The Department of the Navy Corrections Manual, SECNAVINST 1640.9, reiterates the requirement of Article 10, UCMJ, that, when a person is placed in pretrial confinement, immediate steps should be taken to inform the confinee of the specific wrong of which he is accused and try him or to dismiss the charges and release him. The Corrections Manual requires that this information normally will be provided within 48 hours along with advice as to the confinee's right to consult with lawyer counsel and his right to prepare for trial. Lawyer counsel may be either a civilian lawyer provided by the confinee at his own expense or a military lawyer provided by the Government. If a confinee requests to confer with a military lawyer, such lawyer should normally be made available for consultation within 48 hours after the request is made.

[39 FR 18437, May 28, 1974]

### § 719.155 Application under 10 U.S.C. 874(b) for the substitution of an administrative form of discharge for a punitive discharge or dismissal.

(a) *Statutory provisions.* 10 U.S.C. 874(b) provides that the ''Secretary

concerned may, for good cause, substitute an administrative form of discharge for a discharge or dismissal executed in accordance with the sentence of a court-martial.''

(b) *Submission procedures.* Applications for relief will be submitted to the Secretary using the following address: Secretary of the Navy (Judge Advocate General, Code 20), 200 Stovall Street, Alexandria, VA 22332–2400. Except in unusual circumstances, applications will not normally be considered if received within five (5) years of the execution of the punitive discharge or dismissal, or within five (5) years of disapproval of a prior request under 10 U.S.C. 874(b).

(c) *Contents of the application.* All applications shall contain:

(1) Full name of the applicant;

(2) Social Security Number, service number (if different), and branch of service of the applicant;

(3) Present age and date of birth of the applicant;

(4) Present residence of the applicant;

(5) Date and place of the trial, and type of court-martial which resulted in the punitive discharge or dismissal;

(6) Command title of the convening authority of the court-martial which resulted in the punitive discharge or dismissal;

(7) Offense(s) of which the applicant was convicted, and sentence finally approved from the trial which resulted in the punitive discharge or dismissal;

(8) Date the punitive discharge or dismissal was executed;

(9) Applicant's present marital status, and number and ages of dependents, if any;

(10) Applicant's civilian criminal record (arrest(s) with disposition, and conviction(s)), both prior and subsequent to the court-martial which resulted in the punitive discharge or dismissal;

(11) Applicant's entire court-martial record (offense(s) of which convicted and finally approved sentence(s)), and nonjudicial punishment record (including offense(s) and punishment(s) awarded);

(12) Any military administrative discharge proceedings (circumstances and disposition) initiated against the applicant;

(13) Applicant's full employment record since the punitive discharge or dismissal was executed;

(14) The specific type and character of administrative discharge requested pursuant to 10 U.S.C. 874(b) (a more favorable administrative discharge than that requested will not be approved);

(15) At least three but not more than six character affidavits, (The character affidavits must be notarized, must indicate the relationship of the affiant to the applicant, and must include the address of the affiant as well as specific reasons why the affiant believes the applicant to be of good character. The affidavits should discuss the applicant's character primarily as reflected in the civilian community subsequent to the punitive discharge or dismissal which is the subject of the application);

(16) Any matters, other than the character affidavits, supporting the considerations described in subparagraph (18) below;

(17) Any other relief sought within the Department of the Navy and outside the Department of the Navy including dates of application and final dispositions;

(18) A statement by the applicant, setting forth the specific considerations which the applicant believes constitute ''good cause,'' so as to warrant the substitution of an administrative form of discharge for the punitive discharge or dismissal previously executed. (In this connection, 10 U.S.C. 874(b) does not provide another regular or extraordinary procedure for the review of a court-martial. Questions of guilt or innocence, or legal issues attendant to the court-martial which resulted in the punitive discharge or dismissal, are neither relevant nor appropriate for consideration under 10 U.S.C. 874(b). As used in the statute, ''good cause'' was envisioned by Congress to encompass only Secretarial exercise of clemency and ultimate control of sentence uniformity. Accordingly, in determining what constitutes ''good cause'' under 10 U.S.C. 874(b), the primary Secretarial concern will be with the applicant's record in the civilian community subsequent to his or her punitive separation. Material submitted by the 10 U.S.C. 874(b) applicant

should be consistent with the foregoing.)

(d) *Signature on application.* Unless incapable of making application himself or herself, the applicant shall personally sign the application, under oath, before a notary or other official authorized to administer oaths. If the applicant is incapable of executing the application, the application may be signed under oath and submitted by the applicant's spouse, next of kin, executor, guardian and other person recognized as a personal representative by the law of the applicant's domicile. One is considered incapable of executing an application for purposes of this paragraph only when the applicant is unable to sign the application under oath due to physical or mental incapacity. When an application is signed by a person other than the applicant, the circumstances rendering the applicant incapable of making sworn application shall be set forth in the application, with appropriate documentation.

(e) *Privacy Act Statement.* Disclosure of personal information requested by paragraph (c) of this section is voluntary; however, failure to accurately provide all requested information may result in the application being denied because of inadequate documentation of good cause.

[47 FR 49645, Nov. 2, 1982, as amended at 50 FR 23804, June 6, 1985]

# PART 720—DELIVERY OF PERSONNEL; SERVICE OF PROCESS AND SUBPOENAS; PRODUCTION OF OFFICIAL RECORDS

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AUTHORITY: 5 U.S.C. 301; 10 U.S.C. 5031 and 5148; 32 CFR 700.206 and 700.1202.

## Subpart A—Delivery of Personnel

SOURCE: 57 FR 5228, Feb. 13, 1992, unless otherwise noted.

**§ 720.1 Delivery of persons requested by State authorities in criminal cases.**

Subpart A of this part deals with requests by State authorities for the surrender of members or civilians pursuant to arrest warrants or similar process, generally in connection with a criminal prosecution. Responding to such requests by a State for delivery of members or civilian employees involves balancing the Federal interest in preserving sovereign immunity and the productivity, peace, good order, and discipline of the installation against the right of the State to exercise its jurisdiction. Additionally, by regulation, naval and Marine authorities are limited in the extent to which they can directly assist such an act. Commands should respond to such requests as set out below, generally using the minimum authority necessary to preserve the Federal interests without unduly restricting State jurisdiction.

**§ 720.2 Delivery when persons are within the territorial limits of the requesting State.**

When the delivery of any member or civilian is requested by local civil authorities of a State for an offense punishable under the laws of that jurisdiction, and such person is located at a Navy or Marine Corps installation within the requesting jurisdiction, or aboard a ship within the territorial waters of such jurisdiction, commanding officers are authorized to and normally will deliver such person when a proper warrant is issued. In the case of a member, delivery will only be effected upon compliance with § 720.6, subject to the exceptions in § 720.9. A judge advocate of the Navy or Marine Corps should be consulted before delivery is effected. The rule discussed above applies equally to civilian employees and civilian contractors and their employees when located on a Navy or Marine Corps installation, except that compliance with § 720.6 and consideration of § 720.9 are not required (for purposes of this part, ''State'' includes the District of Columbia, territories, commonwealths, and all possessions or protectorates of the United States). Commands should normally not become actively involved in civilian law enforcement. When a command has determined that a person is to be delivered in response to a valid warrant, the following guidance should be considered. If the person to be delivered is a military member, the member may be ordered to report to a location designated by the commanding officer and surrendered to civil authorities under Article 14, UCMJ (10 U.S.C. 814). If the person to be delivered is a civilian, the person may be invited to report to the designated space for delivery. If the civilian refuses, the civilian authorities may be escorted to a place where the civilian is located in order that delivery may be effected. A civilian may be directed to leave a classified area. All should be done with minimum interference to good order and discipline.

**§ 720.3 Delivery when persons are beyond territorial limits of the requesting State.**

(a) *General.* When State civil authorities request delivery of any member of the Navy or Marine Corps for an alleged crime or offense punishable under the law of the jurisdiction making the request, and such member is not attached to a Navy or Marine Corps activity within the requesting State or a ship within the territorial waters thereof, the following action will be taken. Any officer exercising general court-martial jurisdiction, or officer designated by him, or any commanding officer, after consultation with a judge advocate of the Navy or Marine Corps, is authorized (upon compliance with the provisions of this section and § 720.6, and subject to the exceptions in § 720.9) to deliver such member to make the member amenable to prosecution. The member may be delivered upon formal or informal waiver of extradition in accordance with § 720.3(b), or upon presentation of a fugitive warrant, in which case the procedures of § 720.3(c) apply. The rule discussed above applies equally to civilian employees and civilian contractors and their employees when located on a Department of the Navy installation not within the requesting State, except that compliance with § 720.6 and consideration of § 720.9 are not required.

(b) *Waiver of extradition.* (1) Any member may waive formal extradition. A waiver must be in writing and be witnessed. It must include a statement that the member signing it has received counsel of either a military or civilian attorney prior to executing the waiver, and it must further set forth the name and address of the attorney consulted.

(2) In every case where there is any doubt as to the voluntary nature of a waiver, such doubt shall be resolved against its use and all persons concerned will be advised to comply with the procedures set forth in § 720.3(c).

(3) Executed copies of all waivers will be mailed to the Judge Advocate General immediately after their execution.

(4) When a member declines to waive extradition, the nearest Naval Legal Service Office or Marine Corps staff judge advocate shall be informed and shall confer with the civil authorities as appropriate. The member concerned shall not be transferred or ordered out of the State in which he is then located without the permission of the Secretary of the Navy (Judge Advocate General), unless a fugitive warrant is obtained as set forth in § 720.3(c).

(c) *Fugitive warrants.* (1) A fugitive warrant, as used in this chapter, is a warrant issued by a State court of competent jurisdiction for the arrest of a member. Normally, a State requesting delivery of a member from another State will issue a fugitive warrant to the State where the member is then located.

(2) Upon issuance of a fugitive warrant by the requesting State to the State in which the member is located, the latter State will normally request delivery of the member to local State authorities. Delivery to local State authorities should be arranged by Navy or Marine Corps officers designated in § 720.3(a), upon compliance with the provisions of § 720.6, and subject to the conditions of §§ 720.9 and 720.3(c) (3) and (4).

(3) Upon receipt of a request for delivery of a member under fugitive warrant to State authorities, if the member voluntarily waives extradition, the provisions of § 720.3(b) apply. If the member is delivered to local authorities but refuses to waive extradition in the courts of the State in which he is located.

(4) No delivery of a member by Navy or Marine Corps officers pursuant to a fugitive warrant or waiver of extradition shall be effected without completion of the agreement required by § 720.6 and execution of such agreement either:

(i) By authorities of both the requesting State and the State in which the member is located, or

(ii) By authorities of the State in which the member is located if such authorities, on behalf of the requesting State, accept the full responsibility for returning the number to a command designated by the Department of the Navy.

(d) *Members stationed outside the United States.* When the member sought by State authorities is not located within the United States, see § 720.4.

### § 720.4 Persons stationed outside the United States.

(a) *Persons desired by local U.S. authorities.* When delivery of any member in the Navy or Marine Corps, or any civilian employee or dependent, is desired for trial by state authorities and the individual whose presence is sought is stationed outside the United States, the provisions of subpart D of this part will be followed. In all such cases, the nearest judge advocate of the Navy or Marine Corps shall be consulted before any action is taken.

(b) *Members desired by U.S. Federal authorities.* When delivery of any member of the Navy or Marine Corps is desired for trial in a Federal district court, upon appropriate representation by the Department of Justice to the Secretary of the Navy (Judge Advocate General), the member will be returned to the United States at the expense of the Department of the Navy and held at a military facility convenient to the Department of the Navy and to the Department of Justice. Delivery may be accomplished as set forth in § 720.7, subject to the exceptions in § 720.9.

### § 720.5 Authority of the Judge Advocate General and the General Counsel.

(a) *Authority of the Judge Advocate General.* The Judge Advocate General,

the Deputy Judge Advocate General, and the Assistant Judge Advocates General are authorized to act for the Secretary of the Navy in performance of functions under this chapter.

(b) *Authority of the General Counsel.* The authority of the General Counsel of the Navy is prescribed by Navy Regulation (32 CFR 700.203 (a) and (g)) and by appropriate departmental directives and instructions (e.g., SECNAVINST 5430.25D).[1] The principal areas of responsibility of the Office of the General Counsel (OGC) are commerical law, including maritime contract matters; civilian employee law; real property law; and Freedom of Information Act and Privacy Act matters as delineated in 32 CFR part 701. The Office of the General Counsel shares responsibility with the Judge Advocate General for environmental law cases.

(c) *Points of contact.* Commanding officers are advised to contact their local area judge advocates for assistance in referring matters to the appropriate office of the Judge Advocate General or General Counsel.

(d) *Coordination with the Commandant of the Marine Corps.* Marine Corps commands shall inform the Commandant of the Marine Corps (CMC) of all matters referred to the Judge Advocate General or the Office of General Counsel. Copies of all correspondence and documents shall also be provided to CMC. The Staff Judge Advocate to the Commandant (CMC (JAR)) shall be advised of all matters referred to the Judge Advocate General. Counsel to the Commandant shall be advised of matters referred to the Office of General Counsel.

### § 720.6 Agreement required prior to delivery to State authorities.

(a) *Delivery under Article 14, UCMJ.* When delivery of any member of the Navy or Marine Corps to the civilian authorities of a State is authorized, the member's commanding officer shall, before making such delivery, obtain from the Governor or other duly authorized officer of such State a written agreement. The State official completing the agreement must show that he is authorized to bind the State to the terms of the agreement. When indicating in the agreement the naval or Marine Corps activity to which the member delivered is to be returned by the State, care should be taken to designate the closest appropriate activity (to the command to which the member is attached) that possesses special court-martial jurisdiction. The Department of the Navy considers this agreement substantially complied with when:

(1) The member is furnished transportation (under escort in cases of delivery in accordance with § 720.12) to a naval or Marine Corps activity as set forth in the agreement;

(2) The member is provided cash to cover incidental expenses en route thereto; and

(3) The Department of the Navy is so informed.

As soon as practicable, a copy of the delivery agreement shall be forwarded to the Judge Advocate General.

(b) *Delivery under Interstate Agreement on Detainers Act.* Special forms are used when delivering prisoners under the Interstate Agreement on Detainers Act. The Act is infrequently used and most requests are pursuant to Article 14, UCMJ. See § 720.12 for a detailed discussion of the Detainers Act.

### § 720.7 Delivery of persons to Federal authorities.

(a) *Authority to deliver.* When Federal law enforcement authorities display proper credentials and Federal warrants for the arrest of members, civilian employees, civilian contractors and their employees, or dependents residing at or located on a Department of the Navy installation, commanding officers are authorized to and should allow the arrest of the individual sought. The exceptions in § 720.9 may be applied to members. A judge advocate of the Navy or Marine Corps should be consulted before delivery is effected.

(b) *Agreement not required of Federal authorities.* The agreement described in § 720.6 is not a condition to the delivery of members to Federal law enforcement authorities. Regardless of whether the member is convicted or acquitted, after final disposition of the case,

[1] Copies may be obtained if needed, from the Commanding Officer, Naval Publication and Forms Center, 5801 Tabor Avenue, Philadelphia, PA 19120.

the member will be returned to the Naval Service (provided that naval authorities desire his return) and the necessary expenses will be paid from an appropriation under the control of the Department of Justice.

### § 720.8 Delivery of persons to foreign authorities.

Except when provided by agreement between the United States and the foreign government concerned, commanding officers are not authorized to deliver members or civilian employees of the Department of the Navy, or their dependents residing at or located on a naval or Marine Corps installation, to foreign authorities. When a request for delivery of these persons is received in a country with which the United States has no agreement or when the commanding officer is in doubt, advice should be sought from the Judge Advocate General. Detailed information concerning the delivery of members, civilian employees, and dependents to foreign authorities when a status of forces agreement is in effect is contained in DoD Directive 5525.1 of 9 April 1985 and SECNAVINST 5820.4F.[2]

### § 720.9 Circumstances in which delivery is refused.

(a) *Disciplinary proceedings pending.* When disciplinary proceedings involving military offenses are pending, commanding officers should obtain legal guidance from a judge advocate of the Navy or Marine Corps prior to delivery of members to Federal or State authorities.

(b) *When delivery may be refused.* Delivery may be refused only in the following limited circumstances:

(1) Where the accused has been retained for prosecution; or

(2) When the commanding officer determines that extraordinary circumstances exist which indicate that delivery should be refused.

(c) *Delivery under Detainers Act.* When the accused is undergoing sentence of a court-martial, see § 720.12.

(d) *Reports required.* When delivery will be refused, the commanding officer shall report the circumstances to the Judge Advocate General by telephone, or by message if telephone is impractical. The initial report shall be confirmed by letter setting forth a full statement of the facts. A copy of the report shall be forwarded to the regional coordinator.

### § 720.10 Members released by civil authorities on bail or on their own recognizance.

A member of the Navy or Marine Corps arrested by Federal or State authorities and released on bail or on his own recognizance has a duty to return to his parent organization. Accordingly, when a member of the Navy or Marine Corps is arrested by Federal or State authorities and returns to his ship or station on bail, or on his own recognizance, the commanding officer, upon verification of the attesting facts, date of trial, and approximate length of time that should be covered by the absence, shall grant liberty or leave to permit appearance for trial, unless this would have a serious negative impact on the command. In the event that liberty or leave is not granted, a judge advocate of the Navy or Marine Corps should immediately be requested to act as liaison with the court. Nothing in this section is to be construed as permitting the member arrested and released to avoid the obligations of bond or recognizance by reason of the member's being in the military service.

### § 720.11 Interviewing servicemembers or civilian employees by Federal civilian investigative agencies.

Requests by the Federal Bureau of Investigation, Naval Investigative Service Command, or other Federal civilian investigative agencies to interview members or civilian employees of the Department of the Navy suspected or accused of crimes should be promptly honored. Any refusal of such a request shall be immediately reported to the Judge Advocate General, or the Office of General Counsel, as appropriate, by telephone, or by message if telephone is impractical. When the employee in question is a member of an exclusive bargaining unit, a staff judge advocate or General Counsel attorney will be consulted to determine whether

[2] See footnote 1 of § 720.5(b).

the employee has a right to have a bargaining unit representative present during the interview.

### § 720.12 Request for delivery of members serving sentence of court-martial.

(a) *General*. Article 14, UCMJ (10 U.S.C. 814), provides authority to honor requests for delivery of members serving a sentence of a court-martial. Although seldom utilized, additional authority and mandatory obligation to deliver such members are provided by the Interstate Agreement on Detainers Act (18 U.S.C. app. 9, hereinafter ''the Act''), which applies to the Federal agency holding the prisoner. The Department of the Navy, as an agency of the Federal Government, shall comply with the Act. The Act is designed to avoid speedy-trial issues and to aid in rehabilitation efforts by securing a greater degree of certainty about a prisoner's future. The Act provides a way for a prisoner to be tried on charges pending before State courts, either at the request of the State where the charges are pending or the prisoner's request. When refusal of delivery under Article 14, UCMJ, is intended, comply with § 720.9(d).

(b) *Interstate Agreement on Detainers Act*. Upon request under the Act by either State authorities or the prisoner, the cognizant Navy or Marine Corps staff judge advocate, as appropriate, shall communicate with the appropriate State officials, and monitor and ensure that the cognizant commander acts on all such requests. The Act provides that court-martial sentences continue to run during temporary custody. This section does not cover requests between Federal authorities. The procedure set forth in § 720.12(c) shall be applied in such cases.

(1) *State request*. State officials may request delivery of prisoners in military custody under section 2, Article IV, of the Act. Where a detainer has been lodged against the prisoner, and the prisoner is serving a sentence (regardless of whether an appeal is in process), delivery is mandatory unless the request is disapproved by the Director of the Bureau of Prisons, Washington, DC, 20537 as the designee of the Attorney General for this purpose. 28 CFR 0.96(n). There has been no further delegation to military authority. The prisoner should be informed that he may request the Director of the Bureau of Prisons, Washington, DC 20537, within 30 days after such request is received, to deny the request. Upon the expiration of such 30-day period or upon the Director of the Bureau of Prisons' denial of the prisoner's request, whichever occurs first, the prisoner shall be delivered to the requesting authority.

(2) *Prisoner request*. The obligation to grant temporary custody under the Act also applies to prisoners' requests to be delivered to State authority. Section 2, Article III(c) of the Act requires the custodial official to inform the prisoner of the existence of any detainer and of the prisoner's right to request disposition. The prisoner's request is directed to the custodial official who must forward it to the appropriate prosecuting official and court, with a certificate of prisoner status as provided by Article III of the Act.

(c) *Article 14, UCMJ*. When a request for custody does not invoke the Interstate Agreement on Detainers Act, delivery of custody shall be governed by Article 14, UCMJ, and §§ 720.2 through 720.9. The request shall be honored unless, in the exercise of discretion, there is an overriding reason for retaining the accused in military custody, e.g., additional courts-martial are to be convened or the delivery would severely prejudice the prisoner's appellate rights. Execution of the agreement discussed in § 720.6 is a condition precedent to delivery to State authorities. It is not required before delivery to Federal authorities. See § 720.7. Unlike delivery under the Act, delivery of custody pursuant to Article 14, UCMJ, interrupts execution of the court-martial sentence.

### § 720.13 Request for delivery of members serving sentence of a State court.

(a) *General*. Ordinarily, members serving protracted sentences resulting from a State criminal conviction will be processed for administrative discharge by reason of misconduct. It may, however, be in the best interest of the Naval Service to retain a member

charged with a serious offense, subject to military jurisdiction, to try the member by court-martial. The Navy may obtain temporary custody of incarcerated members for prosecution with a request to the State under the Interstate Agreement on Detainers Act. 18 U.S.C. app. 9. The Department of the Navy may use the Act in the same manner in which State authorities may request members purusant to § 720.12.

(b) *Interstate Agreement on Detainers Act*. Military authorities may use the Act to obtain temporary custody of a member incarcerated in a State institution, pursuant to conviction by a State court, to resolve criminal charges against the member before a court-martial.

(1) *Detainer*. If a command requests temporary custody under the Act, the commanding officer of the cognizant naval legal service office or the Marine Corps staff judge advocate, shall file a detainer with the warden, commissioner of corrections, or other State official having custody of the member. The detainer shall identify the member with particularity, enumerate the military charges pending, and request the command be notified in advance of any intention to release the member from confinement.

(2) *Request for delivery*. As soon as practical after filing the detainer, the commanding officer of the cognizant naval legal service office or the Marine Corps staff judge advocate, shall prepare a written request for temporary custody of the member addressed to the State official charged with administration of the State penal system. The request shall designate the person(s) to whom the member is to be delivered and shall be transmitted via the military judge to whom the member's case has been assigned. If the request is properly prepared, the military judge shall approve, record, and transmit the request to the addressee official. The Act provides the State with a 30-day period after receipt of the request before the request is to be honored. Within that period of time, the governor of the State may disapprove the request, either unilaterally or upon the prisoner's request. If the governor disapproves the request, the command should coordinate any further action with the Judge Advocate General.

(3) *Responsibilities*. The cognizant command shall ensure that the responsibilities of a receiving jurisdiction, delineated in section 2, Article IV of the Act, are discharged. In particular, the Act requires that the receiving jurisdiction:

(i) Commence the prisoner's trial within 120 days of the prisoner's arrival, unless the court, for good cause shown during an Article 39(a), UCMJ, session, grants a continuance necessary or reasonable to promote the ends of justice;

(ii) Hold the prisoner in a suitable jail or other facility regularly used for persons awaiting prosecution, except for periods during which the prisoner attends court or travels to or from any place at which his presence may be required;

(iii) Return the prisoner to the sending jurisdiction at the earliest practical time, but not before the charges that underlie the request have been resolved (prematurely returning the prisoner will result in dismissal of the charges); and

(iv) Pay all costs of transporting, caring for, keeping, and returning the prisoner to the sending jurisdiction, unless the command and the State agree on some other allocation of the costs or responsibilities.

**§§ 720.14–720.19 [Reserved]**

## Subpart B—Service of Process and Subpoenas Upon Personnel

SOURCE: 57 FR 5232, Feb. 13, 1992, unless otherwise noted.

### § 720.20 Service of process upon personnel.

(a) *General*. Commanding officers afloat and ashore may permit service of process of Federal or State courts upon members, civilian employees, dependents, or contractors residing at or located on a naval installation, if located within their commands. Service will not be made within the command without the commanding officer's consent. The intent of this provision is to protect against interference with mission accomplishment and to preserve

good order and discipline, while not unnecessarily impeding the court's work. Where practical, the commanding officer shall require that the process be served in his presence, or in the presence of a designated officer. In all cases, individuals will be advised to seek legal counsel, either from a legal assistance attorney or from personal counsel for service in personal matters, and from Government counsel for service in official matters. The commanding officer is not required to act as a process server. The action required depends in part on the status of the individual requested and which State issued the process.

(1) *In-State process.* When a process server from a State or Federal court from the jurisdiction where the naval station is located requests permission to serve process aboard an installation, the command ordinarily should not prevent service of process so long as delivery is made in accordance with reasonable command regulations and is consistent with good order and discipline. Withholding service may be justified only in the rare case when the individual sought is located in an area under exclusive Federal jurisdiction not subject to any reservation by the State of the right to serve process. Questions on the extent of jurisdiction should be referred to the staff judge advocate, command counsel, or local naval legal service office. If service is permitted, an appropriate location should be designated (for example, the command legal office) where the process server and the member or employee can meet privately in order that process may be served away from the workplace. A member may be directed to report to the designated location. A civilian may be invited to the designated location. If the civilian does not cooperate, the process server may be escorted to the location of the civilian in order that process may be served. A civilian may be required to leave a classified area in order that the process server may have access to the civilian. If unusual circumstances require that the command not permit service, see § 720.20(e).

(2) *Out-of-State process.* In those cases where the process is to be served by authority of a jurisdiction other than that where the command is located, the person named is not required to accept process. Accordingly, the process server from the out-of-State jurisdiction need not be brought face-to-face with the person named in the process. Rather, the process server should report to the designated command location while the person named is contacted, apprised of the situation, and advised that he may accept service, but also may refuse. In the event that the person named refuses service, the process server should be so notified. If service of process is attempted from out-of-State by mail and refused, the refusal should be noted and the documents returned to the sender. Questions should be referred to the staff judge advocate, command counsel, or the local naval legal service office.

(b) *Service of process arising from official duties.* (1) Whenever a member or civilian employee of the Department of the Navy is served with process because of his official position, the Judge Advocate General or the Associate General Counsel (Litigation), as appropriate, shall be notified by telephone, or by message if telephone is impractical. Notification shall be confirmed by a letter report by the nearest appropriate command. The letter report shall include the detailed facts which give rise to the action.

(2) Any member or civilian employee served with Federal or State court civil or criminal process or pleadings (including traffic tickets) arising from actions performed in the course of official duties shall immediately deliver all such process and pleadings to the commanding officer. The commanding officer shall ascertain the pertinent facts and notify the Judge Advocate General or Associate General Counsel (Litigation), as appropriate, by telephone or by message if telephone is impractical, of the service and immediately forward the pleadings and process to the relevant office. The member or civilian employee will be advised of the right to remove civil or criminal proceedings from State to Federal court under 28 U.S.C. 1442, 1442a, rights under the Federal Employees Liability Reform and Tort Compensation Act (28 U.S.C. 2679b), if applicable, and the right of a Federal employee to request

representation by Department of Justice attorneys in Federal (civil) or State (civil or criminal) proceedings and in congressional proceedings in which that person is sued in an individual capacity, as delineated in 28 CFR 50.15. Requests for representation shall be addressed to the Judge Advocate General or Associate General Counsel (Litigation), as appropriate, and shall be endorsed by the commanding officer, who shall provide all necessary data relating to the questions of whether the person was acting within the course of official duty or scope of employment at the time of the incident out of which the suit arose.

(3) If the service of process involves a potential claim against the Government, see 32 CFR 750.12(a), 750.12(b), and 750.24. The right to remove to Federal Court under 28 U.S.C. 1442 and 1442a must be considered where the outcome of the State court action may influence a claim or potential claim against the United States. Questions should be directed to the Judge Advocate General or the Associate General Counsel (Litigation).

(c) *Service of process of foreign courts.* (1) Usually, the amenability of members, civilian employees, and their dependents stationed in a foreign country, to the service of process from courts of the host country will have been settled by an agreement between the United States and the foreign country concerned (for example, in the countries of the signatory parties, amenability to service of civil process is governed by paragraphs 5(g) and 9 of Article VIII of the NATO Status of Forces Agreement, TIAS 2846). When service of process on a person described above is attempted within the command in a country in which the United States has no agreement on this subject, advice should be sought from the Judge Advocate General or the Associate General Counsel (Litigation), as appropriate. When service of process is upon the United States Government or one of its agencies or instrumentalities as the named defendant, the doctrine of sovereign immunity may allow the service of process to be returned to the court through diplomatic channels. Service of process directed to an official of the United States, on the other hand, must always be processed in accordance with the applicable international agreement or treaty, regardless of whether the suit involves acts performed in the course of official duties. The Judge Advocate General or the Associate General Counsel (Litigation), as appropriate, will arrange through the Department of Justice for defense of the suit against the United States or an official acting within the scope of official duties, or make other arrangements, and will issue instructions.

(2) Usually, the persons described in § 720.20(c)(1) are not required to accept service of process outside the geographic limits of the jurisdiction of the court from which the process issued. In such cases, acceptance of the service is not compulsory, but service may be voluntarily accepted in accordance with § 720.20(b). In exceptional cases when the United States has agreed that service of process will be accepted by such persons when located outside the geographic limits of the jurisdiction of the court from which the process issued, the provisions of the agreement and of § 720.20(a) will govern.

(3) Under the laws of some countries (such as Sweden), service of process is effected by the document, in original or certified copy, being handed to the person for whom the service is intended. Service is considered to have taken place even if the person refuses to accept the legal documents. Therefore, if a commanding officer or other officer in the military service personally hands, or attempts to hand, that person the document, service is considered to have been effected, permitting the court to proceed to judgment. Upon receipt of foreign process with a request that it be served upon a person described in § 720.20(c)(1), a commanding officer shall notify the person of the fact that a particular foreign court is attempting to serve process and also inform that person that the process may be ignored or received. If the person to be served chooses to ignore the service, the commanding officer will return the document to the embassy or consulate of the foreign country with the notation that the commanding officer had the document, that the person chose to ignore it, and

that no physical offer of service had been made. The commanding officer will advise the Judge Advocate General or the Associate General Counsel (Litigation), as appropriate, of all requests for service of process from a foreign court and the details thereof.

(d) *Leave or liberty to be granted persons served with process.* When members or civilian employees are either served with process, or voluntarily accept service of process, in cases where the United States is not a party to the litigation, the commanding officer normally will grant leave or liberty to the person served to permit compliance with the process, unless to do so would have an adverse impact on naval operations. When a member or civilian employee is a witness for a nongovernmental party because of performance of official duties, the commanding officer may issue the person concerned permissive orders authorizing attendance at the trail at no expense to the Government. The provisions of 32 CFR part 725 must also be considered in such cases. Members or civilian employees may accept allowances and mileage tendered; however, any fees tendered for testimony must be paid to the Department of the Navy unless the member or employee is on authorized leave while attending the judicial proceeding. When it would be in the best interests of the United States Government (for example, in State criminal trails), travel funds may be used to provide members and civilian employees as witnesses as provided in the Joint Federal Travel Regulations. Responsibility for the payment of the member's mileage and allowances will be determined pursuant to the Joint Federal Travel Regulations, Volume 1, paragraph M6300, subsections 1–3.[3]

(e) *Report where service not allowed.* Where service of process is not permitted, or where the member or civilian employee is not given leave, liberty, or orders to attend a judicial proceeding, a report of such refusal and the reasons therefor shall be made by telephone, or message if telephone is impractical, to the Judge Advocate General or the Associate General Counsel (Litigation), as appropriate.

[3] See footnote 1 of § 720.5(b).

### § 720.21 Members or civilian employees subpoenaed as witnesses in State courts.

Where members or civilian employees are subpoenaed to appear as witnesses in State courts, and are served as described in §§ 720.20, 720.20(d) applies. If these persons are requested to appear as witnesses in State courts when the interests of the Federal Government are involved (e.g., Medical Care Recovery Act cases), follow the procedures described in § 720.22. If State authorities are attempting to obtain the presence of a member or a civilian employee as a witness in a civil or criminal case, and such person is unavailable because of an overseas assignment, the command should immediately contact the Judge Advocate General, or the Associate General Counsel (Litigation), as appropriate.

### § 720.22 Members or civilian employees subpoenaed as witnesses in Federal courts.

(a) *Witnesses on behalf of Federal Government.* When members or civilian employees of the Department of the Navy are required to appear as witnesses in a Federal Court to testify on behalf of the Federal Government in cases involving Department of the Navy activities, the Chief of Naval Personnel or the Commandant of the Marine Corps, as appropriate, will issue temporary additional duty orders to that person. The charges for such orders will be borne by the activity to which the required witness is attached. Payment to witnesses will be as provided by the Joint Federal Travel Regulations and U.S. Navy travel instructions. If the required witness is to appear in a case in which the activities of the Department of the Navy are not involved, the Department of the Navy will be reimbursed in accordance with the procedures outlined in the Navy Comptroller Manual, section 046268.

(b) *Witnesses on behalf of nongovernmental parties*—(1) *Criminal actions.* When members or civilian employees are served with a subpoena to appear as a witness for a defendant in a criminal action and the fees and mileage required by rule 17(d) of the Federal Rules of Criminal Procedure are tendered, the commanding officer may

issue the person subpoenaed permissive orders authorizing attendance at the trial at no expense to the Government, unless the person's absence would have an adverse impact on naval operations. In such a case, a full report of the circumstances will be made to the Judge Advocate General or, in the case of civilian employees, to the Associate General Counsel (Litigation). In those cases where fees and mileage are not tendered as required by rule 17(d) of the Federal Rules of Criminal Procedure, but the person subpoenaed still desires to attend, the commanding officer also may issue permissive orders at no cost to the Government. Such persons, however, should be advised that an agreement as to reimbursement for any expenses incident to travel, lodging, and subsistence should be effected with the party desiring their attendance and that no reimnbursement should be expected from the Government.

(2) *Civil actions*. When members or civilian employees are served with a subpoena to appear as a witness on the behalf of a nongovernmental party in a civil action brought in a Federal court, the provisions of § 720.20 apply.

### § 720.23 Naval prisoners as witnesses or parties in civilian courts.

(a) *Criminal actions*. When Federal or State authorities desire the attendance of a naval prisoner as a witness in a criminal case, they should submit a written request for such person's attendance to the Judge Advocate General. The civilian authority should include the following averments in its request:

(1) That the evidence to be derived from the prisoner's testimony is unavailable from any other source:

(2) That the civilian authority will provide adequate security arrangements for the prisoner and assume responsibility for the prisoner while he is in its custody; and

(3) that the civilian authority will assume all costs of transporting the prisoner from the brig, of maintaining that prisoner while in civilian custody, and of returning the prisoner to the brig from which he was removed.

The civilian authority should also include in its request an estimate of the length of time the prisoner's services will be required, and should specify the mode of transport by which it intends to return the prisoner. Upon receipt of such a request, authority by the Judge Advocate General will be given, in a proper case, for the production of the requested naval prisoner in court without resort to a writ of habeas corpus ad testificandum (a writ which requires the production of a prisoner to testify before a court of competent jurisdiction).

(b) *Civil actions*. The Department of the Navy will not authorize the attendance of a naval prisoner in a Federal or State court, either as a party or as a witness, in private litigation pending before such a court. The deposition of a naval prisoner may be taken in such a case, subject to reasonable conditions or limitations imposed by the command concerned.

### § 720.24 Interviews and depositions in connection with civil litigation in matters pertaining to official duties.

Requests to interview, depose, or call as witnesses, current or former members or civilian employees of the Department of the Navy, regarding information obtained in the course of their official duties, including expert testimony related thereto, shall be processed in accordance with 32 CFR part 725.

### § 720.25 Repossession of personal property.

Repossession of personal property, located on a Navy or Marine Corps installation, belonging to a member or to any dependent residing at or located on a Department of the Navy installation, may be permitted in the discretion of the commanding officer of the installation where the property is located, subject to the following. The documents purporting to authorize repossession and the procedures for repossessing the property must comply with State law. Prior to permitting physical repossession of any property, the commanding officer shall cause an informal inquiry into the circumstances and then determine whether to allow the repossession. If repossession is to be allowed, the person whose property is to be repossessed should be asked if he wishes

to relinquish the property voluntarily. Repossession must be carried out in a manner prescribed by the commanding officer. In the case of property owned by civilian employees of the Department of the Navy or civilian contractors or their employees or dependents, the commanding officer should direct that the disputed property be removed from the installation until the commanding officer is satisfied that the dispute is resolved.

**§§ 720.26–720.29 [Reserved]**

## Subpart C—Production of Official Records

### § 720.30 Production of official records in response to court order.

(a) *General*. Where unclassified naval records are desired by or on behalf of litigants, the parties will be informed that the records desired, or certified copies thereof, may be obtained by forwarding to the Secretary of the Navy, Navy Department, Washington, DC, or other custodian of the records, a court order calling for the particular records desired or copies thereof. Compliance with such court order will be effected by transmitting certified copies of the records to the clerk of the court out of which the process issues. See the provisions in the Secretary of the Navy Instruction 5211.5 series which set forth the additional requirement that reasonable efforts be made to notify all individuals to whom the record pertains of (1) the disclosure, and (2) the nature of the information provided, when the court order has become a matter of public record and the record is contained in a system of records as defined in the Secretary of the Navy Instruction 5211.5 series. If an original record is produced by a naval custodian, it will not be removed from the custody of the person producing it, but copies may be placed in evidence. Upon written request of one or more parties in interest or their respective attorneys, records which would be produced in response to a court order as set forth above may be furnished without court order when such records are not in a 'system of records' as defined by the Privacy Act (5 U.S.C. 552a) except as noted in paragraphs (b) and (c) of this section. In determining whether or not a record contained in a ''system of records'' will be furnished in response to a written request for that record, consideration shall be given to the provisions of the Secretary of the Navy Instruction 5720.42 series. If the record is in a ''system of records,'' it may be produced upon written request of one or more parties in interest or their respective attorneys in the absence of a court order only if the individuals to whom the record pertains give written consent to the production or if the production is otherwise authorized under the Privacy Act and the Secretary of the Navy Instruction 5211.5 series. Whenever compliance with a court order for production of Department of the Navy records is deemed inappropriate for any reason, such as when they contain privileged or classified information, the records and subpoena may be forwarded to the Secretary of the Navy (Judge Advocate General) for appropriate action, and the parties to the suit so notified. Any release of classified information for civil court proceedings (whether civil or criminal in nature) must also be coordinated within the office of the Chief of Naval Operations (OP–009D) in accordance with the Chief of Naval Operations Instruction 5510.1 series.

(b) *Records in the custody of National Personnel Records Center*. Court orders, *subpoenas duces tecum*, and other legal documents demanding information from, or the production of, service or medical records in the custody of the National Personnel Records Center involving former (deceased or discharged) Navy and Marine Corps personnel shall be served upon the General Services Administration, 9700 Page Boulevard; St. Louis, MO 63132, rather than the Department of the Navy. In the following situations, the request shall be forwarded to the Secretary of the Navy (Judge Advocate General).

(1) When the United States (Department of the Navy) is one of the litigants.

(2) When the case involves a person or persons who are or have been senior officers or officials within the Department of the Navy; and

(3) In other cases considered to be of special significance to the Judge Advocate General or the Secretary of the Navy.

(c) *Exceptions.* Where not in conflict with the foregoing restrictions relative to personal information, the release of which would result in a clearly unwarranted invasion of personal privacy, the production in Federal, State, territorial, or local courts of evidentiary material from investigations conducted pursuant to this Manual, and the service, employment, pay or medical records (including medical records of dependents) of persons in the naval service is authorized upon receipt of a court order, without procuring specific authority from the Secretary of the Navy. When the request for production involves material related to claims in favor of the Government, notification should be made to the affirmative claims office at the naval legal service office having territorial responsibility in the area. Where travel is involved, it must be without expense to the Government.

(d) *Medical and other records of civilian employees.* Production of medical certificates or other medical reports concerning civilian employees is controlled by the provisions of Executive Order 10561, 19 FR 5963, as implemented by Federal Personnel Manual, chapter 294, and chapter 339.1–4 (reprinted in MANMED article 23–255(6)). Records of civilian employees other than medical records may be produced upon receipt of a court order without procuring specific authority from the Secretary of the Navy, provided there is not involved any classified or For-Official-Use-Only information, such as loyalty or security records. Records relating to compensation benefits administered by the Bureau of Employees' Compensation may not be disclosed except upon the written approval of that Bureau (20 CFR 1.21). In case of doubt, the matter should be handled in accordance with the provisions of subsection a above. Where information is furnished hereunder in response to a court order, it is advisable that certified copies rather than originals be furnished and that, where original records are to be produced, the assistance of the U.S. Attorney or U.S. Marshal be requested so that custody of the records may be maintained.

[38 FR 6021, Mar. 6, 1973, as amended at 48 FR 4466, Feb. 1, 1983]

### § 720.31 Production of official records in the absence of court order.

(a) *General.* Release of official records outside the Department of the Navy in the absence of a court order is governed by the Privacy Act (5 U.S.C. 552a) and the Freedom of Information Act (5 U.S.C. 552). The following sources pertain: SECNAVINST 5211.5 series (Privacy) and SECNAVINST 5720.42 series (Freedom of Information).

(b) *Release of JAG Manual Investigations, Court-Martial Records, Articles 69 and 73 Petitions, and Article 138 Complaints of Wrongs.* Except as provided in this section, only the Assistant Judge Advocates General (Civil Law) and (Military Law) shall make determinations concerning the release of the records covered herein if less than a release of the complete requested record will result. In all other instances the Deputy Assistant Judge Advocates General, who have cognizance of the record(s) in issue, may release such records. Local record holders are reminded that the authority to release records does not necessarily include denial authority.

(1) *JAG Manual Investigations (including enclosures).* Any request for release outside the Department of the Navy shall be forwarded to the Assistant Judge Advocate General (Military Law) for determination, except that Privacy Act requests for release shall be forwarded to the Assistant Judge Advocate General (Civil Law) for determination.

(2) *Court-martial records and Articles 69 and 73 petitions.* These are matters of public record and may be released by any local holder. Court-martial records should be released only following proper authentication.

(3) *Article 138 Complaints of Wrongs.* Forward as in paragraph (b)(1) of this section.

(c) *Affirmative claims files.* Affirmative claims files (including Medical Care Recovery Act files), except to the extent that such files contain copies of reports of investigations prepared

under the Manual of the Judge Advocate General, or classified or privileged information, may be released by local holders to insurance companies to support claims; to civilian attorneys representing the injured party's and the Government's interests; and to other components of the Department of Defense, without the prior approval of the Judge Advocate General, provided that the amount of the claim is within the monetary settlement authority of the releaser. When the request for production involves material related to claims in favor of the Government, notification should be made to the affirmative claims office at the naval legal service office having territorial responsibility for the area.

(d) *Accounting for disclosures of records from systems of records.* When records located in a ''system of records'' are released, the official responsible for releasing the records shall consult SECNAVINST 5211.5 series regarding the requirement that accountings of the disclosures be maintained. Appendix A–3–a of the Manual of the Judge Advocate General is recommended for this purpose.

(1 CFR 18.14, and part 21, subpart B)

[45 FR 8599, Feb. 8, 1980, as amended at 48 FR 4466, Feb. 1, 1983]

### § 720.32 Certificates of full faith and credit.

The Judge Advocate General, the Deputy Judge Advocate General, or any Assistant Judge Advocate General is authorized to execute certificates of full faith and credit certifying the signatures and authority of officers of the Department of the Navy.

[38 FR 6021, Mar. 6, 1973]

## Subpart D—Compliance With Court Orders by Department of the Navy Members, Employees, and Family Members Outside the United States

AUTHORITY: DoD Directive 5525.9, 54 FR 296, 32 CFR part 146.

SOURCE: 55 FR 47876, Nov. 16, 1990, unless otherwise noted.

### § 720.40 Purpose.

This instruction:

(a) Implements 32 CFR part 146.

(b) Establishes policy and procedures for requesting the return to the United States of, or other action affecting, Department of the Navy (DON) personnel and employees serving outside the United States, and family members accompanying them, in compliance with court orders.

### § 720.41 Definitions.

*Court.* Any judicial body in the United States with jurisdiction to impose criminal sanctions on a Department of the Navy member, employee, or family member.

*Employee.* A civilian employed by the Department of the Navy or a component service, including an individual paid from non-appropriated funds, who is a citizen or national of the United States.

*Family member.* A spouse, natural or adopted child, or other lawful dependent of a Department of the Navy employee or member accompanying the Department of the Navy member or employee assigned to duty outside the United States.

*Felony.* A criminal offense that is punishable by incarceration for more than one year, regardless of the sentence that is imposed for commission of that offense.

*Member.* An individual on active duty in the Navy, Naval Reserve, Marine Corps, or Marine Corps Reserve.

*Request for return.* Any request or order received from a court, or from federal, state or local authorities concerning a court order, for the return to the United States of members, employees, or family members, for any reason listed in § 720.42.

*Respondent.* A member, employee, or family member whose return to the United States has been requested, or with respect to whom other assistance has been requested under this instruction.

*Responsible official.* Officials designated in this instruction to act on a request to return, or take other action affecting, members, employees or family members to the United States under this instruction.

*United States*. The 50 states, the District of Columbia, Puerto Rico, Guam, the Northern Mariana Islands, American Samoa, and the Virgin Islands.

**§ 720.42 Policy.**

(a) It is Department of the Navy policy to cooperate, as prescribed in this instruction, with courts and federal, state and local officials in enforcing court orders. The Department of the Navy will cooperate with requests when such action is consistent with mission requirements (including operational readiness), the provisions of applicable international agreements, and ongoing Department of Defense (DoD) investigations and courts-martial.

(b) Every reasonable effort will be made to resolve the matter without the respondent returning to the United States, or other action being taken against the respondent under this instruction.

(c) Requests to return members for felonies or for contempt involving unlawful or contemptuous removal of a child from the jurisdiction of a court or the custody of a parent or other person awarded custody by a court order will normally be granted, but only if the member cannot resolve the issue with the court without return to the United States. When the member's return is inconsistent with mission requirements, applicable international agreements, or ongoing DoD investigations or courts-martial, DoD approval of denial will be requested.

(d) For all other requests involving members, return will be based on the circumstances of the individual case as provided in this instruction.

(e) Members will normally be returned on a temporary additional duty (TAD) basis unless there are compelling reasons the return should be a permanent change of duty station (PCS).

(f) The involuntary return of employees or family members in response to a request for return is not authorized. However, the following action will be taken:

(1) Employees will be strongly urged to comply with court orders. Failure to comply with court orders involving felonies or contempt involving unlawful or contemptuous removal of a child from the jurisdiction of the court or the custody of a parent or other person awarded custody by a court order will normally require processing for adverse action, up to and including removal from federal service. Failure to comply with other court orders may require adverse action, depending on the circumstances of the individual case.

(2) Family members will be strongly encouraged to comply with court orders. Family members who fail to comply with court orders involving felonies or contempt involving unlawful or contemptuous removal of a child from the jurisdiction of the court or the custody of a parent or other person awarded custody by a court order will normally have their command sponsorship removed. Failure to comply with other court orders may also result in removal of command sponsorship, depending on the circumstances of the individual case.

(g) To facilitate prompt resolution of requests for return of members, minimize the burden on operating units, and to provide consistency during initial implementation of this new program, a limited number of responsible officials, designated in § 720.44, will respond to requesting officials.

**§ 720.43 Points of contact.**

(a) Authorities issuing requests for return or for other action under this instruction may contact the following activities:

(1) Chief of Naval Personnel (Pers–14), Washington, DC 20370–5000 (For Navy members and their family members).

(2) Commandant, U.S. Marine Corps (Code JAR), Washington, DC 20380–0001 (For Marine Corps members and their family members).

(3) Director, Office of Civilian Personnel Management (Code OOL), 800 N. Quincy Street, Arlington, VA 22203–1998 (For civilian personnel, including nonappropriated fund employees and their family members).

(b) Upon receipt of a request for action under this instruction, the Office of Civilian Personnel Management will forward the request to the appropriate responsible official for action in accordance with § 720.44.

**§ 720.44 Responsible officials.**

The following officials are designated responsible officials for acting on requests to return or to take other action affecting members, employees or family members to the United States.

(a) The Chief of Naval Personnel (CHNAVPERS) for requests involving Navy members and their family members who are not employees. The CHNAVPERS may delegate this authority within his headquarters, not below the 0–6 level for routine matters and not lower than the flag officer level for decisions to deny the request for return.

(b) The Commandant of the Marine Corps (CMC) for requests involving Marine Corps members and their family members who are not employees. The CMC may delegate this authority within his headquarters, not below the 0–6 level for routine matters and no lower that the general officer level for decisions to deny the request for return.

(c) The local commanding officer or officer in charge for requests involving employees and their family members who are not active duty military members.

(d) The Assistant Secretary of the Navy (Manpower and Reserve Affairs) (ASN(M&RA)) for requests not covered by §§ 720.44 (a) through (c).

**§ 720.45 Procedures.**

(a) If the request pertains to a felony or to contempt involving the unlawful or contemptuous removal of a child from the jurisdiction of a court or the custody of a parent or another person awarded custody by court order, and the matter cannot be resolved with the court without the respondent returning to the United States:

(1) For members: The responsible official shall direct the commanding officer or officer in charge to order the member to return to the United States. Failure to comply will normally be the basis for disciplinary action against the member.

(2) For employees, military and civilian family members: The responsible official shall strongly encourage the respondent to comply. Failure to comply may subject employees to adverse action, to include removal from the Federal service, and subject military and civilian family members to withdrawal of command sponsorship.

(b) For all other requests when the matter cannot be resolved with the court without returning the respondent to the United States, the responsible official shall take the action described in this instruction when deemed appropriate with the facts and circumstances of each particular case, following consultation with legal staff.

(c) When a member's return is inconsistent with mission requirements, the provisions of applicable international agreements, or ongoing DoD investigations and courts-martial, the Department of the Navy will ask DoD to approve denial of the request for the military members's return. To initiate this action, there must be an affirmative showing of articulable harm to the unit's mission or violation of an international agreement.

(d) When a responsible official has determined a request for return is apparently based on an order issued by a court of competent jurisdiction, the responsible official shall complete action on the request for return within 30 days of receipt of the request for return by the responsible official, unless a delay is authorized by the ASN(M&RA).

(e) When a delay to complete the action is warranted, the ASN(M&RA) will grant a 45 day delay, and provide a copy of that approval to the Assistant Secretary of Defense (Force Management & Personnel (ASD(FM&P)) and the General Counsel, DoD. The 45 day period begins upon request by the responsible official of the request for return. Conditions which, when accompanied by full supporting justification, will warrant the granting of the 45 day delay are:

(1) Efforts are in progress to resolve the matter to the satisfaction of the court without the respondent's return to the United States.

(2) To provide sufficient time for the respondent to provide evidence to show legal efforts to resist the request or to show legitimate cause for noncompliance.

(3) To provide commanding officers an opportunity to detail the specific effect on command mission and operational readiness anticipated from the loss of the member or Department of

the Navy employee, and to present facts relating to any international agreement, or ongoing DoD investigation or courts-martial.

(f) A commanding officer or officer in charge who receives a request for the return of, or other action affecting, a member, family member, or employee not of his/her command will forward the request to the appropriate commanding officer or officer in charge, copy to the responsible official, and advise both of them by message that a request for return or other action has been forwarded to them.

(g) A commanding officer or officer in charge who receives a request for the return of, or other action affecting, a member, family member, or employee of his/her command will:

(1) Notify the respondent of the right to provide evidence to show legal efforts to resist the request, or to show legitimate cause for noncompliance for inclusion in the submission to the responsible official.

(2) For members and their family members who are not employees, forward the request immediately to the appropriate responsible official, together with:

(i) Any information the individual desires to provide to show legal efforts to resist the request, or otherwise to show legitimate cause for noncompliance.

(ii) Facts detailing the specific impacts on command missions and readiness anticipated from loss of the member.

(iii) Facts relating to any international agreements or ongoing DoD investigations or courts-martial involving the respondent.

(iv) Information regarding conditions expected to interfere with a member's return to the command after completion of proceedings. If, in the opinion of the commanding officer, there are compelling reasons for the member to be returned to the United States PCS, provide full justification to support that recommendation to the cognizant officer.

(3) If a delay in processing is warranted under § 720.42 or § 720.45(e), make a recommendation with supporting justification to the responsible official.

(4) Monitor, and update as necessary, information provided to the responsible official.

(h) The responsible official shall:

(1) Determine whether the request is based on an order issued by a court of apparent competent jurisdiction and if so, complete action on the request no later than 30 days after its receipt by the responsible official. If a conflicts of law issue is presented between competing state interests, or between a state and a foreign host-nation, or between two different foreign nations, the matter shall be referred to the ASN(M&RA) on the first issue and to the Judge Advocate General (Code 10) on the second and third issues.

(2) Encourage the respondent to attempt to resolve the matter to the satisfaction of the court or other requesting authority without return of or other action affecting the member, employee, or family member.

(3) When a delay to complete action under this section is warranted, request the delay from ASN(M&RA) with full supporting justification.

(4) Examine all information the respondent desires to provide to show legal efforts to resist the request, or otherwise to show legitimate cause for noncompliance.

(5) Requests for exception from the requirements of this instruction shall be submitted, with supporting justification, to the ASN(M&RA) for submission to the ASD(FM&P).

(6) If a member will be ordered to return to the United States, determine if the member will be ordered TAD or PCS and advise the member's commanding officer of the determination.

(7) If a member will be ordered to return to an appropriate port of entry to comply with a request, ensure:

(i) The requesting officer has given official notification to the responsible official that the requesting official or other appropriate party will initiate action with the receiving jurisdiction to secure the member's delivery/extradition, as appropriate, per chapter 6 of the Manual of the Judge Advocate General, and provide for all costs incident thereto, including any escort if desired.

(ii) If applicable, the necessary accounting data are provided to the commanding officer of the member or orders are issued.

(iii) The member has arranged satisfactory foster care for any lawful minor dependents who will be left unaccompanied overseas upon the member's return to the United States.

(8) Notify the requesting official at least 10 days before the member's return to the selected port of entry.

(9) In the case of an employee or of a family member, the commanding officer or officer in charge of the activity to which the family member's sponsor is attached, or by which the employee is employed, will carry out the following steps:

(i) An employee shall be strongly encouraged to comply with the court order or other request for return. Failure to comply may be the basis for adverse action to include removal from Federal service. Adverse action should only be taken after coordination with the cognizant civilian personnel office and legal counsel and in compliance with Civilian Personnel Instruction 752.

(ii) If a family member of either a member or an employee is the subject of a request for return, the family member shall be strongly encouraged to comply with the court order. Failure to respond may be the basis for withdrawal of command sponsorship of the family member.

(10) Report promptly to the ASN(M&RA) any actions taken under § 720.45 (a) or (b).

(i) The ASN(M&RA):

(1) May grant delays of up to 45 days from the date of a request for delay in accordance with § 720.45(e).

(2) Will report promptly all delays of requests for the return of members to the ASD(FM&P) and to the General Counsel of the Department of Defense.

(3) Will request from the ASD(FM&P), when warranted, exception to the policies and procedures of DoD Directive 5525.9 of December 27, 1988.

(4) Consolidate and forward reports of action taken under § 720.45 (a) or (b) to the ASD(FM&P) and the General Counsel, DoD as required by DoD Directive 5525.9 of December 27, 1988.

### § 720.46 Overseas screening programs.

The Chief of Naval Operations (CNO) and the CMC shall incorporate procedures requiring members and employees to certify they have legal custody of all minor dependents accompanying them outside the United States into service overseas screening programs.

### § 720.47 Report.

The report requirement in this instruction is exempt from reports control by SECNAVINST 5214.2B.

## PARTS 721–722 [RESERVED]

## PART 723—BOARD FOR CORRECTION OF NAVAL RECORDS

Sec.
723.1 General provisions.
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723.4 Appearance before the board; notice; counsel; witnesses; access to records.
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723.10 Settlement of claims.
723.11 Miscellaneous provisions.

AUTHORITY: 10 U.S.C. 1034, 1552.

SOURCE: 62 FR 8166, Feb. 24, 1997, unless otherwise noted.

### § 723.1 General provisions.

This part sets up procedures for correction of naval and marine records by the Secretary of the Navy acting through the Board for Correction of Naval Records (BCNR or the Board) to remedy error or injustice. It describes how to apply for correction of naval and marine records and how the BCNR considers applications. It defines the Board's authority to act on applications. It directs collecting and maintaining information subject to the Privacy Act of 1974 authorized by 10 U.S.C. 1034 and 1552.

### § 723.2 Establishment, function and jurisdiction of the Board.

(a) *Establishment and composition.* Under 10 U.S.C. 1034 and 1552, the Board for Correction of Naval Records is established by the Secretary of the Navy.

The Board consists of civilians of the executive part of the Department of the Navy in such number, not less than three, as may be appointed by the Secretary and who shall serve at the pleasure of the Secretary. Three members present shall constitute a quorum of the Board. The Secretary of the Navy will designate one member as Chair. In the absence or incapacity of the Chair, an Acting Chair chosen by the Executive Director shall act as Chair for all purposes.

(b) *Function.* The Board is not an investigative body. Its function is to consider applications properly before it for the purpose of determining the existence of error or injustice in the naval records of current and former members of the Navy and Marine Corps, to make recommendations to the Secretary or to take corrective action on the Secretary's behalf when authorized.

(c) *Jurisdiction.* The Board shall have jurisdiction to review and determine all matters properly brought before it, consistent with existing law.

### § 723.3 Application for correction.

(a) *General requirements.* (1) The application for correction must be submitted on DD 149 (Application for Correction of Military Record) or exact facsimile thereof, and should be addressed to: Board for Correction of Naval Records, Department of the Navy, 2 Navy Annex, Washington, DC 20370–5100. Forms and other explanatory matter may be obtained from the Board upon request.

(2) Except as provided in paragraph (a)(3) of this section, the application shall be signed by the person requesting corrective action with respect to his/her record and will either be sworn to or will contain a provision to the effect that the statements submitted in the application are made with full knowledge of the penalty provided by law for making a false statement or claim. (18 U.S.C. 287 and 1001)

(3) When the record in question is that of a person who is incapable of making application, or whose whereabouts is unknown, or when such person is deceased, the application may be made by a spouse, parent, heir, or legal representative. Proof of proper interest shall be submitted with the application.

(b) *Time limit for filing application.* Applications for correction of a record must be filed within 3 years after discovery of the alleged error or injustice. Failure to file within the time prescribed may be excused by the Board if it finds it would be in the interest of justice to do so. If the application is filed more than 3 years after discovery of the error or injustice, the application must set forth the reason why the Board should find it in the interest of justice to excuse the failure to file the application within the time prescribed.

(c) *Acceptance of applications.* An application will be accepted for consideration unless:

(1) The Board lacks jurisdiction.

(2) The Board lacks authority to grant effective relief.

(3) The applicant has failed to comply with the filing requirements of paragraphs (a)(1), (a)(2), or (a)(3) of this section.

(4) The applicant has failed to exhaust all available administrative remedies.

(5) The applicant has failed to file an application within 3 years after discovery of the alleged error or injustice and has not provided a reason or reasons why the Board should find it in the interest of justice to excuse the failure to file the application within the prescribed 3-year period.

(d) *Other proceedings not stayed.* Filing an application with the Board shall not operate as a stay of any other proceedings being taken with respect to the person involved.

(e) *Consideration of application.* (1) Each application accepted for consideration and all pertinent evidence of record will be reviewed by a three member panel sitting in executive session, to determine whether to authorize a hearing, recommend that the records be corrected without a hearing, or to deny the application without a hearing. This determination will be made by majority vote.

(2) The Board may deny an application in executive session if it determines that the evidence of record fails to demonstrate the existence of probable material error or injustice. The

Board relies on a presumption of regularity to support the official actions of public officers and, in the absence of substantial evidence to the contrary, will presume that they have properly discharged their official duties. Applicants have the burden of overcoming this presumption but the Board will not deny an application solely because the record was made by or at the direction of the President or the Secretary in connection with proceedings other than proceedings of a board for the correction of military or naval records. Denial of an application on the grounds of insufficient evidence to demonstrate the existence of probable material error or injustice is final subject to the provisions for reconsideration contained in § 723.9.

(3) When an original application or a request for further consideration of a previously denied application is denied without a hearing, the Board's determination shall be made in writing and include a brief statement of the grounds for denial.

(4) The brief statement of the grounds for denial shall include the reasons for the determination that relief should not be granted, including the applicant's claims of constitutional, statutory and/or regulatory violations that were rejected, together with all the essential facts upon which the denial is based, including, if applicable, factors required by regulation to be considered for determination of the character of and reason for discharge. Further the Board shall make a determination as to the applicability of the provisions of the Military Whistleblower Protection Act (10 U.S.C. 1034) if it is invoked by the applicant or reasonably raised by the evidence. Attached to the statement shall be any advisory opinion considered by the Board which is not fully set out in the statement. The applicant will also be advised of reconsideration procedures.

(5) The statement of the grounds for denial, together with all attachments, shall be furnished promptly to the applicant and counsel, who shall also be informed that the name and final vote of each Board member will be furnished or made available upon request. Classified or privileged material will not be incorporated or attached to the Board statement; rather, unclassified or nonprivileged summaries of such material will be so used and written explanations for the substitution will be provided to the applicant and counsel.

### § 723.4 Appearance before the board; notice; counsel; witnesses; access to records.

(a) *General.* In each case in which the Board determines a hearing is warranted, the applicant will be entitled to appear before the Board either in person or by counsel of his/her selection or in person with counsel. Additional provisions apply to cases processed under the Military Whistleblower Protection Act (10 U.S.C. 1034).

(b) *Notice.* (1) In each case in which a hearing is authorized, the Board's staff will transmit to the applicant a written notice stating the time and place of hearing. The notice will be mailed to the applicant, at least 30 days prior to the date of hearing, except that an earlier date may be set where the applicant waives his/her right to such notice in writing.

(2) Upon receipt of the notice of hearing, the applicant will notify the Board in writing at least 15 days prior to the date set for hearing as to whether he/she will be present at the hearing and will indicate to the Board the name of counsel, if represented by counsel, and the names of such witnesses as he/she intends to call. Cases in which the applicant notifies the Board that he/she does not desire to be present at the hearing will be considered in accordance with § 723.5(b)(2).

(c) *Counsel.* As used in this part, the term ''counsel'' will be construed to include members in good standing of the federal bar or the bar of any state, accredited representatives of veterans' organizations recognized by the Secretary of Veterans Affairs under 38 U.S.C. 3402, or such other persons who, in the opinion of the Board, are considered to be competent to present equitably and comprehensively the request of the applicant for correction, unless barred by law. Representation by counsel will be at no cost to the government.

(d) *Witnesses.* The applicant will be permitted to present witnesses in his/her behalf at hearings before the

Board. It will be the responsibility of the applicant to notify his/her witnesses and to arrange for their appearance at the time and place set for hearing. Appearance of witnesses will be at no cost to the government.

(e) *Access to records.* (1) It is the responsibility of the applicant to procure such evidence not contained in the official records of the Department of the Navy as he/she desires to present in support of his/her case.

(2) Classified or privileged information may be released to applicants only by proper authorities in accordance with applicable regulations.

(3) Nothing in this part authorizes the furnishing of copies of official records by the Board. Requests for copies of these records should be submitted in accordance with applicable regulations governing the release of information. The BCNR can provide a requestor with information regarding procedures for requesting copies of these records from the appropriate retention agency.

**§ 723.5 Hearing.**

(a) *Convening of board.* The Board will convene, recess and adjourn at the call of the Chair or Acting Chair.

(b) *Conduct of hearing.* (1) The hearing shall be conducted by the Chair or Acting Chair, and shall be subject to his/her rulings so as to ensure a full and fair hearing. The Board shall not be limited by legal rules of evidence but shall maintain reasonable bounds of competency, relevancy, and materiality.

(2) If the applicant, after being duly notified, indicates to the Board that he/she does not desire to be present or to be represented by counsel at the hearing, the Board will consider the case on the basis of all the material before it, including, but not limited to, the application for correction filed by the applicant, any documentary evidence filed in support of such application, any brief submitted by or in behalf of the applicant, and all available pertinent records.

(3) If the applicant, after being duly notified, indicates to the Board that he/she will be present or be represented by counsel at the hearing, and without good cause and timely notice to the Board, the applicant or representative fails to appear at the time and place set for the hearing or fails to provide the notice required by § 723.4(b)(2), the Board may consider the case in accordance with the provisions of paragraph (b)(2) of this section, or make such other disposition of the case as is appropriate under the circumstances.

(4) All testimony before the Board shall be given under oath or affirmation. The proceedings of the Board and the testimony given before it will be recorded verbatim.

(c) *Continuance.* The Board may continue a hearing on its own motion. A request for continuance by or in behalf of the applicant may be granted by the Board if a continuance appears necessary to insure a full and fair hearing.

**§ 723.6 Action by the Board.**

(a) *Deliberations, findings, conclusions, and recommendations.* (1) Only members of the Board and its staff shall be present during the deliberations of the Board.

(2) Whenever, during the course of its review of an application, it appears to the Board's satisfaction that the facts have not been fully and fairly disclosed by the records or by the testimony and other evidence before it, the Board may require the applicant or military authorities to provide such further information as it may consider essential to a complete and impartial determination of the facts and issues.

(3) Following a hearing, or where the Board determines to recommend that the record be corrected without a hearing, the Board will make written findings, conclusions and recommendations. If denial of relief is recommended following a hearing, such written findings and conclusions will include a statement of the grounds for denial as described in § 723.3(e)(4). The name and final vote of each Board member will be recorded. A majority vote of the members present on any matter before the Board will constitute the action of the Board and shall be so recorded.

(4) Where the Board deems it necessary to submit comments or recommendations to the Secretary as to matters arising from but not directly related to the issues of any case, such

comments and recommendations shall be the subject of separate communication. Additionally, in Military Whistleblower Protection Act cases, any recommendation by the Board to the Secretary that disciplinary or administrative action be taken against any Navy official based on the Board's determination that the official took reprisal action against the applicant will not be made part of the Board's record of proceedings or furnished the applicant but will be transmitted to the Secretary as a separate communication.

(b) *Minority report.* In case of a disagreement between members of the Board a minority report will be submitted, either as to the findings, conclusions or recommendation, including the reasons therefor.

(c) *Record of proceedings.* Following a hearing, or where the Board determines to recommend that the record be corrected without a hearing, a record of proceedings will be prepared. Such record shall indicate whether or not a quorum was present, and the name and vote of each member present. The record shall include the application for relief, a verbatim transcript of any testimony, affidavits, papers and documents considered by the Board, briefs and written arguments, advisory opinions, if any, minority reports, if any, the findings, conclusions and recommendations of the Board, where appropriate, and all other papers, documents, and reports necessary to reflect a true and complete history of the proceedings.

(d) *Withdrawal.* The Board may permit an applicant to withdraw his/her application without prejudice at any time before its record of proceedings is forwarded to the Secretary.

(e) *Delegation of authority to correct certain naval records.* (1) With respect to all petitions for relief properly before it, the Board is authorized to take final corrective action on behalf of the Secretary, unless:

(i) Comments by proper naval authority are inconsistent with the Board's recommendation;

(ii) The Board's recommendation is not unanimous; or

(iii) It is in the category of petitions reserved for decision by the Secretary of the Navy.

(2) The following categories of petitions for relief are reserved for decision by the Secretary of the Navy:

(i) Petitions involving records previously reviewed or acted upon by the Secretary wherein the operative facts remained substantially the same;

(ii) Petitions by former commissioned officers or midshipmen to change the character of, and/or the reason for, their discharge; or,

(iii) Such other petitions as, in the determination of Office of the Secretary or the Executive Director, warrant Secretarial review.

(3) The Executive Director after ensuring compliance with this section, will announce final decisions on applications decided under this section.

### § 723.7 Action by the Secretary.

(a) *General.* The record of proceedings, except in cases finalized by the Board under the authority delegated in § 723.6(e), and those denied by the Board without a hearing, will be forwarded to the Secretary who will direct such action as he or she determines to be appropriate, which may include the return of the record to the Board for further consideration. Those cases returned for further consideration shall be accompanied by a brief statement setting out the reasons for such action along with any specific instructions. If the Secretary's decision is to deny relief, such decision shall be in writing and, unless he or she expressly adopts in whole or in part the findings, conclusions and recommendations of the Board, or a minority report, shall include a brief statement of the grounds for denial. See § 723.3(e)(4).

(b) *Military Whistleblower Protection Act.* The Secretary will ensure that decisions in cases involving the Military Whistleblower Protection Act are issued 180 days after receipt of the case and will, unless the full relief requested is granted, inform applicants of their right to request review of the decision by the Secretary of Defense. Applicants will also be informed:

(1) Of the name and address of the official to whom the request for review must be submitted.

(2) That the request for review must be submitted within 90 days after receipt of the decision by the Secretary of the Navy.

(3) That the request for review must be in writing and include:

(i) The applicant's name, address and telephone number;

(ii) A copy of the application to the Board and the final decision of the Secretary of the Navy; and

(iii) A statement of the specific reasons the applicant is not satisfied with the decision of the Secretary of the Navy.

(4) That the request must be based on the Board record; request for review based on factual allegations or evidence not previously presented to the Board will not be considered under this paragraph but may be the basis for reconsideration by the Board under § 723.9.

### § 723.8 Staff action.

(a) *Transmittal of final decisions granting relief.* (1) If the final decision of the Secretary is to grant the applicant's request for relief the record of proceedings shall be returned to the Board for disposition. The Board shall transmit the finalized record of proceedings to proper naval authority for appropriate action. Similarly final decisions of the Board granting the applicant's request for relief under the authority delegated in § 723.6(e), shall also be forwarded to the proper naval authority for appropriate action.

(2) The Board shall transmit a copy of the record of proceedings to the proper naval authority for filing in the applicant's service record except where the effect of such action would be to nullify the relief granted. In such cases no reference to the Board's decision shall be made in the service record or files of the applicant and all copies of the record of proceedings and any related papers shall be forwarded to the Board and retained in a file maintained for this purpose.

(3) The addressees of such decisions shall report compliance therewith to the Executive Director.

(4) Upon receipt of the record of proceedings after final action by the Secretary, or by the Board acting under the authority contained in § 723.6(e), the Board shall communicate the decision to the applicant. The applicant is entitled, upon request, to receive a copy of the Board's findings, conclusions and recommendations.

(b) *Transmittal of final decisions denying relief.* If the final decision of the Secretary or the Board is to deny relief, the following materials will be made available to the applicant:

(1) A statement of the findings, conclusions, and recommendations made by the Board and the reasons therefor;

(2) Any advisory opinions considered by the Board;

(3) Any minority reports; and

(4) Any material prepared by the Secretary as required in § 723.7. Moreover, applicant shall also be informed that the name and final vote of each Board member will be furnished or made available upon request and that he/she may submit new and material evidence or other matter for further consideration.

### § 723.9 Reconsideration.

After final adjudication, further consideration will be granted only upon presentation by the applicant of new and material evidence or other matter not previously considered by the Board. New evidence is defined as evidence not previously considered by the Board and not reasonably available to the applicant at the time of the previous application. Evidence is material if it is likely to have a substantial effect on the outcome. All requests for further consideration will be initially screened by the Executive Director of the Board to determine whether new and material evidence or other matter (including, but not limited to, any factual allegations or arguments why the relief should be granted) has been submitted by the applicant. If such evidence or other matter has been submitted, the request shall be forwarded to the Board for a decision. If no such evidence or other matter has been submitted, the applicant will be informed that his/her request was not considered by the Board because it did not contain new and material evidence or other matter.

**§ 723.10 Settlement of claims.**

(a) *Authority*. (1) The Department of the Navy is authorized under 10 U.S.C. 1552 to pay claims for amounts due to applicants as a result of corrections to their naval records.

(2) The Department of the Navy is not authorized to pay any claim heretofore compensated by Congress through enactment of a private law, or to pay any amount as compensation for any benefit to which the claimant might subsequently become entitled under the laws and regulations administered by the Secretary of Veterans Affairs.

(b) *Application for settlement*. (1) Settlement and payment of claims shall be made only upon a claim of the person whose record has been corrected or legal representative, heirs at law, or beneficiaries. Such claim for settlement and payment may be filed as a separate part of the application for correction of the record.

(2) When the person whose record has been corrected is deceased, and where no demand is presented by a duly appointed legal representative of the estate, payments otherwise due shall be made to the surviving spouse, heir or beneficiaries, in the order prescribed by the law applicable to that kind of payment, or if there is no such law covering order of payment, in the order set forth in 10 U.S.C. 2771; or as otherwise prescribed by the law applicable to that kind of payment.

(3) Upon request, the applicant or applicants shall be required to furnish requisite information to determine their status as proper parties to the claim for purposes of payment under applicable provisions of law.

(c) *Settlement*. (1) Settlement of claims shall be upon the basis of the decision and recommendation of the Board, as approved by the Secretary or his designee. Computation of the amounts due shall be made by the appropriate disbursing activity. In no case will the amount found due exceed the amount which would otherwise have been paid or have become due under applicable laws had no error or injustice occurred. Earnings received from civilian employment, self employment or any income protection plan for such employment during any period for which active duty pay and allowances are payable will be deducted from the settlement. To the extent authorized by law and regulation, amounts found due may be reduced by the amount of any existing indebtedness to the Government arising from military service.

(2) Prior to or at the time of payment, the person or persons to whom payments are to be made shall be advised by the disbursing activity of the nature and amount of the various benefits represented by the total settlement and shall be advised further that acceptance of such settlement shall constitute a complete release by the claimants involved of any claim against the United States on account of the correction of the record.

(d) *Report of settlement*. In every case where payment is made, the amount of such payment and the names of the payee or payees shall be reported to the Executive Director.

**§ 723.11 Miscellaneous provisions.**

(a) *Expenses*. No expenses of any nature whatsoever voluntarily incurred by the applicant, counsel, witnesses, or by any other person in the applicant's behalf, will be paid by the Government.

(b) *Indexing of decisions*. (1) Documents sent to each applicant and counsel in accordance with § 723.3(e)(5) and § 723.8(a)(4), together with the record of the votes of Board members and all other statements of findings, conclusions and recommendations made on final determination of an application by the Board or the Secretary will be indexed and promptly made available for public inspection and copying at the Armed Forces Discharge Review/Correction Boards Reading Room located on the Concourse of the Pentagon Building in Room 2E123, Washington, DC.

(2) All documents made available for public inspection and copying shall be indexed in a usable and concise form so as to enable the public to identify those cases similar in issue together with the circumstances under and/or reasons for which the Board and/or Secretary have granted or denied relief. The index shall be published quarterly and shall be available for public inspection and distribution by sale at the

Reading Room located on the Concourse of the Pentagon Building in Room 2E123, Washington, DC. Inquiries concerning the index or the Reading Room may be addressed to the Chief, Micromation Branch/Armed Forces Discharge Review/Correction Boards Reading Room, Crystal Mall 4, 1941 Jefferson Davis Highway, Arlington, Virginia 22202.

(3) To the extent necessary to prevent a clearly unwarranted invasion of personal privacy, identifying details of the applicant and other persons will be deleted from the documents made available for public inspection and copying. Names, addresses, social security numbers and military service numbers must be deleted. Deletions of other information which is privileged or classified may be made only if a written statement of the basis for such deletion is made available for public inspection.

# PART 724—NAVAL DISCHARGE REVIEW BOARD

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AUTHORITY: 5 U.S.C. 301; 10 U.S.C. 1553.

SOURCE: 50 FR 10943, Mar. 19, 1985, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes to part 724 appear at 65 FR 62616, Oct. 19, 2000.

## Subpart A—Definitions

### § 724.101 Naval Service.

The Naval Service is comprised of the uniformed members of the United States Navy and the United States Marine Corps, including active and inactive reserve components.

### § 724.102 Naval Discharge Review Board.

An administrative board, referred to as the ''NDRB'' established by the Secretary of the Navy pursuant to title 10 U.S.C., section 1553, for the review of discharges of former members of the Naval Service.

### § 724.103 NDRB panel.

An element of the NDRB, consisting of five members, authorized to review discharges. In plenary review session, an NDRB panel acts with the authority delegated by the Secretary of the Navy to the Naval Discharge Review Board.

### § 724.104 NDRB Traveling Panel.

An NDRB Panel that travels for the purpose of conducting personal appearances discharge review hearings at locations outside of the National Capital Region (NCR).

### § 724.105 President of the NDRB.

A senior officer of the Naval Service designated by the Secretary of the Navy who is responsible for the direct supervision of the discharge review function within the Naval Service. (See subpart E).

### § 724.106 Presiding Officer, NDRB Panel.

The senior member of an NDRB Panel shall normally be the Presiding

Officer. He/she shall convene, recess and adjourn the NDRB Panel as appropriate.

### § 724.107 Discharge.

In the context of the review function prescribed by 10 U.S.C. 1553, a discharge or dismissal is a complete separation from the Naval Service, other than one pursuant to the sentence of a general court-martial. By reason of usage, the term ''discharge'' is predominantly applicable to the separation of enlisted personnel for any reason, and the term ''dismissal'' to the separation of officers as a result of Secretarial or general court-martial action. In the context of the mission of the NDRB, the term ''discharge'' used here shall, for purpose of ease of expression, include any complete separation from the naval service other than that pursuant to the sentence of general court-martial. The term ''discharge'' also includes the type of discharge and the reason/basis for that discharge, e.g., Other Than Honorable/Misconduct (Civil Conviction).

### § 724.108 Administrative discharge.

A discharge upon expiration of enlistment or required period of service, or prior thereto, in a manner prescribed by the Commandant of the Marine Corps or the Commander, Naval Personnel Command, but specifically excluding separation by sentence of a general court-martial.

[65 FR 62616, Oct. 19, 2000]

### § 724.109 Types of administrative discharges.

(a) A determination reflecting a member's military behavior and performance of duty during a specific period of service. The three characterizations are:

(1) *Honorable.* A separation from the naval service with honor. The issuance of an Honorable Discharge is contingent upon proper military behavior and performance of duty.

(2) Under Honorable Conditions (also termed General Discharge). A separation from the naval service under honorable conditions. The issuance of a discharge under honorable conditions is contingent upon military behavior and performance of duty which is not sufficiently meritorious to warrant an Honorable Discharge.

(3) *Under Other Than Honorable Conditions (formerly termed Undesirable Discharge).* A separation from the naval service under conditions other than honorable. It is issued to terminate the service of a member of the naval service for one or more of the reasons/basis listed in the Naval Military Personnel Manual, Marine Corps Separation and Retirement Manual and their predecessor publications.

(4) *Entry Level Separation.* (i) A separation initiated while a member is in entry level status will be described as an Entry Level Separation except in the following circumstances:

(*a*) When characterization under Other Than Honorable Conditions is authorized and is warranted by the circumstances of the case; or

(*b*) When characterization of service as Honorable is clearly warranted by the presence of unusual circumstances including personal conduct and performance of naval duty and is approved on a case-by-case basis by the Secretary of the Navy. This characterization will be considered when the member is separated by reason of Selected Changes in Service Obligation, Convenience of the Government, or Disability.

(ii) With respect to administrative matters outside the administrative separation system that require a characterization of service as Honorable or General, an Entry Level Separation shall be treated as the required characterization. An Entry Level Separation for a member of a Reserve component separated from the Delayed Entry Program is under honorable conditions.

(b) [Reserved]

[50 FR 10943, Mar. 19, 1985, as amended at 51 FR 44909, Dec. 15, 1986; 65 FR 62616, Oct. 19, 2000]

### § 724.110 Reason/basis for administrative discharge.

The terms ''reason for discharge'' and ''basis for discharge'' have the same meaning. The first is a Navy term and the second is a Marine Corps term. These terms identify why an administrative discharge was issued, e.g., Convenience of the Government, Misconduct. Reasons/basis for discharge

are found in the Naval Military Personnel Manual and Marine Corps Separation and Retirement Manual as well as predecessor publications.

**§ 724.111 Punitive discharge.**

A discharge awarded by sentence of a court-martial. There are two types of punitive discharges:

(a) *Bad conduct.* A separation from the naval service under conditions other than honorable. It may be effected only as a result of the approved sentence of a general or special court-martial.

(b) *Dishonorable.* A separation from the naval service under dishonorable conditions. It may be effected only as a result of the approved sentence of a general court-martial.

**§ 724.112 Clemency discharge.**

(a) The clemency discharge was created by the President on September 16, 1974, in his Proclamation 4313, ''Announcing a Program for the Return of Vietnam Era Draft Evaders and Military Deserters.'' Upon issuance to individuals who have an undesirable discharge or a punitive discharge, a clemency discharge serves as a written testimonial to the fact that the individual has satisfied the requirements of the President's program, and has fully earned his/her return to the mainstream of American society in accordance with that program.

(b) The clemency discharge is a neutral discharge, neither honorable nor less than honorable. It does not effect a change in the characterization of the individual's military service as having been under other than honorable condition, nor does it serves to change, seal, erase or in any way modify the individual's past military record. Therefore, if the underlying discharge was issued as a result of a general court-martial, the issuance of a Clemency Discharge does not subject the underlying characterization to review under 10 U.S.C. 1553. Clemency discharges are issued by the Commander, Naval Military Personnel Command or the Commandant of the Marine Corps when an individual has met the requirements of the Presidential Proclamation.

**§ 724.113 Application.**

In the context of this Manual, a written application to the NDRB for the review of a discharge submitted by a former member of the naval service or, where a former member is deceased or incompetent, by spouse, next of kin or legal representative. Department of Defense Form 293 must be used for the application.

**§ 724.114 Applicant.**

A former member of the naval service who has been discharged administratively in accordance with the directives of the naval service or by sentence of a special court-martial under title 10 U.S.C. 801 *et seq.* (Uniform Code of Military Justice) and, in accordance with statutory and regulatory provisions:

(a) Whose case is considered by the NDRB at the request of the former member, of, if authorized under § 724.113, the surviving spouse, next-of-kin or legal representative, or

(b) Whose case is considered on the NDRB's own motion.

**§ 724.115 Next of kin.**

The person or persons in the highest category of priority as determined by the following list (categories appear in descending order of priority): Surviving legal spouse; children (whether by current or prior marriage) age 18 years or older in descending precedence by age; father or mother, unless by court order custody has been vested in another (adoptive parent takes precedence over natural parent); siblings (whole or half) age 18 years or older in descending precedence by age; grandfather or grandmother; any other relative (precedence to be determined in accordance with the civil law of descent of the deceased former member's state of domicile at time of death).

**§ 724.116 Counsel/Representative.**

An individual or agency designated by the applicant who agrees to represent the applicant in a case before the NDRB. 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; or a representative from private organizations or local Government agencies.

### § 724.117 Discharge review.

A nonadversary administrative reappraisal at the level of the Navy Department of discharges from the naval service. The object of the reappraisal is to determine whether the discharge should be changed, and if so, the nature of the change. This reappraisal includes the type and reason/basis for separation, the procedures followed in accomplishing separation, and the characterization of service. This term includes determinations made under the provisions of 38 U.S.C. 3103(2).

### § 724.118 Documentary discharge review.

A formal session of the NDRB convened for the purpose of reviewing, on the basis of documentary data, an applicant's discharge. The Documentary data shall include the application together with all information accompanying that application, available service records, and any other information considered relevant by the NDRB.

[50 FR 10943, Mar. 19, 1985, as amended at 75 FR 747, Jan. 6, 2010]

### § 724.119 Personal appearance discharge review.

A formal session of the NDRB convened for the purpose of reviewing an applicant's discharge on the basis of a personal appearance, as well as documentary data. The personal appearance may be by the applicant or by a representative of the applicant, or both.

### § 724.120 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.

### § 724.121 Decisional document.

The written recordation of the applicant's summary of service, the issue or issues presented together with any evidence offered in support of the application, the NDRB's response to the issue or issues, the votes of the members of the panel, and any recommendations or responses by the President of the NDRB or the Secretarial Reviewing Authority (SRA). The decisional document is promulgated by the ''en bloc letter''.

### § 724.122 Recorder, NDRB Panel.

A panel member responsible for briefing an applicant's case from the documentary evidence available prior to a discharge review, presenting the brief to the panel considering the application, performing other designated functions during personal appearance discharge hearings, and drafting the decisional document subsequent to the hearing.

### § 724.123 Complainant.

A former member of the Armed Forces (or the former member's counsel) who submits a complaint under 32 CFR part 70 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 reference (b) 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.

## Subpart B—Authority/Policy for Departmental Discharge Review

### § 724.201 Authority.

The Naval Discharge Review Board, established pursuant to 10 U.S.C. 1553, is a component of the Secretary of the Navy Council of Review Boards. On December 6, 2004, the Assistant Secretary of the Navy (Manpower & Reserve Affairs) approved the change in name from Naval Council of Personnel Boards to Secretary of the Navy Council of Review Boards. By SECNAVINST 5730.7 series, the Assistant Secretary of

the Navy (Manpower and Reserve Affairs) is authorized and directed to act for the Secretary of the Navy within his/her assigned area of responsibility and exercises oversight over the Secretary of the Naval Council of Review Boards. SECNAVINST 5420.135 series states the organization, mission, duties and responsibilities of the Secretary of the Naval Council of Review Boards to include the Naval Discharge Review Board. The Chief of Naval Operations established the Office of Naval Disability Evaluation and the Navy Council of Personnel Boards on 1 October 1976 (OPNAVNOTE 5450 Ser 09b26/535376 of 9 Sep 1976 (Canc frp: Apr 77)). The Chief of Naval Operations approved the change in name of the Office of Naval Disability Evaluation and Navy Council of Personnel Boards to Naval Council of Personnel Boards on 1 February 1977 (OPNAVNOTE 5450 Ser 099b26/32648 of 24 Jan 1977 (Canc frp: Jul 77)) with the following mission Statement:

To administer and supervise assigned boards and councils.

[75 FR 747, Jan. 6, 2010]

### § 724.202 Statutory/Directive Authority.

The NDRB, in its conduct of discharge review, shall be guided by the applicable statutes, regulations, and manuals and directives of the Department of the Navy, and other written public expressions of policy by competent authority:

(a) 10 U.S.C. 1553, Review of discharge or dismissal:

(1) ''The Secretary concerned shall, after consulting the Administrator of Veterans' Affairs, establish a board of review, consisting of five members, to review the discharge or dismissal (other than a discharge or dismissal by sentence of a general court-martial) of any former member of an armed force under the jurisdiction of his/her department upon its own motion or upon the request of the former member or, if he/she is dead, his/her surviving spouse, next of kin, or legal representative. A motion or request for review must be made within 15 years after the date of the discharge or dismissal.''

(2) A board established under this section may, subject to review by the Secretary concerned, change a discharge or dismissal, or issue a new discharge, to reflect its findings.

(3) A review by the board established under this section shall be based on the records of the armed forces concerned and such other evidence as may be presented to the board. A witness may present evidence to the board in person or by affidavit. A person who requests a review under this section may appear before the board in person or by counsel or an accredited representative or an organization recognized by the Administrator of Veterans' Affairs under title 38 U.S.C. 3401 *et seq.*''.

(b) *Pub. L. 95–126*. See appendix D.

(c) *32 CFR part 70*. This provides for uniform standards and procedures for review of discharges from the military services of the Department of Defense. The provisions of 32 CFR part 70 are incorporated in this Manual.

(d) *The Secretary of Defense memoranda dated August 13, 1971 and April 28, 1972 (NOTAL)*. These directed a review for recharacterization of (1) administrative discharges under other than honorable conditions issued solely on the basis of personal use of drugs or possession of drugs for the purpose of such use, and (2) punitive discharges and dismissals issued solely for conviction of personal use of drugs and possession for the purpose of such use for those discharges executed as a result of a case completed or in process on or before July 7, 1971. (See appendix B).

(e) *32 CFR part 41*. This prescribes policy, standards and procedures which govern the administrative separation of enlisted persons from the Armed Forces.

### § 724.203 Broad objectives of naval discharge review.

Naval discharge review shall have as its broad objectives:

(a) The furtherance of good order and discipline.

(b) The correction of injustice or inequity in the discharge issued.

(c) The correction of administrative or clerical errors.

### § 724.204 Eligibility for naval discharge review.

Any former member of the Naval Service, eligible for review under reference (a) or surviving spouse, next of

kin or legal representative, shall upon submission of an application be afforded a review of the member's discharge from the Naval Service as provided in §§ 724.205 and 724.206. Discharge review may also be initiated on the motion of the NDRB (See § 724.220).

### § 724.205 Authority for review of naval discharges; jurisdictional limitations.

(a) The Board shall have no authority to:

(1) Review a discharge or dismissal resulting from a general court-martial;

(2) Alter the judgment of a court-martial, except the discharge or dismissal awarded may be changed for purposes of clemency;

(3) Revoke any discharge or dismissal;

(4) Reinstate a person in the naval service;

(5) Recall a former member to active duty;

(6) Change a reenlistment code;

(7) Make recommendations for reenlistment to permit entry in the naval service or any other branch of the Armed Forces;

(8) Cancel or void enlistment contracts; or

(9) Change the reason for discharge from or to a physical disability

(b) Review of naval discharges shall not be undertaken in instances where the elapsed time between the date of discharge and the date of receipt of application for review exceeds fifteen years.

### § 724.206 Jurisdictional determinations.

The determination as to whether the NDRB has jurisdiction in any case shall be predicated on the policy stated in § 724.205. Decisions shall be made by administrative action without referral to the NDRB. Normally, they shall be made by the Executive Secretary of the NDRB, or they may be referred to the President, NDRB.

### § 724.207 Disposition of applications for discharge review.

One of three dispositions will be made of an application for review of a discharge:

(a) The application may be rejected for reason of:

(1) Absence of jurisdiction;

(2) Previous review on the same evidence; or

(b) The application may be withdrawn by the applicant; or

(c) The application may be accepted and the discharge reviewed by the NDRB, resulting in,

(1) Change to the discharge, or

(2) No change.

### § 724.208 Implementation of NDRB decisions.

The Commandant of the Marine Corps and the Chief of Naval Operations are responsible for implementing Naval Discharge Review Board decisions within their respective services. The Commandant of the Marine Corps shall be notified of decisions in each discharge review case and shall implement the decisions within the Marine Corps. The Commander, Naval Military Personnel Command, acting for the Chief of Naval Operations and Chief of Naval Personnel, shall be notified of decisions in each discharge review case and shall implement the decisions within the Navy.

### § 724.209 Evidence supporting applications.

In the absence of law, evidence or policy to the contrary, naval discharges shall be considered just, equitable and proper as issued. When hearings are scheduled, applicants must be prepared to present their case at the scheduled time. In the absence of any other evidence, naval discharge review shall be undertaken by examination of available service and health records of the applicant. Normally, the responsibility for presenting evidence from outside available service and health records shall rest with the applicant. Applications in which elements of relevant information are obviously omitted will be returned for completion and resubmission.

### § 724.210 Review action in instances of unavailable records.

(a) In the event that Department of the Navy personnel or health records associated with a requested review of

discharge are not located at the custodial activity, the following action shall be taken by the NDRB prior to consideration of the request for discharge review.

(1) A certification that the records are unavailable shall be obtained from the custodial activity.

(2) The applicant shall be notified of the situation 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 60 days shall be allowed for such documents to be submitted. At the expiration of this time period, the review may be conducted with information available to the NDRB.

(3) The presumption of regularity in the conduct of government affairs may be applicable in instances of unavailable records depending on the circumstances of the case. (See § 724.211)

(b) [Reserved]

[50 FR 10943, Mar. 19, 1985, as amended at 65 FR 62616, Oct. 19, 2000]

### § 724.211 Regularity of government affairs.

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.

### § 724.212 Availability of records.

(a) 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 63132. Once the application for discharge review (DD Form 293) is submitted, an applicant's military records are forwarded to the NDRB where they cannot be reproduced. Submission of a request for an applicant's military records, including a request under the Freedom of Information Act (5 U.S.C. 552) or Privacy Act (5 U.S.C. 552a) 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 NDRB. 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 may also examine their military personnel records at the site of their scheduled review before the hearing. The NDRB shall notify applicants of the dates the records are available for examination in their standard scheduling information.

(b) If the NDRB 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 NDRB shall advise the applicant of the mailing address of the government department, office, or activity to which the request should be submitted.

(c) [Reserved]

(d) The NDRB 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.

(1) In any case heard on request of an applicant, the NDRB 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 NDRB shall also

notify the applicant or counsel or representative: (a) of the right to examine such documents or to be provided with copies of the documents upon request; (b) of the date by which such requests must be received; and (c) of the opportunity to respond within a reasonable period of time to be set by the NDRB.

(2) When necessary to acquaint the applicant with the substance of a classified document, the classifying authority, on the request of the NDRB, 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 source shall not be considered by the NDRB in its review of the case.

(e) 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, The Pentagon, Washington, DC 20310.

[50 FR 10943, Mar. 19, 1985, as amended at 65 FR 62616, Oct. 19, 2000]

### § 724.213 Attendance of witnesses.

Arrangement for attendance of witnesses testifying in behalf of the applicant at discharge review hearings is the responsibility of the applicant. The NDRB is not authorized to subpoena or otherwise require their presence.

### § 724.214 Applicant's expenses.

Unless otherwise specified by law or regulation, expenses incurred by the applicant, witnesses, or counsel/representative will not be paid by the Department of Defense. The NDRB is not authorized to issue orders or other process to enable the applicant to appear in person.

### § 724.215 Military representation.

Military officers, except those acting pursuant to specific detailing by appropriate authorities desiring to act for or on behalf of an applicant in the presentation of a case before an NDRB Panel are advised to consult legal counsel before undertaking such representation. Such representation may be prohibited by 18 U.S.C. 205.

### § 724.216 Failure to appear at a hearing or respond to a scheduling notice.

(a) 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:

(1) 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

(2) 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.

(b) In such cases, the applicant shall be deemed to have waived the right to a hearing, and the NDRB 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.

### § 724.217 Limitation—Reconsiderations.

A discharge review shall not be subject to reconsideration except:

(a) When the only previous consideration of the case was on the motion of the NDRB;

(b) When the original discharge review did not involve a personal hearing and a hearing is now desired, and the provisions of § 724.216 do not apply;

(c) When changes in discharge policy are announced after an earlier review of an applicant's discharge, and the new policy is made expressly retroactive;

(d) When the NDRB 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 an applicant in such proceedings;

(e) When an individual is to be represented by counsel or representative, and was not so represented in any previous consideration of the case by the NDRB;

(f) 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

(g) 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.

### § 724.218 Limitation—Continuance and Postponements.

(a) A continuance of a discharge review hearing may be authorized by the President of the NDRB 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.

(b) 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.

### § 724.219 Withdrawal of application.

An applicant shall be permitted to withdraw an application without prejudice at any time before the scheduled review, except that failure to appear for a scheduled hearing shall not be construed or accepted as a withdrawal.

### § 724.220 Review on motion of the NDRB.

Reviews of Naval discharges may be initiated by the NDRB on its own motion (10 U.S.C. 1553) which includes reviews requested by the Veterans Administration under 38 U.S.C. 101, 3103 as amended by Pub. L. 95–126 of October 8, 1977 (See Pub. L. 98–209).

### § 724.221 Scheduling of discharge reviews.

(a) If an applicant requests a personal appearance discharge review, or to be represented in absentia, the NDRB shall provide a hearing in the NCR or at another site within the forty-eight contiguous states.

(b) The NDRB shall subsequently notify the applicant and representative (if any) in writing of the proposed personal appearance hearing time and place. This notice shall normally be mailed thirty to sixty days prior to the date of the hearing. If the applicant elects, this time limit may be waived and an earlier date set.

(c) When an applicant requests a documentary review, the NDRB shall undertake the review as soon as practicable. Normally, documentary reviews shall be conducted in the order in which they are received.

### § 724.222 Personal appearance discharge hearing sites.

(a) The NDRB shall be permanently located, together with its administrative staff, in the NCR. The NDRB shall routinely conduct personal appearance discharge reviews and documentary reviews at this, its permanent office.

(b) In addition, as permitted by available resources, NDRB Panels shall travel to other selected sites within the contiguous 48 states for the purpose of conducting reviews. The selection of sites and frequency of visits shall be predicated on the number of requests pending within a region and the availability of resources.

### § 724.223 NDRB support and augmentation by regular and reserve activities.

(a) When an NDRB Panel travels for the purpose of conducting hearings, it shall normally select Navy or Marine Corps installations in the area visited as review sites.

(b) The NDRB Traveling Board shall normally consist of members from the NCPB and augmentees from regular and reserve Navy and Marine Corps sources, as required.

(c) Navy and Marine Corps activities in the geographical vicinity of selected review sites shall provide administrative support and augmentation to an NDRB Panel during its visit where such assistance can be undertaken without interference with mission accomplishment. The NDRB shall coordinate requests for augmentees and administrative support through Commandant of the Marine Corps or the Chief of Naval Reserve, as appropriate.

(d) The administrative staff of the NDRB shall undertake all arrangements for NDRB Traveling Panel visits and shall process associated review documents.

[50 FR 10943, Mar. 19, 1985, as amended at 75 FR 747, Jan. 6, 2010]

### § 724.224 Court-martial specifications, presumption concerning.

(a) Relevant and material facts stated in a court-martial specification, shall be presumed by the NDRB Panel as established facts. With respect to a discharge or dismissal adjudged by a court-martial case tried under the Uniform Code of Military Justice, the action may extend only to change in the discharge or dismissal for purposes of clemency. This policy only applies to cases filed with the discharge review board after December 6, 1983.

(b) Relevant and material facts stated in a court-martial specification, in the face of which the applicant requested a discharge for the good of the service to avoid trial by court-martial, shall be considered in accordance with the following:

(1) If the applicant/accused was required to admit the facts contained in the charge sheet, or if the discharge authority was required to find that the stated facts were true, then the NDRB can presume the truth of such facts, unless there is a substantial credible evidence to rebut this presumption; or

(2) If the discharge in lieu of court-martial only required a valid preferral, the NDRB may presume that the signer either had personal knowledge of, or had investigated the matters set forth, and that the charges were true in fact to the best of the signer's knowledge and belief.[1] The weight to be given this presumption in determining whether the facts stated in the charge sheet are true is a matter to be determined by the NDRB. To the extent that the discharge proceeding reflects an official determination that the facts stated in the charge sheet are true; that the applicant/accused admitted the facts stated in the charge sheet; or that the applicant/accused admitted guilt of the offense(s), then the presumption is strengthened. In accordance with paragraph B12f of enclosure (3) to 32 CFR part 70 the presumption may be rebutted by ''substantial credible evidence.''

## Subpart C—Director, Secretary of the Navy Council of Review Boards and President Naval Discharge Review Board; Responsibilities in Support of the Naval Discharge Review Board

### § 724.301 Mission.

To administer and supervise assigned boards and councils within the Department of the Navy.

### § 724.302 Functions: Director, Secretary of the Navy Council of Review Boards.

(a) Make recommendations to the Secretary of the Navy regarding organization, tasking and resources of the

[1] Charges may be preferred by any person subject to the Uniform Code of Military Justice. The charges must be signed and sworn to before a commissioned officer authorized to administer oaths, and shall state that the signer has personal knowledge of, or has investigated the matters set forth therein; and that the charges are true in fact to the best of the signer's knowledge and belief. 10 U.S.C. 830 (1976) (Art. 30 Uniform Code of Military Justice).

NDRB and its associated administrative support.

(b) Submit recommendations to the Secretary of the Navy regarding policy and procedures for discharge review.

(c) Provide administrative and clerical support for NDRB.

(d) Inform the Secretary of the Navy of matters of interest to him.

(e) Maintain a system of records, including as a minimum:

(1) Records specified for the NDRB as stipulated in the procedures prescribed in subpart H of this Manual.

(2) Records required for the administration of military and civilian personnel.

(3) Files of correspondence received and issued.

(f) Establish billet/position assignment criteria for the NDRB.

(g) Propose to the Secretary of the Navy, changes to this instruction.

(h) Issue requisite precepts and remove or add members to the NDRB from personnel detailed to serve on the Secretary of the Navy Council of Review Boards, or from personnel otherwise made available.

[50 FR 10943, Mar. 19, 1985, as amended at 75 FR 747, Jan. 6, 2010]

### § 724.303 Functions: President, Naval Discharge Review Board.

(a) Exercise primary cognizance within the Department of the Navy for matters relating to discharge review.

(b) Supervise and direct the activities of the NDRB.

(c) Maintain appropriate liaison with discharge review activities in other services (use Army Discharge Review Board as focal point for service coordination).

(d) Maintain coordination with the Commandant of the Marine Corps (Code M) and the Commander, Naval Military Personnel Command in matters associated with discharge review.

(e) In conformance with SECNAVINST 5211.5 series, protect the privacy of individuals in connection with discharge review.

(f) Assure that NDRB functions are administered in accordance with the appropriate Secretary of the Navy instructions dealing with privacy and access to information.

(g) Convene the NDRB as authorized by the Secretary of the Navy.

(h) Direct the movement of the NDRB Traveling Panel(s) on the basis of regional hearing requests.

(i) Monitor the performance of the naval discharge review system. Make recommendations for changes and improvements. Take action to avoid delays in processing of individual discharge review actions.

(j) Provide NDRB inputs for the maintenance of a public reading file and maintain associated NDRB indexes updated quarterly.

[50 FR 10943, Mar. 19, 1985, as amended at 75 FR 747, Jan. 6, 2010]

### § 724.304 Responsibility for Department of the Navy support of the Naval Discharge Review Board.

The Commandant of the Marine Corps; Commander, Naval Military Personnel Command; Commander, Naval Reserve Force; Commander, Naval Medical Command; and chiefs of other bureaus and offices of the Department of the Navy shall provide support, as requested, to the Naval discharge review process.

### § 724.305 Functions of the CMC and CNO.

In the case of Navy, CNMPC, under the CNP, shall discharge responsibilities of the CNO.

(a) Provide and facilitate access by the NDRB to service/health records and other data associated with performance of duty of applicants.

(b) Advise the NDRB of developments in personnel management which may have a bearing on discharge review judgments.

(c) Implement the discharge review decisions of the NDRB and those of higher authority within respective areas of cognizance.

(d) Include the record of NDRB proceedings as a permanent part of the service record of the applicant in each case.

(e) Where appropriate, recommend cases for the NDRB to review on its own motion.

(f) Provide qualified personnel as NDRB members, recorders and administrative staff.

(g) Establish administrative procedures to ensure that if a member is separated from the Navy or the Marine Corps under other than fully honorable conditions, the member is advised of:

(1) The right to a review of his or her discharge under provisions of 10 U.S.C. 1553, and

(2) The procedures for applying for such a review.

(h) Provide Navy and Marine Corps units and activities with information on the mission of the Naval Discharge Review Board through entries in appropriate personnel administration directives.

### § 724.306 Functions of the Commander, Naval Medical Command.

Under the CNO the COMNAVMEDCOM shall facilitate, as required, access by the NDRB to health records of applicants.

### § 724.307 Functions of the Commander, Naval Reserve Force.

In the case of Navy, the COMNAVRESFOR shall discharge the responsibilities of the CNO—

(a) Upon request and within available resources, provide qualified inactive duty reservists to serve as members of the NDRB.

(b) Upon request, provide appropriate accommodations to the NDRB Traveling Panels for purposes of conducting reviews at Naval and Marine Corps Reserve Centers and aviation facilities.

## Subpart D—Principal Elements of the Navy Department Discharge Review System

### § 724.401 Applicants.

As defined in § 724.114.

### § 724.402 Naval Discharge Review Board.

As defined in § 724.102.

### § 724.403 President, Naval Discharge Review Board.

Supervises the Naval Discharge Review Board. (See subpart C).

### § 724.404 Director, Naval Council of Personnel Boards.

Exercises adminstrative control and oversight of the Naval discharge review process. (See subpart C).

### § 724.405 Commandant of the Marine Corps or the Commander, Naval Military Personnel Command.

Personnel managers of the Marine Corps and the Navy; responsible for providing limited support to the Naval Discharge Review Board and for implementation of departmental discharge review decisions. (See subpart C).

### § 724.406 Commander, Naval Medical Command.

Custodian of Navy and Marine Corps health records. (See subpart C).

### § 724.407 Commander, Naval Reserve Force.

Manages Naval Reserve resources. Responsible for providing limited support to the Naval Discharge Review Board. (See subpart C).

### § 724.408 Secretary of the Navy.

The final authority within the Department of the Navy in discharge review.

## Subpart E—Procedural Rights of the Applicant and Administrative Actions Preliminary To Discharge Review

### § 724.501 Procedural rights of the applicant.

Each applicant has the following procedural rights:

(a) Within 15 years after the date of discharge, to make a written request for review of the applicant's discharge if the discharge was other than the result of a general court-martial. The request may include such other statements, affidavits, or documentation as desired.

(b) To have that review conducted by the NDRB either in the NCR or other designated location, when a personal appearance discharge review is desired.

(c) To appear before the NDRB in person, with or without counsel/representative; with counsel/representative concurrence, to have counsel/representative present the applicant's case in the absence of the applicant; or to have the review conducted based on records and any additional documentation submitted by the applicant or counsel/representative.

(d) To request copies of any documents or other evidence to be considered by the NDRB in the review of the applicant's discharge or dismissal other than the documents or evidence contained in the official record or submitted by the applicant prior to the conduct of the formal review and to be afforded an opportunity to examine such other documents or evidence or to be provided with copies of them.

(e) To withdraw the request for discharge review without prejudice at any time prior to the scheduled review, except that failure to appear for a scheduled hearing shall not be construed or accepted as a withdrawal.

(f) To request a continuance of the review when the continuance is of a reasonable duration and essential to achieving a full and fair hearing. The request must indicate the reason why the continuance is required.

(g) To request postponement of the discharge review for good and sufficient reason set forth in a timely manner.

(h) To request reconsideration of the discharge review under the conditions set forth in § 724.217.

(i) To have access to the information to be considered by the NDRB prior to the actual review of the applicant's case.

(j) To have the applicant's right to privacy protected in any review conducted by the NDRB.

(k) When appearing personally before the NDRB:

(1) To introduce witnesses, documents, and sworn or unsworn testimony.

(2) To present oral or written arguments personally or through counsel/representative.

(l) To submit documents, affidavits, briefs or arguments in writing. When the counsel/representative appears in person before the NDRB, arguments may be presented orally.

(m) To state clearly and specifically the issue or issues which the applicant desires the NDRB to answer in writing. These must be presented in writing on DD Form 293 by the applicant or counsel/representative.

(n) To have the applicant's discharge reviewed under the standards of equity and propriety outlined in subpart I.

(o) To be provided with a written decision on the applicant's review.

(p) If the case is to be forwarded for Secretarial review, to present a timely statement rebutting any findings, conclusions, or reasons of the NDRB or the President, NDRB, which are alleged to be erroneous on the facts, against the substantial weight of the evidence, or contrary to law or governing regulation, prior to that Secretarial review.

[50 FR 10943, Mar. 19, 1985, as amended at 75 FR 747, Jan. 6, 2010]

### § 724.502 Actions to be taken by the applicant preliminary to discharge review.

(a) *Application for Review of Discharge or Dismissal from the Armed Forces of the United States*, DD Form 293 must be used in requesting a discharge review. DD Form 293 is available at most military installations and regional offices of the Veterans Administration. This form is to be signed personally by the applicant. In the event the discharged individual is deceased or incompetent, the form must be signed by an authorized individual as discussed in § 724.113 of this Manual.

(b) The application is to be accompanied by:

(1) A copy of the certificate of discharge, if available;

(2) A copy of the Armed Forces of the United States Report of Transfer or Discharge (DD–214), if available;

(3) Certification of death, incompetency and evidence of relationship in applicable cases (§ 724.113);

(4) Other statements, affidavits, depositions, documents and information desired by the applicant to be considered by the NDRB.

(c) Correspondence relating to review of naval discharges should be addressed to:

Naval Discharge Review Board, 720 Kennon Ave SE., Suite 309, Washington, DC 20374–5023

(d) NDRB telephone number is (202) 685–6600.

[50 FR 10943, Mar. 19, 1985, as amended at 75 FR 747, Jan. 6, 2010]

### § 724.503 NDRB response to application for discharge review.

(a) The NDRB shall acknowledge receipt of the application.

(b) In the event a documentary review is requested, the applicant shall normally receive no further communication from the NDRB until notified of the decision in the case.

(c) In the event a personal appearance discharge review is requested, the applicant shall be notified of the proposed time and place of this review and shall be advised of the availability of the official documents to be considered by the NDRB.

(d) A copy of NDRB correspondence to an applicant shall be sent to the representative of record, if any.

### § 724.504 NDRB actions preliminary to discharge review.

(a) When each application for discharge review is received by the NDRB, the service record and, if required, health record of the applicant will be requested from the appropriate record custodian.

(b) Upon receipt, each record of service will be reviewed to determine whether or not the applicant appears to have been discharged under circumstances which might act as a bar to Veterans' Administration benefits under 38 U.S.C. 3103. These circumstances of discharge are:

(1) Discharge or dismissal by reason of the sentence of a general court-martial.

(2) Discharge as a conscientious objector who refused to perform military duty, to wear the uniform or otherwise to comply with lawful orders of competent military authority.

(3) Discharge as a deserter.

(4) Discharge on the basis, or as part of the basis, of an absence without authority from active duty for a continuous period of at least 180 days, if such discharge was under conditions other than honorable. Additionally, such absence is computed without regard to the applicant's normal or adjusted expiration of term of service.

(5) Discharge or dismissal of an officer based on acceptance of the officer's resignation for the good of the service.

(6) Discharge, on his/her own application, during a period of hostilities, as an alien.

(c) If it appears that the applicant was discharged under one or more of the circumstances outlined in § 724.504b, a written notification will be sent which informs the applicant that:

(1) An initial service record review reveals that the discharge may have been awarded under circumstances which make the applicant ineligible for receipt of VA benefits regardless of any action taken by the NDRB.

(2) Separate action by the Board for Correction of Naval Records (BCNR) and/or the VA, in case of 180 days consecutive UA disqualification, may confer eligibility for VA benefits. Instructions for making application to the BCNR and for contacting the VA are provided.

[50 FR 10943, Mar. 19, 1985, as amended at 75 FR 747, Jan. 6, 2010]

## Subpart F—Naval Discharge Review Board Mission and Functions

### § 724.601 General.

The NDRB is a component of the Secretary of the Navy Council of Review Boards and has its offices located in the NCR. The NDRB conducts documentary reviews and personal appearance reviews in the NCR and, on a traveling basis, at selected sites within the 48 contiguous states. Regional site selection is predicated on the number of pending applications accumulated from a given geographical area and the resources available to support distant personal appearance reviews. The NDRB does not maintain facilities other than at its NCR offices. The primary sites of NCR are: Chicago, IL; Dallas, TX; and San Francisco, CA.

[50 FR 10943, Mar. 19, 1985, as amended at 75 FR 747, Jan. 6, 2010]

### § 724.602 Mission.

To decide, in accordance with standards of naval law and discipline and the standards for discharge review set forth in subpart I, whether a discharge or dismissal from the naval service is proper and equitable, or whether it should be changed.

### § 724.603 Functions.

(a) Meet as frequently as necessary to provide expeditious review of naval discharges.

(b) Meet at locations within the 48 contiguous states as determined appropriate on the basis of the number of discharge review applications received from various geographical areas and of available resources and facilities.

(c) Review applications for review of discharges.

(d) In consonance with directives of higher authority and the policies set forth in this Manual, grant or deny change of discharges.

(e) Promulgate decisions in a timely manner.

(f) Maintain a system of records.

(g) Maintain liaison in discharge review matters with:

(1) General Counsel of the Navy.

(2) Commandant of the Marine Corps.

(3) Chief of Naval Operations.

(i) Commander, Naval Reserve Force.

(ii) Commander, Naval Medical Command.

(iii) Commander, Naval Military Personnel Command, under the Chief of Naval Personnel.

(4) Judge Advocate General of the Navy.

(5) Veterans' service organizations.

(6) Discharge review boards of the other services, using the Army Discharge Review Board as the focal point for service coordination.

(h) Protect the privacy of individuals whose records are reviewed.

(i) Maintain for public access a reading file and associated index of records of NDRB proceedings in all reviews undertaken subsequent to July 1, 1975.

## Subpart G—Organization of the Naval Discharge Review Board

### § 724.701 Composition.

The NDRB acting in plenary review session shall be composed of five members. Normally the members shall be career military officers, assigned to the Secretary of the Navy Council of Review Boards or otherwise made available; inactive duty officers of the Navy and Marine Corps Reserve may serve as members when designated to do so by the President, NDRB.

(a) Presiding officers of the NDRB shall normally be Navy or Marine Corps officers in the grade of Captain/Colonel or above.

(b) The remaining NDRB membership shall normally be not less than the grade of Lieutenant Commander/Major with preference being given to senior grades.

(c) Normally, at least three of the five members of the NDRB shall belong to the service from which the applicant whose case is under review was discharged.

(d) Individual membership in the NDRB may vary within the limitations of the prescribed composition.

(e) Any member of a panel of the NDRB other than the presiding officer may act as recorder for cases assigned. The recorder will participate as a voting member of the panel.

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### § 724.702 Executive management.

The administrative affairs of the NDRB shall be managed by the Executive Secretary. This responsibility shall include schedules, records, correspondence and issuance of NDRB decisions.

### § 724.703 Legal counsel.

Normally, the NDRB shall function without the immediate attendance of legal counsel. In the event that a legal advisory opinion is deemed appropriate by the NDRB, such opinion shall be obtained routinely by reference to the Counsel assigned to the Office of the Director, Secretary of the Navy Council of Review Boards. In addition, the NDRB may request advisory opinions

from staff offices of the Department of the Navy, including, but not limited to the General Counsel and the Judge Advocate General.

[75 FR 747, Jan. 6, 2010]

## Subpart H—Procedures of Naval Discharge Review Board

### § 724.801 Matters to be considered in discharge review.

In the process of its review of discharges, the NDRB shall examine available records and pertinent regulations of the Department of the Navy, together with such information as may be presented by the applicant and/or representative, which will normally include:

(a) The application for discharge review;

(b) Statements, affidavits or documentation, if any, accompanying the application or presented during hearings;

(c) Testimony, if any, presented during hearings;

(d) Service and health records;

(e) A brief of pertinent facts extracted from the service and health records, prepared by the NDRB recorder.

### § 724.802 Applicant's responsibilities.

(a) *Request for change of discharge.* An applicant may request a change in the character of or reason for discharge (or both).

(1) *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). 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 will be treated as a request for a change to an Honorable Discharge unless the applicant requests a specific change to another character of discharge.

(2) *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 NDRB will 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 NDRB will change the reason for discharge if such a change is warranted.

(3) The applicant must ensure that issues submitted to the NDRB 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 and applicant's issue and the request in block 7, the NDRB will respond to the issue in the context of the action requested in block 7. In the case of a personal appearance hearing, the NDRB will attempt to resolve the ambiguity under § 724.802(c).

(b) *Request for consideration of specific issues.* An applicant may request the Board 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 manual before submitting issues for consideration by the Board.

(1) *Submission of issues on DD Form 293.* Issues must be provided to the NDRB on DD Form 293 (82 Nov) before the NDRB closes the review process for deliberation.

(i) *Issues must be clear and specific.* An issue must be stated clearly and specifically in order to enable the NDRB to understand the nature of the issue and its relationship to the applicant's discharge.

(ii) *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 NDRB.

(iii) *Use of DD Form 293.* DD Form 293 provides applicants with a standard format for submitting issues to the NDRB, and its use:

(A) Provides a means for an applicant to set forth clearly and specifically those matters that, in the option of the applicant, provide a basis for changing the discharge;

(B) Assists the NDRB in focusing on those matters considered to be important by an applicant;

(C) Assists the NDRB in distinguishing between a matter submitted by an applicant in the expectation that it will be treated as a decisional issue, and those matters submitted simply as background or supporting materials;

(D) Provides the applicant with greater rights in the event that the applicant later submits a complaint concerning the decisional document;

(E) Reduces the potential for disagreement as to the content of an applicant's issue.

(iv) *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 NDRB 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 NDRB'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 failed expressly to incorporate an issue which the applicant clearly identifies as an issue to be addressed by the NDRB, the NDRB shall respond to such an issue. (See §§ 724.805 and 724.806.)

(v) *Effective date of the new Form DD 293*. With respect to applications pending (before November 1982, the effective date of the new DD Form 293), the NDRB shall consider issues clearly and specifically stated in accordance with the rules in effect at the time of submission. With respect to applications received after November 1982, if the applicant submits an obsolete DD Form 293, the NDRB 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 instruction.

(2) *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 either the character of or the reason for discharge (or both). Unless the issue is directed at the reason for discharge expressly or by necessary implication, the NDRB will presume that it applies solely to the character of discharge.

(3) *Relationship of issues to the standards for discharge review*. The NDRB reviews discharges on the basis of issues of propriety and equity. The standards used by the NDRB are set forth in § 724.804. The applicant is encouraged to review those standards before submitting any issue upon which the applicant believes a change in discharge should be based.

(i) *Issues concerning the equity of the discharge*. An issue of equity is a matter that involves a determination whether a discharge should be changed under the equity standards of this part. This includes any issue, submitted by the applicant in accordance with § 724.802(b)(1), that is addressed to the discretionary authority of the NDRB.

(ii) *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 this part. This includes an applicant's issue, submitted in accordance with § 724.802(b)(1), 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 NDRB adequately of the basis for the applicant's position.

(iii) *The applicant's identification of an issue.* The applicant is encouraged, but not required, to specify that each issue pertains to the propriety or the equity of the discharge. This will assist the NDRB in assessing the relationship of the issue to propriety or equity.

(4) *Citation of matter from decisions.* The primary function of the NDRB involves the exercise of discretion on a case-by-case basis. Applicants are not required to cite prior decisions as the basis for a change in discharge. If the applicant wishes to bring the NDRB'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 with respect to applications received on or after November 27, 1982 apply:

(i) The issue must be set forth or expressly incorporated in the ''Applicant's Issue'' portion of DD Form 293.

(ii) If an applicant's issue cites a prior decision (of the NDRB, 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.

(iii) 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 NDRB 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.

(iv) If the applicant fails to comply with requirements in § 724.802(b)(4), the decisional document shall note the defect, and shall respond to the issue without regard to the citation.

(c) *Identification by the NDRB 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 § 924.803, is made.

(1) *Issues on DD Form 293.* The NDRB shall consider all items submitted as issues by an applicant on DD Form 293 (or incorported therein).

(2) *Amendment of issues.* The NDRB 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:

(i) Limits the NDRB's authority to question an applicant as to the meaning of such matter;

(ii) Precludes the NDRB from developing decisional issues based upon such questions;

(iii) Prevents the applicant from amending or withdrawing such matter any time before the NDRB closes the review process for deliberation; or

(iv) Prevents the NDRB 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.

(3) *Additional issues identified during a hearing.* The following additional procedure shall be used during a hearing in order to promote the NDRB's understanding of an applicant's presentation. If, before closing the case for deliberation, the NDRB believes that an applicant has presented an issue not listed on DD Form 293, the NDRB 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 NDRB from developing its own decisional issues.

### § 724.803 The decisional document.

A decisional document shall be prepared for each review. At a minimum, this document shall contain:

(a) 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:

(1) Information concerning the discharge under review, including:

(i) Date (YYMMDD) of discharge;

(ii) Character of discharge;

(iii) Reason for discharge;

(iv) The specific regulatory authority under which the discharge was issued;

(v) Date (YYMMDD) of enlistment;

(vi) Period of enlistment;

(vii) Age at enlistment;

(viii) Length of service;

(ix) Periods of unauthorized absence;

(x) Conduct and efficiency ratings (numerical or narrative);

(xi) Highest rank achieved;

(xii) Awards and decorations;

(xiii) Educational level;

(xiv) Aptitude test scores;

(xv) Incidents of punishment pursuant to Article 15, Uniform Code of Military Justice (including nature and date (YYMMDD) of offense or punishment);

(xvi) Convictions by court-martial;

(xvii) Prior military service and type of discharge received.

(2) Any other matters in the applicant's record which pertains to the discharge or the issues, or provide a clearer picture of the overall quality of the applicant's service.

(b) A list of the type of documents submitted by or on behalf of the applicant (including written briefs, letters of recommendation, affidavits concerning the circumstances of the discharge, or other documentary evidence), if any.

(c) A statement whether the applicant testified, and a list of the type of witnesses, if any , who testified on behalf of the applicant.

(d) A notation whether the application pertained to the character of discharge, the reason for discharge, or both.

(e) 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. 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 written consent of the applicant need not be listed.

(f) The response to the items submitted as issues by the applicant.

(g) A list of decisional issues and a discussion of such issues.

(h) NDRB's conclusions on the following:

(1) Whether the character of or reason for discharge should be changed.

(2) The specific changes to be made, if any.

(i) A record of the voting, including:

(1) The number of votes for the NDRB's decision and the number of votes in the minority, if any.

(2) The NDRB members' names 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.

(j) 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 that are not fully set forth in the discussion of decisional issues or otherwise in response to items submitted as issues by the applicant 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.

(k) The recommendation of the NDRB president when required.

(l) The addendum of the SRA when required.

(m) Index entries for each decisional issue under appropriate categories listed in the index of decisions.

(n) An authentication of the document by an appropriate official.

### § 724.804 Decision process.

(a) The NDRB or the NDRB panel, as appropriate, shall meet in plenary session to review discharges and exercise its discretion on a case-by-case basis in applying the standard set forth in subpart I.

(b) The presiding officer is responsible for the conduct of the discharge review. The presiding officer shall convene, recess, and adjourn the NDRB

panel as appropriate and shall maintain an atmosphere of dignity and decorum at all times.

(c) Each NDRB member shall act under oath or affirmation requiring careful, objective consideration of the application. NDRB members are responsible for eliciting all facts necessary for a full and fair review. 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 NDRB, and any other evidence obtained in accordance with this Manual.

(d) The NDRB shall identify and address issues after a review of the following material obtained and presented in accordance with this Manual and any implementing instructions of the NDRB: 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.

(e) If an applicant who has requested a hearing does not respond to a notification letter or does not appear for a scheduled hearing, the NDRB may complete the review on the basis of material previously submitted and available service records.

(f) *Application of standards.* (1) When the NDRB determines that an applicant's discharge was improper, the NDRB 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, the provisions as to the characterization in the regulation under which the applicant should have been discharged will be considered in determining whether further relief is warranted.

(2) When the NDRB determines that an applicant's discharge was inequitable, any change will be based on the evaluation of the applicant's overall record of service and relevant regulations of the service of which the applicant was a member.

(g) Voting shall be conducted in closed session, a majority of the votes of the five members constituting the NDRB decision.

(h) Details of closed session deliberations of the NDRB are priviledged information and shall not be divulged.

(i) There is no requirement for a statement of minority views in the event of a split vote.

(j) The NDRB may request advisory opinions from appropriate staff officers of the naval service. These opinions are advisory in nature and are not binding on the NDRB in its decision-making process.

(k) The preliminary determinations required by 38 U.S.C. 3103(e) shall be made upon majority vote of the NDRB concerned on an expedited basis. Such determination shall be based upon the standards set forth in this Manual.

### § 724.805 Response to items submitted as issues by the applicant.

(a) *General guidance.* (1) If any issue submitted by an applicant contains two or more clearly separate issues, the NDRB should respond to each issue under the guidance of this paragraph as if it had been set forth separately by the applicant.

(2) 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.

(3) Nothing in this paragraph precludes the NDRB 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.

(b) *Decisional issues.* An item submitted as an issue by an applicant in accordance with this Manual shall be addressed as a decisional issue in the following circumstances:

(1) When the NDRB decides that a change in discharge should be granted, and the NDRB bases its decision in

whole or in part on the applicant's issue; or

(2) When the NDRB does not provide the applicant with the full change in discharge requested, and the decision is based in whole or in part on the NDRB's disagreement on the merits with an issue submitted by the applicant.

(c) *Response to items not addressed as decisional issues.* (1) 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.

(2) 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 NDRB shall address the items submitted by the applicant under § 724.806, (Decisional Issues) unless one of the following responses is applicable:

(i) *Duplicate issues.* The NDRB 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.

(ii) *Citations without principles and facts.* The NDRB 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 § 724.802(b)(4).

(iii) *Unclear issues.* The NDRB 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.

(iv) *Nonspecific issues.* The NDRB 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 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 NDRB disagrees with the applicant as to the relevance of matters set forth in the submission, the NDRB normally will set forth the nature of the disagreement with respect to decisional issues, or it will reject the applicant's position. If the applicant's submission is so general that none of those provisions is applicable, then the NDRB may state that it cannot respond because the item is not specific.

### § 724.806 Decisional issues.

(a) *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 NDRB should not address matters other than issues relied upon in the decision or raised by the applicant.

(1) *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 NDRB denies the full change requested.

(2) *Relationship of issue of 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.

(3) *Relationship of an issue to propriety or equity.* (i) If an applicant identifies an issue as pertaining to both propriety and equity, the NDRB will consider it under both standards.

(ii) 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 NDRB shall consider the issue solely as a matter of propriety. Except as provided in

§ 724.806(a)(3)(d), the NDRB is not required to consider such an issue under the equity standards.

(iii) If the applicant's issue contends that the NDRB 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 § 724.806 (a) or (b).

(iv) If the applicant's issue sets forth principles of equity contained in a prior NDRB decision, describes the relationship to the applicant's case, and contends that the NDRB is required as a matter of law to follow the prior case, the decisional document shall note that the NDRB is not bound by its discretionary decisions in prior cases. However, the principles cited by the applicant, and the description of the relationship of the principles to the applicant's case, shall be considered and addressed under the equity standards.

(v) If the applicant's issue cannot be identified as a matter of propriety or equity, the NDRB shall address it as an issue of equity.

(b) *Change of discharge: issues of propriety*. If a change in the discharge is warranted under the propriety standards, the decisional document shall state that conclusion and list the errors of expressly retroactive changes in policy or violations of regulations 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 set forth.

(c) *Denial of the full change requested: issues of propriety*. (1) If the decision rejects the applicant's position on an issue of propriety, of 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.

(2) The decisional document shall list reasons for its conclusion on each issue of propriety under the following guidance:

(i) If a reason is based in whole or in part upon a regulation, statute, constitutional provision, judicial determination, or other source of law, the NDRB 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.

(ii) If a reason is based in whole or in part on a determination as to the occurrence or nonoccurrence of an event or circumstances, 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 NDRB shall make a finding of fact for each such event or circumstance.

(A) 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.

(B) 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 NDRB), 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 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 NDRB did not find the applicant's testimony to be sufficiently credible to overcome the presumption.

(iii) If the NDRB disagrees with the position of the applicant on an issue of propriety, the following guidance applies in addition to the guidance in § 724.806(c)(2) (a) and (b):

(A) The NDRB 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 § 724.802(b)(4).

(B) The NDRB 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 § 724.802(b)(4)) are not relevant to the applicant's case.

(C) The NDRB may reject an applicant's position by stating that the applicant's issue of propriety is not a matter upon which the NDRB 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.

(D) The NDRB may reject the applicant's position on the grounds that other specified factors in the case preclude granting relief, regardless of whether the NDRB agreed with the applicant's position.

(E) If the applicant take 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 NDRB 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 NDRB should provide the applicant with a brief description of the procedures for requesting correction of the record. If the NDRB on its own motion cites this issue as a decisional issue on the basis of equity, it shall address the issue.

(F) When an applicant's issue contains a general allegation that a certain course of action violated his or her constitutional rights, the NDRB 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.

(d) *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 NDRB has not otherwise relied upon an issue of propriety to change the discharge, the decisional document shall contain a statement to that effect. The NDRB is not required to provide any further discussion as to the propriety of the discharge.

(e) *Change of discharge: issues of equity.* If the NDRB concludes that a change in the discharge is warranted under the equity standards, the decisional document shall list each issue of equity upon which this conclusion is based. The NDRB 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.

(f) *Denial of the full change in discharge requested: issues of equity.* (1) If the NDRB 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.

(2) The NDRB shall list reasons for its conclusion on each issue of equity under the following guidance:

(i) If a reason is based in whole or in part upon a regulation, statute, constitutional provision, judicial determination, or other source of law, the NDRB 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.

(ii) 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 NDRB shall make a finding of fact for each such event or circumstance.

(A) 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.

(B) If a finding of fact is made after consideration of contradictory evidence in the record (including information cited by the applicant or otherwise indentified by members of the NDRB), 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 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 NDRB did not find the applicant's testimony to be sufficiently credible to overcome the presumption.

(iii) If the NDRB disagrees with the postion of the applicant on an issue of equity, the following guidance applies in addition to the guidance in paragraphs above:

(A) The NDRB 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).

(B) The NDRB 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.

(C) The NDRB may reject an applicant's position by explaining why the applicant's issue is not a matter upon which the NDRB 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.

(D) The NDRB may reject the applicant's position on the grounds that other specified factors in the case preclude granting relief, regardless of whether the NDRB agrees with the applicant's position.

(E) 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 NDRB may respond that it will presume the validity of the record in the absence of such corrective action. However, the NDRB 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.

(iv) When NDRB concludes that aggravating factors outweigh mitigating factors, the NDRB 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 NDRB 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.

(v) If the applicant has not submitted any issues and the NDRB 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.

**§ 724.807 Record of NDRB proceedings.**

(a) When the proceedings in any review have been concluded, a record thereof will be prepared. Records may include written records, electromagnetic records, audio and/or videotape recordings, or a combination.

(b) At a minimum, the record will include the following:

(1) The application for review;

(2) A record of the testimony in either verbatim, summarized, or recorded form at the option of the NDRB;

(3) Documentary evidence or copies, other than the military service record considered by the NDRB;

(4) Briefs and arguments submitted by or on behalf of the applicant;

(5) Advisory opinions considered by the NDRB, if any:

(6) The findings, conclusions, and reasons developed by the NDRB;

(7) Notification of the NDRB's decision to the cognizant custodian of the applicant's records, or reference to the notification document;

(8) A copy of the decisional document.

**§ 724.808 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. Final notification of decisions shall be issued to the applicant with a copy to the counsel or representative, if any, and to the service manager concerned.

(a) 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.

(b) Notification to the service manager 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.

(c) Actions on review by superior authority, when occurring, shall be provided to the applicant and counsel or representative in the same manner as to the notification of the review decision.

**§ 724.809 Final disposition of the record of proceedings.**

The original decisional document and all appendices thereto, shall in all cases be incorporated in the military service record of the applicant and the service record shall be returned to the custody of the appropriate record holding facility. If a portion of the original record of proceedings cannot be stored with the service record, the service record shall contain a notation as to the place where the record is stored. Other copies including any electromagnetic records, audio and/or videotape recordings or any combination thereof shall be filed in the NDRB case folder and disposed of in accordance with appropriate naval regulations.

**§ 724.810 Availability of Naval Discharge Review Board documents for public inspection and copying.**

(a) A copy of the decisional document prepared in accordance with subpart H of this enclosure shall be made available for public inspection and copying promptly after a notice of final decision is sent to the applicant.

(b) 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.

(1) 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.

(2) The NDRB 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.

(c) Any other privileged or classified material contained in or appended to any documents required by this Manual to be furnished the applicant and counsel or representative or made available for public inspection and copying may be deleted only if a written statement on 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.

(d) NDRB 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 NDRB, 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 NDRB or the Secretary concerned granted or denied relief.

(1) The reading file index shall include, in addition to any other item determined by the NDRB, the case number, the date, character of, reason and authority for the discharge. It shall also include the decisions of the NDRB and reviewing authority, if any, and the issues addressed in the statement of findings, conclusions, and reasons.

(2) 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 NDRB is present and in operation. An applicant who has requested a traveling panel review shall be advised, in the notice of such review, of the permanent index locations.

(3) The Armed Forces Discharge Review/Corrections Board Reading Room shall publish indexes quarterly for all DRBs. The NDRB shall be responsible for timely submission to the Reading Room of individual case information required for update of the indexes. In addition, the NDRB 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 NDRB has accepted an application, information concerning the availability of the index shall be provided in the NDRB's response to the application.

### § 724.811 Privacy Act information.

Information protected under the Privacy Act is involved in the discharge review functions. The provisions of SECNAVINST 5211.5C shall be observed throughout the processing of a request for review of discharge or dismissal.

### § 724.812 Responsibilities of the Reading Room.

(a) 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.

(b) Correspondence relating to matters under the cognizance of the Reading Room (including requests for purchase of indexes) shall be addressed to:

DA Military Review Board Agency, Attention: SFBA (Reading Room), Room 1E520, The Pentagon, Washington, DC 20310.

### § 724.813 The recommendation of the NDRB president.

(a) *General.* The president of the NDRB may forward cases for consideration by the Secretarial Review Authority (SRA). 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 § 724.813b.

(b) *Format for recommendation*. If a recommendation is provided, it shall contain the president's view 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:

(1) *Adoption of the NDRB'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 enclosure.

(2) *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.

(3) *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:

(i) The issues on which the president's recommendation is based. Each such decisional issue shall be addressed by the president.

(ii) The president's response to items submitted as issues by the applicant.

(iii) Reasons for rejecting the conclusion of the majority with respect to the decisional document 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. Such issues shall be addressed under the principles in § 724.806.

### § 724.814 Secretarial Review Authority (SRA).

(a) *Review by the SRA*. The Secretarial Review Authority (SRA) is the Secretary concerned or the official to whom Secretary's discharge review authority has been delegated.

(1) The SRA may review the following types of cases before issuance of the final notification of a decision:

(i) Any specific case in which the SRA has an interest.

(ii) Any specific case that the president of the NDRB believes is of significant interest to the SRA.

(2) Cases reviewed by the SRA shall be considered under the standards set forth in this part.

(b) *Processing the decisional document*. (1) The decisional document shall be transmitted by the NDRB president under § 724.813.

(2) The following guidance applies to cases that have been forwarded to the SRA except for cases reviewed on the NDRB's own motion, without the participation of the applicant or the applicant's counsel:

(i) The applicant and counsel or representative, if any, shall be provided with a copy of the proposed decisional document, including the NDRB president's recommendation to the SRA, if any. Classified information shall be summarized.

(ii) The applicant shall be provided with a reasonable period of time, but not less than 25 days, to submit a rebuttal to the SRA. Any issue in rebuttal consists of a clear and specific statement by the applicant in support of or in opposition to the statements of the NDRB or NDRB president on decisional issues and other clear and specific issues that were submitted by the applicant. The rebuttal shall be based solely on matters in the record before the NDRB closed the case for deliberation or in the president's recommendation.

(c) *Review of the decisional document*. If corrections in the decisional document are required, the decisional document shall be returned to the NDRB 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 decision by the NDRB (or NDRB president) of the issues raised by the majority or the applicant.

(d) *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.

(1) *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 NDRB or the NDRB president, the decisional document shall contain a reference to the matter adopted.

(2) *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 and issues raised by the NDRB and the NDRB president in accordance with the following guidance:

(i) *Adoption of the NDRB president's recommendation*. The addendum may state that the SRA has adopted the NDRB president's recommendation.

(ii) *Adoption of the NDRB's proposed decisional document*. The addendum may state that the SRA has adopted the proposed decisional document prepared by the NDRB.

(iii) *Adoption of specific statements from the majority or the NDRB president*. If the SRA adopts the views of the NDRB or the NDRB president only in part, the addendum shall cite the specific statements adopted. If the SRA modifies a statement submitted by the NDRB or the NDRB president, the addendum shall set forth the modification.

(iv) *Response to issues not included in matter adopted from the NDRB or the NDRB president*. The addendum shall set forth the following if not adopted in whole or in part from the NDRB or the NDRB president:

(A) A list of the issues on which the SRA's decision is based. Each such decisional document issue shall be addressed by the SRA. This includes reasons for rejecting the conclusion of the NDRB or the NDRB president with respect to decisional issues which, if resolved in the applicant's favor, would have resulted in a 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 § 724.806(f).

(B) The SRA's response to items submitted as issues by the applicant.

(3) *Response to the rebuttal*. (i) 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 and no further response to the rebuttal is required.

(ii) 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:

(A) If the SRA rejects an issue in rebuttal, the SRA may respond in accordance with the principals in § 724.806.

(B) 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.

(C) If the matter submitted by the applicant does not meet the requirements for rebuttal material, that fact shall be noted.

(4) *Index entries*. Appropriate index entries shall be prepared for the SRA's actions for matters that are not adopted from the NDRB's proposed decisional document.

### § 724.815 Complaints.

A complaint is any correspondence in which it is alleged that a decisional document issued by the NDRB or the SRA contains a specifically indentified violation of 32 CFR part 70 or any references thereto. Complaints will be reviewed pursuant to 32 CFR part 70.

## Subpart I—Standards for Discharge Review

### § 724.901 Objective of discharge review.

The objective of a discharge review is ot examine the propriety and equity of the applicant's discharge and to effect changes, if necessary. The standards of the review and the underlying factors which aid in determining whether the

standards are met shall be consistent with historical criteria for determining honorable service. No factors shall be established that require automatic change or denial of a change in a discharge. Neither the NDRB nor the Secretary of the Navy shall be bound by any methodology of weighting of the factors in reaching a determination. In each case, the NDRB shall give full, fair, and impartial consideration to all applicable factors before reaching a decision. An applicant may not receive a less favorable discharge than that issued at the time of separation. This does not preclude correction of clerical errors.

**§ 724.902 Propriety of the discharge.**

(a) A discharge shall be deemed to be proper unless, in the course of discharge review, it is determined that:

(1) 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

(2) 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.

(b) 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 NDRB will recognize an error only to the extent that the error has been corrected by the organization with primary responsibility for correcting the record.

(c) The primary function of the NDRB 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 NDRB 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 NDRB in its review of subsequent cases because no two cases present the same issues of equity.

(d) The following applies to applicants who received less than fully honorable administrative discharges because of their civilian misconduct while in an inactive duty status in a reserve component and who were discharged or had their discharge reviewed on or after April 20, 1971: the NDRB 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:

(1) An other than honorable (formerly undesirable) discharge for an inactive duty reservist can only be based upon civilian misconduct found to have affected directly the performance of military duties;

(2) A general discharge for an inactive duty 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.

**§ 724.903 Equity of the discharge.**

A discharge shall be deemed to be equitable unless:

(a) 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:

(1) Current policies or procedures represent a substantial enhancement of the rights afforded a respondent in such proceedings; and

(2) 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.

(b) At the time of issuance, the discharge was inconsistent with standards

of discipline in the military service of which the applicant was a member.

(c) 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 NDRB viewed in conjunction with the factors listed in this paragraph 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:

(1) Quality of service, as evidenced by factors such as:

(i) Service history, including date of enlistment, period of enlistment, highest rank achieved, conduct and proficiency ratings (numerical and narrative);

(ii) Awards and decorations;

(iii) Letters of commendation or reprimand;

(iv) Combat service;

(v) Wounds received in action;

(vi) Records of promotions and demotions;

(vii) Level of responsibility at which the applicant served;

(viii) Other acts of merit that may not have resulted in formal recognition through an award or commendation;

(ix) Length of service during the service period which is the subject of the discharge review;

(x) Prior military service and type of discharge received or outstanding post service 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;

(xi) Convictions by court-martial;

(xii) Records of nonjudicial punishment;

(xiii) Convictions by civil authorities while a member of the service, reflected in the discharge proceedings or otherwise noted in the service records;

(xiv) Records of periods of unauthorized absence;

(xv) Records relating to a discharge in lieu of court-martial.

(2) Capability to serve, as evidenced by factors such as:

(i) *Total capabilities*. This includes an evaluation of matters such as age, educational level, and aptitude scores. Consideration may also be given as to 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.

(ii) *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.

(iii) *Arbitrary or capricious actions*. This includes actions by individuals in authority which constiute a clear abuse of such authority and that, although not amounting to prejudicial error, may have contributed to the decision to discharge the individual or unduly influence the characterization of service.

(iv) *Discrimination*. This includes unauthorized acts as documented by records or other evidence.

## APPENDIX A TO PART 724—POLICY STATEMENT BY THE SECRETARY OF DEFENSE—ADDRESSING CERTAIN CATEGORIES OF DISCHARGES

Secretary of Defense memorandum of August 13, 1971, to the Secretaries of the Military Departments, The Chairman, Joint Chiefs of Staff; Subject: Review of Discharges Under Other Than Honorable Conditions Issued to Drug Users:

''Consistent with Department of Defense Directive 1300.11, October 23, 1970, and my memorandum of July 7, 1971, concerning rehabilitation and treatment of drug users, administrative discharges under other than honorable conditions issued solely on the basis of personal use of drugs or possession of drugs for the purpose of such use will be reviewed for recharacterization.

''Accordingly, each Secretary of a Military Department, acting through his/her Discharge Review Board, will consider applications for such review from former service members. Each Secretary is authorized to issue a discharge under honorable conditions upon establishment of facts consistent with this policy. Former service members will be notified of the results of the review. The Veterans' Administration will also be notified of the names of former service members whose discharges are recharacterized.

''The statute of limitations for review of discharges within the scope of this policy

will be in accordance with 10 United States Code 1553.

''This policy shall apply to those service members whose cases are finalized or in process on or before July 7, 1971''.

Secretary of Defense memorandum of April 28, 1972, to Secretaries of the Military Departments, Chairman, Joint Chiefs of Staff; Subject: Review of Punitive Discharges Issued to Drug Users:

''Reference is made to Secretary Packard's memorandum of July 7, 1971, concerning rehabilitation and treatment of drug users, and my memorandum of August 13, 1971, subject: 'Review of Discharges Under Other Than Honorable Conditions Issued to Drug Users.'

''My August 13, 1971 memorandum established the current Departmental policy that administrative discharges under other than honorable conditions issued solely on the basis of personal use of drugs or possession of drugs for the purpose of such use will be reviewed for recharacterization to under honorable conditions.

''It is my desire that this policy be expanded to include punitive discharges and dismissals resulting from approved sentences of courts-martial issed solely for conviction of personal use of drugs or possession of drugs for the purpose of such use.

''Review and recharacterization are to be effected, upon the application of former service members, utilizing the procedures and authority set forth in Title 10, United States Code, sections 874(b), 1552 and 1553.

''This policy is applicable only to discharges which have been executed on or before July 7, 1971, or issued as a result of a case in process on or before July 7, 1971.

''Former service members requesting a review will be notified of the results of the review. The Veterans' Administration will also be notified of the names of former service members whose discharges are recharacterized.''

## APPENDIX B TO PART 724—OATH OR AFFIRMATION TO BE ADMINISTERED TO DISCHARGE REVIEW BOARD MEMBERS

Prior to undertaking duties as a Board member, each person assigned to such duties in the precept of the Board shall execute the following oath or affirmation which shall continue in effect throughout service with the Board.

*Oath/Affirmation*

I, _____, do swear or affirm that I will faithfully and impartially perform all the duties incumbent upon me as a member of the Naval Discharge Review Board; that I will fully and objectively inquire into and examine all cases coming before me; that I will, without regard to the status of the individual in any case, render my individual judgment according to the facts, my conscience and the law and regulations applicable to review of naval discharges, so help me God.

## APPENDIX C TO PART 724—SAMPLES OF FORMATS EMPLOYED BY THE NAVAL DISCHARGE REVIEW BOARD

| Attachment | Form | Title |
|---|---|---|
| 1 | Letter ..... | En Block Notification of Decision to Commander, Naval Military Personnel Command (No Change). |
| 2 | .....do ..... | En Block Notification of Decision to Commander, Naval Military Personnel Command (Change). |
| 3 | .....do ..... | En Block Notification of Decision to Commandant, Marine Corps (No Change). |
| 4 | .....do ..... | En Block Notification of Decision to Commandant, Marine Corps (Change). |

NOTE: The Forms appearing in appendix C are not carried in the Code of Federal Regulations.

## APPENDIX D TO PART 724—VETERANS' BENEFITS

91 Stat. 1106
Pub. L. 95–126, Oct. 8, 1977
95th Congress

*An Act*

To deny entitlement to veterans' benefits to certain persons who would otherwise become so entitled solely by virtue of the administrative upgrading under temporarily revised standards of other than honorable discharges from service during the Vietnam era; to require case-by-case review under uniform, historically consistent, generally appli cable standards and procedures prior to the award of veterans' benefits to persons administratively discharged under other than honorable conditions from active military, naval, or air service; and for other purposes.

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, That (a) section 3103 of Title 38, United States Code, is amended by—

(1) Inserting ''or on the basis of an absence without authority from active duty for a continuous period of at least one hundred and eighty days if such person was discharged under conditions other than honorable unless such person demonstrates to the satisfaction of the Administrator that there are compelling circumstances to warrant such prolonged unauthorized absence.'' after ''deserter,'' in subsection (a), and by inserting a coma and ''notwithstanding any action

subsequent to the date of such discharge by a board established pursuant to section 1553 of title 10'' before the period at the end of such subsection; and

(2) Adding at the end of such section the following new subsection:

''(e)(1) Notwithstanding any other provision of law, (A) no benefits under laws administered by the Veterans' Administration shall be provided, as a result of a change in or new issuance of a discharge under section 1553 of title 10, except upon a case-by-case review by the board of review concerned, subject to review by the Secretary concerned, under such section, of all the evidence and factors in each case under published uniform standard (which shall be historically consistent with criteria for determining honorable service and shall not include any criterion for automatically granting or denying such change or issuance) and procedures generally applicable to all persons administratively discharged or released from active military, naval, or air service under other than honorable conditons: and (B) any such person shall be afforded an opportunity to apply for such review under such section 1553 for a period of time terminating not less than one year after the date on which such uniform standards and procedures are promulgated and published.

''(2) Notwithstanding any other provision of law—

''(A) No person discharged or released from active military, naval, or air service under other than honorable conditions who has been awarded a general or honorable discharge under revised standards for the review of discharges, (i) as implemented by the President's directive of January 19, 1977, initiating further action with respect to the President's Proclamation 4313 of September 16, 1974, (ii) as implemented on or after April 5, 1977, under the Department of Defense's special discharge review program, or (iii) as implemented subsequent to April 5, 1977, and not made applicable to all persons administratively discharged or released from active military, naval, or air service under other than honorable conditions, shall be entitled to benefits under laws administered by the Veterans' Administration except upon a determination, based on a case-by-case review, under standards (meeting the requirements of paragraph (1) of this subsection) applied by the board of review concerned under section 1553 of title 10, subject to review by the Secretary concerned, that such person would be awarded an upgraded discharged under such standards;

''(B) Such determination shall be made by such board, (i) on an expedited basis after notification by the Veterans' Administration to the Secretary concerned that such person has received, is in receipt of, or has applied for such benefits or after a written request is made by such person or such determination, (ii) on its own initiative within one year after the date of enactment of this paragraph in any case where a general or honorable discharge has been awarded on or prior to the date of enactment of this paragraph under revised standards referred to in clause (A) (i), (ii), or (iii) of this paragraph, or (iii) on its own initiative at the time a general or honorable discharge is so awarded in any case where a general or honorable discharge is awarded after such enactment date.

''If such board makes a preliminary determination that such person would not have been awarded an upgraded discharge under standards meeting the requirements of paragraph (1) of this subsection, such personal shall be entitled to an appearance before the board, as provided for in section 1553(c) of title 10, prior to a final determination on such question and shall be given written notice by the board of such preliminary determination and of his or her right to such appearance. The Administrator shall, as soon as administratively feasible, notify the appropriate board of review of the receipt of benefits under laws administered by the Veterans' Administration, or the application for such benefits, by any person awarded an upgraded discharge under revised standards referred to in clause (A) (i), (ii), or (iii) of this paragraph with respect to whom a favorable determination has not been made under this paragraph.''.

(b)(1) The Secretary of Defense shall fully inform each person awarded a general or honorable discharge under revised standards for the review of discharges referred to in section 3103(e)(2)(A) (i), (ii), or (iii) of title 38, United States Code, as added by subsection (a)(2) of this section of his or her right to obtain an expedited determination under section 3103(e)(2)(B)(i) of such title and of the implications of the provisions of this Act for each such person.

(2) Notwithstanding any other provision of law, the Secretary of Defense shall inform each person who applies to a board of review under section 1553 of title 10, United States Code, and who appears to have been discharged under circumstances which might constitute a bar to benefits under section 3103(a), of title 38, United States Code, (A) that such person might possibly be administratively found to be entitled to benefits under laws administered by the Veterans' Administration only through the action of a board for the correction of military records under section 1552 of such title 10 or the action of the Administrator of Veterans' Affairs under section 3103 of such title 38, and (B) of the procedures for making application to such section 1552 board for such purpose and to the Administrator of Veterans' Affairs for such purpose (including the right to proceed concurrently under such sections 3103, 1552 and 1553).

Section 2. Notwithstanding any other provision of law, the Administrator of Veterans' Affairs shall provide the type of health care and related benefits authorized to be provided under chapter 17 of title 38, United States Code, for any disability incurred or aggravated during active military, naval, or air service in line of duty by a person other than a person barred from receiving benefits by section 3103(a) of such title, but shall not provide such health care and related benefits pursuant to this section for any disability incurred or aggravated during a period of service from which such person was discharged by reason of a bad conduct discharge.

Section 3. Paragraph (18) of section 101 of Title 38, United States Code, is amended to read as follows:

''(18) The term 'discharge or release' includes, (A) retirement from the active military, naval, or air service, and (B) the satisfactory completion of the period of active military, naval, or air service for which a person was obligated at the time of entry into such service in the case of a person who, due to enlistment or reenlistment, was not awarded a discharge or release from such period of service at the time of such completion thereof and who, at such time, would otherwise have been eligible for the award of a discharge or release under conditions other than dishonorable.''

Section 4. In promulgating, or making any revisions of or amendments to, regulations governing the standards and procedures by which the Veterans' Administration determines whether a person was discharged or released from active military, naval, or air service under conditions other than dishonorable, the Administrator of Veterans' Affairs shall, in keeping with the spirit and intent of this Act, not promulgate any such regulations or revise or amend any such regulations for the purpose of, or having the effect of, (1) providing any unique or special advantage to veterans awarded general or honorable discharges under revised standards for the review of discharges described in section 3103(e)(2)(A) (i), (ii), or (iii) of title 38, United States Code, as added by section 1(a)(2) of this Act, or (2) otherwise making any special distinction between such veterans and other veterans.

Section 5. This Act shall become effective on the date of its enactment, except that—

(1) Section 2 shall become effective on October 1, 1977, or on such enactment date, whichever is later; and

(2) The amendments made by section 1(a) shall apply retroactively to deny benefits under laws administered by the Veterans' Administration, except that, notwithstanding any other provision of law.

(A) With respect to any person who, on such enactment date is receiving benefits under laws administered by the Veterans' Administration, (i) such benefits shall not be terminated under paragraph (2) of section 3103(e) of title 38, United States Code, as added by section 1(a)(2) of this Act, until, (I) the day on which a final determination not favorable to the person concerned is made on an expedited basis under paragraph (2) of such section 3103(e), (II) the day following the expiration of ninety days after a preliminary determination not favorable to such person is made under such paragraph, or (III) the day following the expiration of one hundred and eighty days after such enactment date, whichever day is the earliest, and (ii) the United States shall not make any claim to recover the value of any benefits provided to such person prior to such earliest day;

(B) With respect to any person awarded a general or honorable discharge under revised standards for the review of discharges referred to in clause (A) (i), (ii), or (iii) of such paragraph who has been provided any such benefits prior to such enactment date, the United States shall not make any claim to recover the value of any benefits so provided; and

(C) The amendments made by clause (1) of section 1(a) shall apply, (i) retroactively only to persons awarded general or honorable discharges under such revised standards and to persons who, prior to the date of enactment of this Act, had not attained general eligibility to such benefits by virtue of (I) a change in or new issuance of a discharge under section 1553 of title 10, United States Code, or (II) any other provision of law, and (ii) prospectively (on and after such enactment date) to all other persons.

# PART 725—RELEASE OF OFFICIAL INFORMATION FOR LITIGATION PURPOSES AND TESTIMONY BY DEPARTMENT OF THE NAVY PERSONNEL

Sec.

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AUTHORITY: 5 U.S.C. 301; 10 U.S.C. 113, 5013; 31 U.S.C. 9701 and 32 CFR part 97.

SOURCE: 57 FR 2463, Jan. 22, 1992, unless otherwise noted.

### § 725.1 Purpose.

This instruction implements 32 CFR part 97 regarding the release of official Department of the Navy (DON) information and provision of testimony by DON personnel for litigation purposes, and prescribes conduct of DON personnel in response to a litigation request or demand. It restates the information contained in Secretary of the Navy Instruction 5820.8A of 27 August 1991[1], and is intended to conform in all respects with the requirements of that instruction.

### § 725.2 Policy.

(a) It is DON policy that official factual information, both testimonial and documentary, should be made reasonably available for use in Federal courts, state courts, foreign courts, and other governmental proceedings unless that information is classified, privileged, or otherwise protected from public disclosure.

(b) DON personnel, as defined in § 725.4(b), however, shall not provide such official information, testimony, or documents, submit to interview, or permit a view or visit, without the authorization required by this part.

(c) DON personnel shall not provide, with or without compensation, opinion or expert testimony concerning official DON or Department of Defense (DOD) information, subjects, personnel, or activities, except on behalf of the United States or a party represented by the Department of Justice, or with the written special authorization required by this part.

(d) Section 725.2(b) and (c) constitute a regulatory general order, applicable to all DON personnel individually, and need no further implementation. A violation of those provisions is punishable under the Uniform Code of Military Justice for military personnel and is the basis for appropriate administrative procedures with respect to civilian employees. Moreover, violations of this instruction by DON personnel may, under certain circumstances, be actionable under 18 U.S.C. 207.

(e) Upon a showing by a requester of exceptional need or unique circumstances, and that the anticipated testimony will not be adverse to the interests of the DON, DOD, or the United States, the General Counsel of the Navy, the Judge Advocate General of the Navy, or their respective delegates may, in their sole discretion, and pursuant to the guidance contained in this instruction, grant such written special authorization for DON personnel to appear and testify as expert or opinion witnesses at no expense to the United States.

### § 725.3 Authority to act.

(a) The General Counsel of the Navy, the Judge Advocate General of the Navy, and their respective delegates [hereafter ''determining authorities'' described in § 725.4(a), shall respond to litigation requests or demands for official DOD information or testimony by DON personnel as witnesses.

(b) If required by the scope of their respective delegations, determining authorities' responses may include: consultation and coordination with the Department of Justice or the appropriate United States Attorney as required; referral of matters proprietary to another DOD component to that component; determination whether official information originated by the Navy may be released in litigation; and determination whether DOD personnel assigned to or affiliated with the Navy may be interviewed, contacted, or used as witnesses concerning official DOD information or as expert or opinion witnesses. Following coordination with the appropriate commander, a response may further include whether installations, facilities, ships, or aircraft may be visited or inspected; what, if any, conditions will be imposed upon any release, interview, contact, testimony, visit, or inspection; what, if any, fees shall be charged or waived for access under the fee assessment considerations set forth in § 725.11; and what, if any, claims of privilege, pursuant to this instruction, may be invoked before any tribunal.

### § 725.4 Definitions.

(a) *Determining authority*. The cognizant DON or DOD official designated

[1] Copies may be obtained, if needed, from the Naval Publications and Forms Directorate, Attn: Code 301, 5801 Tabor Avenue, Philadelphia, PA 19120-5099.

to grant or deny a litigation request. In all cases in which the United States is, or might reasonably become, a party, or in which expert testimony is requested, the Judge Advocate General or the General Counsel of the Navy, depending on the subject matter of the request, will act as determining authority. In all other cases, the responsibility to act as determining authority has been delegated to all officers exercising general court-martial convening authority, or to their subordinate commands, and to other commands and activities indicated in § 725.6.

(b) *DON personnel.* Active duty and former military personnel of the naval service including retirees; personnel of other DOD components serving with a DON component; Naval Academy midshipmen; present and former civilian employees of the DON including nonappropriated fund activity employees; non-U.S. nationals performing services overseas for the DON under provisions of status of forces agreements; and other specific individuals or entities hired through contractual agreements by or on behalf of DON, or performing services under such agreements for DON (e.g., consultants, contractors and their employees and personnel).

(c) *Factual and expert or opinion testimony.* DON policy favors disclosure of factual information if disclosure does not violate the criteria stated in § 725.8. The distinction between factual matters, and expert or opinion matters (where DON policy favors non-disclosure), is not always clear. The considerations set forth below pertain.

(1) Naval personnel may merely be percipient witnesses to an incident, in which event their testimony would be purely factual. On the other hand, they may be involved with the matter only through an after-the-event investigation (e.g., JAGMAN investigation). Describing the manner in which they conducted their investigation and asking them to identify factual conclusions in their report would likewise constitute factual matters to which they might testify. In contrast, asking them to adopt or reaffirm their findings of fact, opinions, and recommendations, or asking them to form or express any other opinion—particularly one based upon matters submitted by counsel or going to the ultimate issue of causation or liability—would clearly constitute precluded testimony under the above policy.

(2) Naval personnel, by virtue of their training, often form opinions because they are required to do so in the course of their duties. If their opinions are formed prior to, or contemporaneously with, the matter in issue, and are routinely required of them in the course of the proper performance of their professional duties, they constitute essentially factual matters (*i.e.*, the opinion they previously held). Opinions formed after the event in question, including responses to hypothetical questions, generally constitute the sort of opinion or expert testimony which this instruction is intended to severely restrict.

(3) Characterization of expected testimony by a requester as fact, opinion, or expert is not binding on the determining authority. When there is doubt as to whether or not expert or opinion (as opposed to factual) testimony is being sought, advice may be obtained informally from, or the request forwarded, to the Deputy Assistant Judge Advocate General (General Litigation) or the Associate General Counsel (Litigation) for resolution.

(d) *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, or reasonably anticipated to involve, civil or criminal litigation.

(e) *Official information.* All information of any kind, however stored, in the custody and control of the DOD and its components including the DON; relating to information in the custody and control of DOD or its components; or acquired by DOD personnel or its component personnel as part of their official duties or because of their official status within DOD or its components,

while such personnel were employed by or on behalf of the DOD or on active duty with the United States Armed Forces (determining whether ''official information'' is sought, as opposed to non-DOD information, rests with the determining authority identified in § 725.6, rather than the requester).

(f) *Request or demand (legal process).* Subpoena, order, or other request by a federal, state, or foreign court of competent jurisdiction, by any administrative agency thereof, or by any party or other person (subject to the exceptions stated in § 725.5) for production, disclosure, or release of official DOD information or for appearance, deposition, or testimony of DON personnel as witnesses.

**§ 725.5 Applicability.**

(a) This instruction applies to all present and former civilian and military personnel of the DON whether employed by, or assigned to, DON temporarily or permanently. Affected personnel are defined more fully in § 725.4(b).

(b) This instruction applies only to situations involving existing or reasonably anticipated litigation, as defined in § 725.4(d), when DOD information or witnesses are sought, whether or not the United States, the DOD, or its components are parties thereto. It does not apply to formal or informal requests for information in other situations.

(c) This instruction provides guidance only for DON operation and activities of its present and former personnel in responding to litigation requests. It is not intended to, does not, and may not be relied upon to, create any right or benefit, substantive or procedural, enforceable at law or equity against the United States, DOD, or DON.

(d) This instruction 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.

(e) This instruction does not supersede or modify existing laws, DOD or DON regulations, directives, or instructions governing testimony of DON personnel or release of official DOD or DON information during grand jury proceedings.

(f) This instruction does not control release of official information in response to requests unrelated to litigation or under the Freedom of Information Act (FOIA), 5 U.S.C. 552, or the Privacy Act, 5 U.S.C. 552a. This instruction does not preclude treating any written request for DON records as a request under the FOIA or Privacy Acts. Activities are encouraged to treat such requests for documents under the FOIA or the Privacy Act if they are invoked by the requestor either explicitly or by fair implication. See 32 CFR 701.3(a), 701.10(a). Activities are reminded that such treatment does not absolve them of the responsibility to respond in a timely fashion to legal process. In any event, if the official information requested pertains to a litigation matter which the United States is a present or potential party, the release authority should notify the delegate of the General Counsel or the Judge Advocate General, under § 725.6.

(g) This part does not apply to release of official information or testimony by DON personnel in the following situations:

(1) Before courts-martial convened by any DOD component, or in administrative proceedings conducted by, or on behalf of, such component;

(2) Under administrative proceedings conducted by, or on behalf of, the Equal Employment Opportunity Commission (EEOC) or the Merit Systems Protection Board (MSPB), the Federal Labor Relations Authority, the Federal Services Impasse Panel, or under 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, or counsel representing the interests of the Federal Government, in litigation conducted, in whole or in part, on behalf of the United States (e.g., Medical Care Recovery Act claims, affirmative claims, or subpoenas issued by, or concurred in by, Government counsel when the United States is a party), but the regulation does apply to an action brought under the qui tam provisions of the False Claims Act in which a private party brings an action in the name of the United States but in which the Department of Justice either has not yet

determined to intervene in the litigation or has declined to intervene;

(4) As part of the assistance required by the Defense Industrial Personnel Security Clearance Review Program under DOD Directive 5220.6[2];

(5) Release of copies of Manual of the Judge Advocate General (JAGMAN) investigations, to the next of kin (or their representatives) of deceased or incompetent naval personnel;

(6) Release of information by DON personnel to counsel retained on their behalf for purposes of litigation, unless that information is classified, privileged, or otherwise protected from disclosure (in the latter event, compliance with 32 CFR part 97 and this part is required);

(7) Cases involving garnishment orders for child support and/or alimony. The release of official information in these cases is governed by 5 CFR 581 and SECNAVINST 7200.16[3], or;

(8) Release of information to Federal, state, and local prosecuting and law enforcement authorities, in conjunction with an investigation conducted by a DOD component or DON criminal investigative organization.

(h) This part does not preclude official comment on matters in litigation in appropriate cases.

(i) The DOD General Counsel may notify DOD components that DOD will assume primary responsibility for coordinating all litigation requests for demands for official DOD information or testimony of DOD personnel in litigation involving terrorism, espionage, nuclear weapons, and intelligence sources or means. Accordingly, determining officials who receive requests pertaining to such litigation shall notify the Associate General Counsel (Litigation) or the Deputy Assistant Judge Advocate General (International Law or General Litigation) who shall consult and coordinate with DOD General Counsel prior to any response to such requests.

(j) *Relationship with Federal Rules of Procedure.* The requirements imposed by this instruction are intended, among other things, to provide adequate notice to DON regarding the scope of proposed discovery. This will assure that certain DON information, which properly should be withheld, is not inadvertently released in response to a litigation request or demand, including a subpoena or other request for discovery issued under Federal rules of procedure. When the United States is a party to Federal litigation and the party opponent uses discovery methods (e.g., request for interrogatories and admissions, depositions) set forth in Federal rules of procedure, the Judge Advocate General or General Counsel, in consultation with representatives of the Department of Justice or the cognizant United States Attorney, may determine whether the requirement for a separate written request in accordance with § 725.7 should be waived. Even if this requirement is waived, however, DON personnel who are subpoenaed to testify still will be required to obtain the written permission described in § 725.2.

### § 725.6 Authority to determine and respond.

(a) *Matters proprietary to DON.* If a litigation request or demand is made of DON personnel for official DON or DOD information or for testimony concerning such information, the individual to whom the request or demand is made will immediately notify the cognizant DON official designated in § 725.6(c) and (d), who will determine availability and respond to the request or demand.

(b) *Matters proprietary to another DOD component.* If a DON activity receives a litigation request or demand for official information originated by another DOD component or for non-DON personnel presently or formerly assigned to another DOD component, the DON activity will forward appropriate portions of the request or demand to the DOD component originating the information, to the components where the personnel are assigned, or to the components where the personnel were formerly assigned, for action under 32 CFR part 97. The forwarding DON activity will also notify the requester and court (if appropriate) or other authority of its transfer of the request or demand.

[2] See footnote 1 to § 725.1.

[3] See footnote 1 to § 725.1.

(c) *Litigation matters to which the United States is, or might reasonably become, a party.* Examples of such instances include suits under the Federal Tort Claims Act, Freedom of Information Act, Medical Care Recovery Act, Tucker Act, and suits against Government contractors where the contractor may interplead the United States or seek indemnification from the United States for any judgment paid, e.g., aviation contractors or asbestos matters. Generally, a suit in which the plaintiff is representing the interests of the United States under the Medical Care Recovery Act is not a litigation matter to which the United States is, or might reasonably become, a party. Determining authorities, if in doubt whether the United States is likely to become a party to the litigation, should seek guidance from representatives of the Offices of the Judge Advocate General or General Counsel. The Judge Advocate General and the General Counsel have the authority to determine whether a litigation request should be forwarded to them, or retained by a determining authority, for resolution.

(1) Litigation requests regarding matters assigned to the Judge Advocate General of the Navy under Navy Regulations, article 0331 (1990), shall be referred to the Deputy Assistant Judge Advocate General for General Litigation, Office of the Navy Judge Advocate General (Washington Navy Yard), 1322 Patterson Avenue, SE., Suite 3000, Washington, DC, 20374-5066, who will respond for the Judge Advocate General or transmit the request to the appropriate Deputy Assistant Judge Advocate General for response.

(2) Litigation requests regarding matters assigned to the General Counsel of the Navy under Navy Regs., art. 0327 (1990)[5], shall be referred to the cognizant Command Counsel under, and subject to, limitations set forth in § 725.6(d)(2). That Command Counsel may either respond or refer the matter for action to another office. Requests involving asbestos litigation shall be referred to the Office of Counsel, Naval Sea Systems Command Headquarters, Personnel and Labor Law Section (Code 00LD), Washington, DC 20362-5101. Matters not clearly within the purview of a particular command counsel shall be referred to Associate General Counsel (Litigation), who may either respond or refer the matter for action to another office.

(3) Matters involving the Armed Services Board of Contract Appeals shall be forwarded to these respective counsel except where the determination may involve the assertion of the deliberative process privilege before that Board. In such an event, the matter shall be forwarded for determination to the Associate General Counsel (Litigation).

(d) *Litigation matters in which the United States is not, and is reasonably not expected to become, a party*—(1) *Matters within the cognizance of the Judge Advocate General*—(i) *Fact witnesses.* Requests to interview, depose, or obtain testimony of any present or former DON personnel as defined in § 725.4(b) about purely factual matters shall be forwarded to the Navy or Marine Corps officer exercising general court-martial jurisdiction (OEGCMJ) in whose chain of command the prospective witness or requested documents lie. That determining authority will respond for the Judge Advocate General under criteria set forth in § 725.8.

(A) If the request pertains to personnel assigned to the Office of the Chief of Naval Operations, the Office of the Vice Chief of Naval Operations, or an Echelon 2 command located in the Washington, DC, area, it shall be forwarded to that office which will likewise respond for the Judge Advocate General under the criteria set forth in § 725.8.

(B) If a request pertains to Marine Corps personnel assigned to Headquarters Battalion, Headquarters Marine Corps, or to other Marine Corps commands located in the Washington, DC, area, it shall be forwarded to the Commandant of the Marine Corps (JAR), Headquarters, U.S. Marine Corps, Washington, DC 20380-0001, which will respond for the Judge Advocate General under criteria set forth in § 725.8.

[5] See footnote 1 to § 725.1.

(C) Nothing here shall prevent a determining authority from referring requests or demands to another determining authority better suited under the circumstances to determine the matter and respond, but the requester shall be notified of the referral. Further, each determining authority specified in this paragraph may further delegate his or her decisional authority to a principal staff member, staff judge advocate, or legal advisor.

(D) In the alternative, the requester may forward the request to the Deputy Assistant Judge Advocate General (General Litigation), who may refer the matter to another determining authority for response, and so notify the requester.

(ii) *Visits and views*. A request to visit a DON activity, ship, or unit, or to inspect material or spaces located there will be forwarded to one of the authorities stated in § 725.6(d)(1)(i), who will respond on behalf of the Judge Advocate General. Action taken by that authority will be coordinated with the commanding officer of the activity, ship, or unit at issue, or with his or her staff judge advocate (if applicable). The military mission of the unit shall normally take precedence over any visit or view. The commanding officer may independently prescribe reasonable conditions as to time, place, and circumstances to protect against compromise of classified or privileged material, intrusion into restricted spaces, and unauthorized photography.

(iii) *Documents*. 10 U.S.C. 7861 provides that the Secretary of the Navy has custody and charge of all DON books, records, and property. Under DOD Directive 5530.1,[6] the Secretary of the Navy's sole delegate for service of process is the General Counsel of the Navy. See CFR 257.5(c). All process for such documents shall be served upon the General Counsel at the Department of the Navy, Office of the General Counsel, Navy Litigation Office, 720 Kennon Street SE, Bldg 36 Room 233, Washington Navy Yard, DC 20374–5013, 202–685–7039, who will refer the matter to the proper delegate for action.

(iv) *Expert or opinion requests*. Any request for expert or opinion consultations, interviews, depositions, or testimony will be referred to the Deputy Assistant Judge Advocate General (General Litigation) who will respond for the Judge Advocate General, or transmit the request to the appropriate DAJAG for response. Matters not clearly within the purview of a particular Deputy Assistant Judge Advocate General will be retained by the Deputy Assistant Judge Advocate General (General Litigation), who may either respond or refer the matter to another determining authority for response.

(2) *Matters within the cognizance of the General Counsel of the Navy*—(i) *Matters not involving issues of Navy policy*. Such matters shall be forwarded for determination to the respective counsel for Naval Sea Systems Command, Naval Air Systems Command, Naval Supply Systems Command, Naval Facilities Engineering Command, Space and Naval Warfare Command, Office of the Navy Comptroller, Commandant of the Marine Corps, Office of the Chief of Naval Research, Military Sealift Command, Office of Civilian Personnel Policy, or to the Assistant General Counsel (Acquisition), depending upon who has cognizance over the information or personnel at issue.

(ii) *Matters involving issues of Navy policy*. Such matters shall be forwarded for determination to the General Counsel of the Navy via the Associate General Counsel (Litigation).

(iii) *Matters involving asbestos litigation*. Such matters shall be forwarded to the Office of Counsel, Naval Sea Systems Command Headquarters, Personnel and Labor Law Section (Code 00LD), Washington, DC 20362-5101.

(3) *Matters not clearly within the cognizance of either the Judge Advocate General or the General Counsel*. Such matters may be sent to the Deputy Assistant Judge Advocate General (General Litigation) or the Associate General Counsel (Litigation), who will, in consultation with the other, determine the appropriate authority to respond to the request.

[57 FR 2463, Jan. 22, 1992, as amended at 69 FR 20541, Apr. 16, 2004; 70 FR 12966, Mar. 17, 2005]

[6] See footnote 1 to § 725.1.

**§ 725.7 Contents of a proper request or demand.**

(a) *Routine requests.* If official information is sought, through testimony or otherwise, a detailed written request must be submitted to the appropriate determining authority far enough in advance to assure an informed and timely evaluation of the request, and prevention of adverse effects on the mission of the command or activity that must respond. The determining authority shall decide whether sufficient information has been provided by the requester. Absent independent information, the following data is necessary to assess a request.

(1) *Identification of parties, their counsel and the nature of the litigation.* (i) Caption of case, docket number, court.

(ii) Name, address, and telephone number of all counsel.

(iii) The date and time on which the documents, information, or testimony sought must be produced; the requested location for production; and, if applicable, the estimated length of time that attendance of the DON personnel will be required.

(2) *Identification of information or documents requested.* (i) A description, in as much detail as possible, of the documents, information, or testimony sought, including the current military service, status (active, separated, retired), social security number, if known, of the subject of the requested pay, medical, or service records;

(ii) The location of the records, including the name, address, and telephone number, if known, of the person from whom the documents, information, or testimony is sought; and

(iii) A statement of whether factual, opinion, or expert testimony is requested (see §§ 725.4(c) and 725.8(b)(3)(ii)).

(3) *Description of why the information is needed.* (i) A brief summary of the facts of the case and the present posture of the case.

(ii) A statement of the relevance of the matters sought to the proceedings at issue.

(iii) If expert or opinion testimony is sought, an explanation of why exceptional need or unique circumstances exist justifying such testimony, including why it is not reasonably available from any other source.

(b) *Additional considerations.* The circumstances surrounding the underlying litigation, including whether the United States is a party, and the nature and expense of the requests made by a party may require additional information before a determination can be made. Providing the following information or stipulations in the original request may expedite review and eliminate the need for additional correspondence with the determining authority.

(1) A statement of the requester's willingness to pay in advance all reasonable expenses and costs of searching for and producing documents, information, or personnel, including travel expenses and accommodations (if applicable);

(2) In cases in which deposition testimony is sought, a statement of whether attendance at trial or later deposition testimony is anticipated and requested. A single deposition normally should suffice;

(3) An agreement to notify the determining authority at least 10 working days in advance of all interviews, depositions, or testimony. Additional time for notification may be required where the witness is a DON health care provider or where the witness is located overseas;

(4) An agreement to conduct the deposition at the location of the witness, unless the witness and his or her commanding officer or cognizant superior, as applicable, stipulate otherwise;

(5) In the case of former DON personnel, a brief description of the length and nature of their duties while in DON employment, and a statement of whether such duties involved, directly or indirectly, the information or matters as to which the person will testify;

(6) An agreement to provide free of charge to any witness a signed copy of any written statement he or she may make, or, in the case of an oral deposition, a copy of that deposition transcript, if taken by a stenographer, or a video tape copy, if taken solely by video tape, if not prohibited by applicable rules of court;

(7) An agreement that if the local rules of procedure controlling the litigation so provide, the witness will be given an opportunity to read, sign, and correct the deposition at no cost to the witness or the Government;

(8) A statement of understanding that the United States reserves the right to have a representative present at any interview or deposition; and

(9) A statement that counsel for other parties to the case will be provided with a copy of all correspondence originated by the determining authority so they may have the opportunity to submit any related litigation requests and participate in any discovery.

(c) *Response to deficient requests.* A letter request that is deficient in providing necessary information may be returned to the requester by the determining authority with an explanation of the deficiencies and a statement that no further action will be taken until they are corrected. If a subpoena has been received for official information, counsel should promptly determine the appropriate action to take in response to the subpoena. See § 725.9(g).

(d) *Emergency requests.* Written requests are generally required by 32 CFR part 97.

(1) The determining authority, identified in § 725.6, has discretion to waive that requirement in the event of a bona fide emergency, under conditions set forth here, which were not anticipated in the course of proper pretrial planning and discovery. Oral requests and subsequent determinations should be reserved for instances where factual matters are sought, and compliance with the requirements of a proper written request would result in the effective denial of the request and cause an injustice in the outcome of the litigation for which the information is sought. No requester has a right to make an oral request and receive a determination. Whether to permit such an exceptional procedure is a decision within the sole discretion of the determining authority, unless overruled by the General Counsel or the Judge Advocate General, as appropriate.

(2) If the determining authority concludes that the request, or any portion of it, meets the emergency test, he or she will require the requester to agree to the conditions set forth in § 725.7(a). The determining authority will then orally advise the requester of the determination, and seek a written confirmation of the oral request. Thereafter, the determining authority will make a written record of the disposition of the oral request including the grant or denial, circumstances requiring the procedure, and conditions to which the requester agreed.

(3) The emergency procedure should not be utilized where the requester refuses to agree to the appropriate conditions set forth in § 725.7(a) or indicates unwillingness to abide by the limits of the oral grant, partial grant, or denial.

### § 725.8 Considerations in determining to grant or deny a request.

(a) *General considerations.* In deciding whether to authorize release of official information, or the testimony of DON personnel concerning official information (hereafter referred to as ''the disclosure'' under a request conforming with the requirements of § 725.7, the determining authority shall consider the following factors:

(1) The DON policy regarding disclosure in § 725.2;

(2) Whether the request or demand is unduly burdensome or otherwise inappropriate under applicable court rules;

(3) Whether disclosure, including release in camera (*i.e.*, to the judge or court alone), is appropriate under procedural rules governing the case or matter in which the request or demand arose;

(4) Whether disclosure would violate or conflict with a statute, executive order, regulation, directive, instruction, or notice;

(5) Whether disclosure, in the absence of a court order or written consent, would violate 5 U.S.C. 552, 552a;

(6) Whether disclosure, including release in camera, is appropriate or necessary under the relevant substantive law concerning privilege (e.g., attorney-client, attorney work-product, or physician-patient in the case of civilian personnel);

(7) Whether disclosure, except when in camera (*i.e.*, before the judge alone) and necessary to assert a claim of privilege, would reveal information

properly classified under the DOD Information Security Program under DOD 5200.1-R[7], withholding of unclassified technical data from public disclosure following OPNAVINST 5510.161; privileged Naval Aviation Safety Program information (OPNAVINST 3750.6Q (NOTAL))[8], or other matters exempt from unrestricted disclosure under 5 U.S.C. 552, 552a;

(8) Whether disclosure would unduly interfere with ongoing law enforcement proceedings, violate constitutional rights, reveal the identity of an intelligence source or source of confidential information, conflict with U.S. obligations under international agreement, or be otherwise inappropriate under the circumstances;

(9) Whether attendance of the requested witness at deposition or trial will unduly interfere with the military mission of the command; and

(10) Whether, in a criminal case, requiring disclosure by a defendant of detailed information about the relevance of documents or testimony as a condition for release would conflict with the defendant's constitutional rights.

(b) *Specific considerations*—(1) *Documents, interviews, depositions, testimony, and views (where the United States is, or may become, a party).* All requests pertaining to such matters shall be forwarded to the Judge Advocate General or the General Counsel, as appropriate under § 725.6(c).

(2) *Documents (where the United States is not, and is reasonably not expected to become a party)*—(i) *Unclassified Navy and Marine Corps records.* Where parties or potential parties desire unclassified naval records in connection with a litigation matter, the subpoena duces tecum or court order will be served, under 32 CFR 257.5(c), upon the General Counsel of the Navy, along with a written request complying with § 725.7.

(A) If the determining authority to whom the matter is referred determines to comply with the order or subpoena, compliance will be effected by transmitting certified copies of records to the clerk of the court from which process issued. If, because of an unusual circumstance, an original record must be produced by a naval custodian, it will not be removed from the custody of the person producing it, but copies may be placed in evidence.

(B) Upon written request of one or more parties in interest or their respective attorneys, records which would be produced in response to a court order signed by a judge as set forth above may be furnished without a court order, but only upon a request complying with § 725.7 and only when such records are not in a ''system of records'' as defined by the Privacy Act (5 U.S.C. 552a). In determining whether a record not contained in a ''system of records'' will be furnished in response to a Freedom of Information Act (FOIA) request, SECNAVINST 5720.42E[9] controls.

(C) Generally, a record in a Privacy Act ''system of records'' may not be released under a litigation request except with the written consent of the person to whom the record pertains or in response to a court order signed by a judge. See SECNAVINST 5211.5C[10] and 5 U.S.C. 552, 552a for further guidance.

(D) Whenever compliance with a court order or subpoena duces tecum for production of DON records is denied for any reason, the subpoena or court order and complete copies of the requested records will be forwarded to the appropriate Deputy Assistant Judge Advocate General (General Litigation) or the Associate General Counsel (Litigation) for action, and the parties to the suit notified in accordance with this part.

(ii) *Classified Navy and Marine Corps records.* Any consideration of release of classified information for litigation purposes, within the scope of this instruction, must be coordinated within the Office of the Chief of Naval Operations (OP-09N) per OPNAVINST 5510.1H.[11]

(iii) *Records in the custody of the National Personnel Records Center.* Court orders or subpoenas duces tecum demanding information from, or production of, service or medical records of former Navy and Marine Corps personnel in the custody of the National

[7] See footnote 1 to § 725.1.
[8] See footnote 1 to § 725.1.
[9] See footnote 1 to § 725.1.
[10] See footnote 1 to § 725.1.
[11] See footnote 1 to § 725.1.

Personnel Records Center will be served upon the Director, National Personnel Records Center, 9700 Page Boulevard, St. Louis, MO 63132. If records responsive to the request are identified and maintained at the National Personnel Records Center, that Center shall make appropriate certified (authenticated) copies of the information requested. These copies will then be forwarded, along with the request, in the case of Navy personnel, to Chief, Bureau of Naval Personnel (Pers-06), Washington, DC 20370-5000, or his delegate, who will respond. In the case of Marine Corps personnel, the copies and request will be sent to the Commandant of the Marine Corps (MMRB-10), Quantico, VA 22134-0001, who will respond. Those requests that do not constitute legal demands will be refused by the Director, National Personnel Records Center, and written guidance provided to the requester.

(iv) *Medical and other records of civilian employees.* Production of medical certificates or other medical reports concerning civilian employees is controlled by Federal Personnel Manual, chapter 294 and chapter 339.1-4.[12] Records of civilian employees, other than medical records, may be produced upon receipt of a court order and a request complying with § 725.7, provided no classified or for official use only information, such as loyalty or security records, are involved. Disclosure of records relating to compensation benefits administered by the Office of Workers' Compensation Programs of the Department of Labor are governed by Secretary of the Navy Instruction 5211.5C (Privacy Act implementation) and Secretary of the Navy Instruction 5720.42E (Freedom of Information Act implementation), as appropriate. Where information is furnished per this subparagraph in response to a court order and proper request, certified copies rather than originals should be furnished. Where original records must be produced because of unusual circumstances, they may not be removed from the custody of the official producing them, but copies may be placed on the record.

[12] See footnote 1 to § 725.1.

(v) *JAGMAN investigations (other than to next of kin).* The Deputy Assistant Judge Advocate General having cognizance over the records at issue for litigation or prospective litigation purposes may release the records if a complete release will result. The Assistant Judge Advocate General (Civil Law) will make determinations concerning the release of the records specified in this subparagraph if a release of less than the complete requested record will result. A release to next of kin of incompetent or deceased DON personnel or their representatives is exempt from these requirements and this part.

(vi) *Affirmative claims files.* Affirmative claims files (including Medical Care Recovery Act files), except to the extent they contain copies of JAGMAN investigations prepared under the Manual of the Judge Advocate General, or classified or privileged information, may be released by the commanding officer of the Naval Legal Service Office having cognizance over the claim at issue, without compliance with this instruction, to: insurance companies to support claims; to civilian attorneys representing injured service persons, their dependents, and the Government's interests; and to other DOD components. When a request for production involves material related to claims in favor of the Government, either the cognizant Command Counsel or the Naval Legal Service Office having territorial responsibility for the area should be notified.

(vii) *Accounting for disclosures from ''systems of records.''* When compliance with a litigation request or demand for production of records is appropriate, or when release of records is otherwise authorized, and records contained in a ''system of records,'' are released, the releasing official will consult Secretary of the Navy Instruction 5211.5C regarding disclosure accounting requirements.

(viii) *Pay records.* Official pay records of active-duty, reserve, retired, or former Navy members should be requested from Director, Defense Finance and Accounting Service (DFAS), Cleveland Center, Anthony J. Celebrezze Federal Building, Cleveland, OH 44199-2055. Official pay records of active-

duty, reserve, retired, or former Marines should be requested from Director, Defense Finance and Accounting Service, Kansas City Center (Code G), Kansas City, MO 64197-0001.

(3) *Interviews, depositions, and testimony (where the United States is not, and is reasonably not expected to become, a party)*—(i) *Factual matters.* DON policy favors disclosure of factual matters when disclosure does not violate the criteria stated in this section. Distinguishing between factual matters and expert or opinion matters (where DON policy favors non-disclosure) requires careful analysis. Opinion matters are defined at § 725.4(c).

(ii) *Expert, opinion, or policy matters.* Such matters are to be determined, under the delegation in § 725.6, by the cognizant Deputy Assistant Judge Advocate General or by General Counsel. General considerations to identify expert or opinion testimony are in § 725.4(c). DON personnel shall not provide, with or without compensation, opinion or expert testimony concerning official 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 requester of exceptional need or unique circumstances, and that the anticipated testimony will not be adverse to the interests of the DOD or the United States, the appropriate DON official designated in § 725.6, may grant, in writing, special authorization for DON personnel to appear and testify at no expense to the United States. In determining whether exceptional need or unique circumstances exist, the determining official should consider whether such expert or opinion testimony is available to the requester from any other source. The burden of demonstrating such unavailability, if any, is solely upon the requester.

(iii) *Visits and views (where the United States is not, and is reasonably not expected to become, a party).* Such disclosures are normally factual in nature and should not be accompanied by interviews of personnel unless separately requested and granted. The authority of the commanding officer of the activity, ship, or unit at issue is not limited by this part. Accordingly, he or she may prescribe appropriate conditions as to time, place, and circumstances (including proper restrictions on photography).

(iv) *Non-DOD information.* A request for disclosure under this part, particularly through the testimony of a witness, may involve both official information and non-DOD information (e.g., in the case of a person who has acquired additional and separate knowledge or expertise wholly apart from Government employment). Determining whether or not official information is at issue is within the purview of the determining authority, not the requester. A requester's contention that only non-DOD information is at issue is not dispositive. The requester must still comply with this instruction to support that contention. If non-DOD information is at issue in whole or in part, the determining authority shall so state in the written determination described in § 725.9. He or she shall make no other determination regarding that non-DOD information.

**§ 725.9 Action to grant or deny a request.**

(a) The process of determining whether to grant or deny a request is not an adversary proceeding. This part provides guidance for the operation of DON only 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, DOD, or DON.

(b) 32 CFR part 97 and this part apply to testimony by former naval personnel and former civilian employees of DON. A proper request must be made, under § 725.7, to obtain testimony by former personnel regarding official DOD information. However, this part is not intended to place unreasonable restraints upon the post-employment conduct of such personnel. Accordingly, requests for expert or opinion testimony by such personnel will normally be granted unless that testimony would constitute a violation of the U.S. Code (e.g., 18 U.S.C. 201 *et seq.*), conflict with pertinent regulations (e.g., Secretary of the Navy Instruction 5370.2H), or disclose properly classified or privileged information.

(c) A determination to grant or deny should be made as expeditiously as possible to provide the requester and the court with the matter at issue or with a statement of the reasons for denial. The decisional period should not exceed 10 working days from receipt of a complete request complying with the requirements of § 725.7, absent exceptional or particularly difficult circumstances. The requester should also be informed promptly of the referral of any portion of the request to another authority for determination.

(d) Except as provided in § 725.7(d), a determination to grant or deny shall be in writing.

(e) The determination letter should respond solely to the specific disclosures requested, stating a specific determination on each particular request. When a request is denied in whole or in part, a statement of the reasons for denial should be provided to fully inform a court of the reasons underlying the determination if it is challenged.

(f) A copy of any denial, in whole or in part, of a request, should be forwarded to the cognizant Deputy Assistant Judge Advocate General or the Associate General Counsel (Litigation), as appropriate. Such notification is likewise appropriate when the litigation request has been treated under 5 U.S.C. 552, 552a and § 725.5(f). Telephonic notification is particularly appropriate where a judicial challenge or contempt action is anticipated.

(g) In cases in which a subpoena has been received and the requester refuses to pay fees or otherwise comply with the guidance and requirements imposed by this part, or if the determining authority declines to make some or all of the subpoenaed information available, or if the determining authority has had insufficient time to complete its determination as to how to respond to the request, the determining authority must promptly notify the General Litigation Division of the Office of the Judge Advocate General or the Navy Litigation Office of the Office of the General Counsel, which offices will determine, in consultation with the Department of Justice, the appropriate response to be made to the tribunal which issued the subpoena. Because the Federal Rules of Civil Procedure require that some objections to subpoenas must be made either within 10 days of service of the subpoena or on or before the time for compliance, whichever first occurs, and because this will require consultation with the Department of Justice, timely notice is essential.

### § 725.10 Response to requests or demands in conflict with this instruction.

(a) Except as otherwise provided in this paragraph, DON personnel, including former military personnel and civilian employees, shall not produce, disclose, release, comment upon, or testify concerning any official DOD information in response to a litigation request or demand without prior written approval of the appropriate DON official designated in § 725.6. If a request has been made, and granted, in whole or in part, per 32 CFR part 97 and this part, DON personnel may only produce, disclose, release, comment upon, or testify concerning those matters specified in the request and properly approved by the determining authority designated in § 725.6. See *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

(b) If, after DON personnel have received a litigation request or demand and have in turn notified the appropriate determining authority described in § 725.6, a response to the request or demand is required before instructions from the responsible official have been received, the responsible authority designated in § 725.6 shall notify the Deputy Assistant Judge Advocate General or Associate General Counsel (Litigation) who has cognizance over the matter. That official will furnish the requester, the court, or other authority that the request or demand is being reviewed in accordance with this part and seek a stay of the request or demand pending a final determination.

(c) 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 under § 725.10(b), or if such court or other authority orders that the request or demand must be complied with, notwithstanding the final decision of the

appropriate DON official, the DON personnel upon whom the request or demand was made will, if time permits, notify the determining authority of such ruling or order. That authority will notify the Deputy Assistant Judge Advocate General or the Associate General Counsel (Litigation) having cognizance over the matter. After due consultation and coordination with the Department of Justice, as required by the Manual of the Judge Advocate General, that official will determine whether the individual is required to comply with the request or demand and will notify the requester, the court, or other authority accordingly. The witness shall, if directed by the appropriate DON official, respectfully decline to comply with the demand. Legal counsel for the command concerned should accompany and advise DON personnel during any court proceedings involving the foregoing circumstances.

(d) It is expected that all DON actions in the foregoing paragraphs will be taken only after active consultation with the appropriate component of the Department of Justice. Generally, DON personnel will be instructed to decline to comply with a court order only if the Department of Justice commits to represent the DON personnel in question.

**§ 725.11 Fees.**

(a) *Generally*. Except as provided below, determining authorities shall charge reasonable fees and expenses to parties seeking official DON information or testimony under this instruction. Pursuant to 32 CFR 288.4, 288.10, these fees should include all costs of processing a request for information, including time and material expended. Travel for active duty members summoned as witnesses is governed by Joint Travel Regulations, Vol. I, Chap. 7, pt. E. and Navy Travel Instructions, Chap. 6, pt. E.[13] Travel for civilian personnel summoned as witnesses is governed by the Joint Travel Regulations, Vol. II, Chap. 4, pt. E.[14]

(1) *When DON is a party*. No fees normally shall be charged when the DON is a party to the proceedings, and the activity holding the requested information or employing the witness shall bear the expense of complying with the request.

(2) *When another federal agency is a party*. No fees shall be charged to the requesting agency. Travel and per diem expenses may be paid by the requesting agency, or by the Navy activity to which the requested witness is assigned, subject to reimbursement from the requesting agency.

(3) *When neither DON nor another federal agency is a party*. Fees shall be charged to the requester for time taken from official duties by DON personnel who are authorized to be interviewed, give testimony, or escort persons on views and visits of installations. At the discretion of the cognizant command, DON personnel need not be made available during duty hours unless directed by subpoena. Time which DON personnel spend in court testifying, or waiting to testify on factual matters shall not be charged. Fees should be charged, however, for expert or opinion testimony based upon the witness's education, training, or experience. Testimony by a treating physician called to testify about his personal knowledge of a specific case is considered fact not expert testimony. Fees are payable to the Treasurer of the United States for deposit in the Treasury's miscellaneous receipts. Rates for uniformed personnel are published in NAVCOMPT Notice 7041 series.[15] Pursuant to 32 CFR 288.4, charges for civilian personnel should include the employee's hourly rate of pay, as well as allowances and benefits. Except as provided in § 725.11(b)(4), no funds may be expended for travel or per diem of active duty members when an agency of the Federal Government is not a party. The requesting party is responsible for travel arrangements and funding. Government funding of travel and per diem for civilian employees is authorized.

(b) *Special circumstances*—(1) *Refusal to pay fees*. In cases in which a subpoena has been received and the requester refuses to pay appropriate fees, it may become necessary to request the

[13] See footnote 1 to § 725.1.

[14] See footnote 1 to § 725.1.

[15] See footnote 1 to § 725.1.

Department of Justice to take appropriate legal action before the court issuing the subpoena. Determining authorities should consult promptly with the OJAG General Litigation Division or the Navy Litigation Office of the General Counsel if this course of action appears necessary, because some objections to subpoenas must be made either within ten days of service of the subpoena or on or before the time for compliance, whichever first occurs, and because this will require timely consultation with the Department of Justice. If no subpoena has been issued, the determining authority must decide whether to deny the request or, if appropriate, waive the fees.

(2) *Waiver or reduction of fees.* The determining authority may waive or reduce fees pursuant to 32 CFR 288.4, 288.9, provided such waiver or reduction is in the best interest of the DON and the United States. Fee waivers and reductions shall not be routinely granted, or granted under circumstances which might create the appearance that DON favors one party over another.

(3) *Witness fees required by the court.* Witness fees required by the rules of the applicable court shall be paid directly to the witness by the requester. Such amounts are to defray the cost of travel and per diem. In a case where the Government has paid the cost of travel and per diem, the witness shall turn over to his or her supervisor any payment received from a private party to defray the cost of travel that, when added to amounts paid by the Government, exceed the actual cost of travel. The supervisor shall forward the amount turned over by the witness to the Office of the Comptroller of the Navy for appropriate action.

(4) *Exceptional cases.* If neither the DON, nor an agency of the Federal Government is a party, appropriated funds may be used to pay, without reimbursement, travel and per diem of DON personnel who are witnesses in criminal or civil proceedings, provided, the case is directly related to the Armed Services, or its members, and the Armed Services have a genuine and compelling interest in the outcome.

# PART 726—PAYMENTS OF AMOUNTS DUE MENTALLY INCOMPETENT MEMBERS OF THE NAVAL SERVICE

Sec.

726.1 Purpose.
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AUTHORITY: 5 U.S.C. 301; 10 U.S.C. 5013, and 5148; 37 U.S.C. 601–604, and 1001; 32 CFR 700.105 and 700.312.

SOURCE: 56 FR 55088, Oct. 24, 1991, unless otherwise noted.

NOTE: This part 726 is chapter XIV, of the Manual of the Judge Advocate General of the Navy.

## § 726.1 Purpose.

This part explains the procedures for convening competency boards and how to appoint trustees for members of the Naval service who have been determined to be mentally incompetent in accordance with Chapter 11 of Title 37, United States Code.

[56 FR 55088, Oct. 24, 1991, as amended at 73 FR 64206, Oct. 29, 2008]

## § 726.2 Scope.

(a) The Secretary of the Navy has authority to designate a trustee in the absence of notice that a legal committee, guardian, or other legal representative has been appointed by a State court of competent jurisdiction. 37 U.S.C. 601-604. Trustees receive the active duty pay and allowances, amounts due for accrued or accumulated leave, and retired pay or retainer pay, that are otherwise payable to a member found by competent medical authority to be mentally incapable of managing his affairs. The Secretary of the Navy has authority to designate a trustee in the absence of notice that a legal committee, guardian, or other legal representative has been appointed by a State court of competent jurisdiction (37 U.S.C. 601–604). This authority is exercised by the Defense Finance and

Accounting Service-Cleveland Center (DFAS–CL), who has delegated it to DFAS–CL, Office of Continuing Government Activity (DFAS–CL(CGA)). Trustees receive the active duty pay and allowances, amounts due for accrued or accumulated leave, and retired pay or retainer pay, that are otherwise payable to a member found by competent medical authority to be mentally incapable of managing his affairs.

(b) *Member* as used in this chapter refers to:

(1) Members of the Navy or Marine Corps on active duty (other than for training) or on the retired list of the Navy or Marine Corps; and

(2) Members of the Fleet Reserve or Fleet Marine Corps Reserve.

[56 FR 55088, Oct. 24, 1991, as amended at 73 FR 64206, Oct. 29, 2008]

### § 726.3 Authority to appoint trustees.

DFAS–CL (CGA) is authorized to act for the Secretary of the Navy to appoint trustees to receive and administer Federal monies for members and to carry out the provisions of this chapter.

[56 FR 55088, Oct. 24, 1991, as amended at 73 FR 64206, Oct. 29, 2008]

### § 726.4 Procedures.

(a) *Competency Board*. (1) The commanding officer of the cognizant Naval medical facility will convene a board of not less than three Medical Department officers or physicians, one of whom will be a Navy psychiatrist or clinical psychologist, when there is evidence that a member may be incapable of handling his financial affairs. The board will be convened in accordance with Chapter 18, Manual of the Medical Department (MANMED). The board may include members of the Reserve components on active or inactive duty. When active duty Navy or Marine Corps members are hospitalized in non-Naval medical facilities, the Military Medical Support Office will ensure compliance with Chapter 18, MANMED.

(2) DFAS–CL(CGA) may request the commanding officer of any Naval medical facility, or request the commanding officer of another service medical facility or administrator of a Department of Veterans Affairs medical facility, convene a competency board in accordance with this section to determine the mental capability of a member to manage his financial affairs.

(3) A finding of restoration of competency or capability to manage personal and financial affairs may be accomplished in the same manner specified in Chapter 18, MANMED, except that the board may consist of one or two Medical Department officers or physicians, one of whom must be a Navy psychiatrist or clinical psychologist.

(4) At least one officer on the competency board, preferably the psychiatrist or clinical psychologist, will personally observe the member and ensure that the member's medical record, particularly that portion concerning his mental health, is accurate and complete.

(5) The requirement to convene a competency board under this chapter is in addition to and separate from the medical board procedures. Each board member signs the report of the board and certifies whether the member is or is not mentally capable of managing his financial affairs. After approval by the convening authority, the original board report is forwarded to DFAS–CL(CGA).

(b) *Records*. The convening authority will forward the original of each board report to the Defense Finance and Accounting Service-Cleveland Center, Office of Continuing Government Activity (Code CGA), Post Office Box 998021, Room 2323, Cleveland, OH 44199–80216. If a member is found to be not mentally capable of managing his financial affairs, the forwarding endorsement will set forth the name, relationship, address, and telephone number(s) of the member's next of kin, and any other information that will assist to identify a prospective trustee.

[73 FR 64206, Oct. 29, 2008]

### § 726.5 Procedures for designation of a trustee.

Upon receipt of a report of a competency board that a member has been found mentally incapable of managing his financial affairs, DFAS–CL(CGA)

will initiate action to appoint a trustee, provided no notice of appointment of a committee, guardian, or other legal representative by a State court of competent jurisdiction has been received by DFAS–CL(CGA).

[73 FR 64207, Oct. 29, 2008]

### § 726.6 Travel orders.

The Chief of Naval Personnel or the Deputy Commandant, Manpower & Reserve Affairs, may issue travel orders to a member to appear before a competency board convened to determine whether the member is mentally capable of managing his financial affairs. In the case of permanently retired members, travel will be at no cost to the Government.

[73 FR 64207, Oct. 29, 2008]

### § 726.7 Status of pay account.

Upon notification by the commanding officer of the medical facility preparing the board report that a member has been declared mentally incapable of managing his financial affairs, DFAS–CL(CGA) will suspend the member's pay. Thereafter, DFAS–CL(CGA) or his designee will direct payment of monies to:

(a) The appointed trustee;

(b) The legal representative appointed by a State court of competent jurisdiction; or

(c) Directly to the member following a determination the member is capable of managing his financial affairs.

[73 FR 64207, Oct. 29, 2008]

### § 726.8 Emergency funds and health and comfort.

Until a trustee is appointed, DFAS–CL(CGA) may appoint the member's designated next of kin to receive emergency funds equal to, but not to exceed the amount of pay due the incompetent member for a period of one month. These funds will be deducted from the member's pay account and will be used for the benefit of the member and any legal dependents.

[73 FR 64207, Oct. 29, 2008]

### § 726.9 Reports and supervision of trustees.

(a) *Accounting reports.* The trustee designated by DFAS–CL(CGA) will submit accounting reports annually or at such other times as DFAS–CL(CGA) or his designee directs. DFAS–CL(CGA) will provide forms to be used by trustees for the required accounting report. The report will account for all funds received from the Navy or Marine Corps on behalf of the member. When payments to a trustee are terminated for any reason, the trustee will submit a final accounting report to DFAS–CL(CGA). Upon approval of the final accounting report, the trustee and the surety will be discharged from liability.

(b) *Failure to submit a report and default.* If an accounting report is not received by the date designated by DFAS–CL(CGA) or an accounting is unsatisfactory, DFAS–CL(CGA) will notify the trustee in writing. If a satisfactory accounting is not received by DFAS–CL(CGA) within the time specified, the trustee will be declared in default of the trustee agreement and will be liable for all unaccounted trustee funds. If a trustee is declared in default of the trustee agreement, DFAS–CL(CGA) will terminate payments to the trustee and, if necessary, a successor trustee may be appointed. The trustee and surety will be notified in writing by DFAS–CL(CGA) of the declaration of default. The notification will state the reasons for default, the amount of indebtedness to the Government, and will demand payment for the full amount of indebtedness. If payment in full is not received by DFAS–CL(CGA) within an appropriate period of time from notification of default, the account may be forwarded to the Department of Justice for recovery of funds through appropriate civil action.

[73 FR 64207, Oct. 29, 2008]

## PART 727—LEGAL ASSISTANCE

Sec.

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AUTHORITY: 5 U.S.C. 301; 10 U.S.C. 5031 and 5148; 32 CFR 700.206 and 700.1202.

SOURCE: 38 FR 6026, Mar. 6, 1973, unless otherwise noted.

### § 727.1 Purpose.

A legal assistance program providing needed legal advice and assistance to military personnel and their dependents has been in operation in the naval service since 1943. The program has improved the morale of personnel and reduced disciplinary problems since its inception. The purpose of this part is to provide guidelines for the continuation of the program.

### §§ 727.2–727.4 [Reserved]

### § 727.5 Persons eligible for assistance.

Legal assistance shall be available to members of the Armed Forces of the United States and their dependents, and military personnel of allied nations serving in the United States, its territories or possessions. Legal assistance is intended primarily for the benefit of active duty personnel during active service, including reservists (and members of the National Guard) on active duty for 30 days or more. As resources permit, legal assistance may be extended to retired military personnel, their dependents, survivors of members of the Armed Forces who would be eligible were the service member alive, reservists on active duty for single periods of 29 days or less, members of Reserve Components following release from active duty under a call or order to active duty for more than 30 days issued under a mobilization authority (as determined by the Secretary of Defense), for a period of time that begins on the date of the release and is not less than twice the length of the period served on active duty under that call or order to active duty, and in overseas areas, civilians, other than local-hire employees, who are in the employ of, serving with, or accompanying the U.S. Armed Forces, and their dependents, when and if the workload of the office renders such service feasible, and other persons authorized by the Judge Advocate General of the Navy.

[69 FR 20541, Apr. 16, 2004]

### § 727.6 Functions of legal assistance officers.

(a) *Basic duties.* A legal assistance officer, while performing legal assistance duties, in addition to performing any other duties which may be assigned to him/her:

(1) Shall counsel, advise, and assist persons eligible for assistance in connection with their personal legal problems, or refer such persons to a civilian lawyer as provided in § 727.9.

(2) Shall serve as advocate and counsel for persons eligible for assistance in connection with their personal legal problems and may prepare and sign correspondence on behalf of a client, negotiate with another party or his lawyer, and prepare all types of legal documents, including pleadings, as are appropriate.

(3) Shall, in appropriate cases and under guidelines prescribed in the Manual of the Judge Advocate General contemplating agreements or liaison with appropriate civilian bar officials, serve as advocate and counsel for, and provide full legal representation including representation in court to, persons eligible for assistance in connection with their personal legal problems.

(4) Shall, subject to the direction of the senior legal assistance officer of the command, establish contact and maintain liaison with local bar organizations, lawyer referral services, legal aid societies, and other local organizations through which the services of civilian lawyers may be made available to military personnel and their dependents.

(5) Shall supervise the personnel and operation of the legal assistance office in accordance with good legal practice and the policies and guidance provided by the Judge Advocate General.

(6) Shall advise persons with complaints of discrimination on policies and procedures under the Civil Rights Act of 1964 and pertinent Navy instructions.

(b) *Nature of assistance.* Legal assistance officers and administrative and clerical personnel assigned to legal assistance offices perform legal assistance duties as official duties in the capacity of an officer or an employee of the United States. Persons performing legal assistance duties, however, should not mislead those with whom they may deal into believing that their views or opinions are the official views or opinions of, approved by, or binding on, the Department of the Navy or the United States.

(c) *Duty to client.* A legal assistance officer should exercise his independent professional judgment on behalf of his client within the standards promulgated in the Code of Professional Responsibility and the specific limitations imposed in this part.

(d) *Professional legal advice.* Legal assistance is authorized for personal legal affairs only, as contrasted with military justice problems, business ventures, or matters that are not of a personal nature. Legal assistance duties are separate and apart from responsibilities of trial counsel, defense counsel, or others involved in processing courts-martial, nonjudicial punishments, administrative boards or proceedings, and investigations. Only legal assistance officers are authorized to render services that call for the professional judgment of a lawyer. The legal assistance officer may delegate tasks to clerks, secretaries, and other lay personnel provided the officer maintains a direct relationship with the client, supervises the delegated work, and has complete professional responsibility for the work product. Services that call for the professional judgment of a lawyer include, but are not limited to, the preparation of wills and powers of attorney, advising personnel with respect to legal rights and relationships, negotiating contracts, and other matters requiring an educated ability to relate the general body and philosophy of law to a specified legal problem of a client. Guidance in this matter may be had from various official sources including the ethical considerations under the Code of Professional Responsibility of the American Bar Association.

[41 FR 26863, June 30, 1976, as amended at 47 FR 41561, Sept. 21, 1982; 65 FR 26748, May 9, 2000]

### § 727.7 Limitations on service provided.

(a) *Assistance in official military matters.* Legal Assistance duties are separate and apart from the responsibilities of a trial counsel, defense counsel, or other officer involved in the processing of courts-martial, nonjudicial punishment, administrative boards or proceedings, investigations, or other official military matters. Frequently, a service member accused or suspected of an offense or conduct leading to an administrative proceeding will request advice from the legal assistance officer. In such a case, the service member should be advised of the proper procedures for obtaining counsel or advice. This limitation does not prevent the assignment of the same officer to perform the functions of a legal assistance officer and the functions of a defense counsel, counsel for respondent, or counsel for a party.

(b) *Domestic-relations cases.* In domestic-relations cases, a legal assistance officer may provide advice concerning the legal and practical implications of divorce, legal separation, annulment, custody, and paternity. Assistance and advice in domestic violence cases will be consistent with the Department of the Navy family advocacy program. If two or more eligible persons with conflicting interests seek legal assistance from the same office on the same matter, the party first establishing an attorney-client relationship will be provided representation. Other parties shall be advised that they are also eligible for assistance, but that it must be obtained from another source, with the assistance of and referral by the first office.

(c) *Nonlegal advice.* The legal assistance officer, while giving legal advice, may also determine that the client needs or desires advice on related nonlegal matters. The legal assistance officer should provide legal advice only, or defer giving such advice, and

refer the client to an appropriate person or agency for such nonlegal counseling. The legal assistance officer should establish and maintain a working relationship with those individuals who are qualified to provide nonlegal counseling services.

(d) *Proceedings involving the United States.* A legal assistance officer shall not advise on, assist in, or become involved with, individual interests opposed to or in conflict with the United States without the specific approval of the Judge Advocate General.

(e) *Telephone inquiries.* In the absence of unusual or compelling circumstances, legal advice should not be given over the telephone. This does not prohibit appropriate follow-up telephone discussions between the legal assistance attorney and the client.

[41 FR 26863, June 30, 1976, as amended at 65 FR 26749, May 9, 2000]

### § 727.8 Confidential and privileged character of service provided.

All information and files pertaining to the persons served will be treated as confidential and privileged in the legal sense as outlined in the Code of Professional Responsibility, as opposed to confidential in the military sense of security information. These privileged matters may not be disclosed to anyone by personnel rendering the service, except upon the specific permission of the person concerned, and disclosure thereof may not be lawfully ordered by superior military authority. This restriction does not prohibit providing the nonprivileged statistical data required by § 727.13 of this part. Protection of the confidences of a legal assistance client is essential to the proper functioning of the legal assistance program in order to assure all military personnel, regardless of grade, rank, or position, that they may disclose frankly and completely all material facts of their problem to those rendering the service without fear that their confidence will be abused or used against them in any way. While case files are not subject to the control of the Department of the Navy and therefore do not constitute a ''system of records'' within the meaning of the Privacy Act of 1974 (5 U.S.C. 552a), no information which identifies an individual legal assistance client by name or any other particular, such as social security number, shall be extracted from the case files and incorporated into any file or index system aside from or in addition to the information contained on the legal assistance form (NAVJAG 5801/9) or locally used equivalent. Strict adherence to the foregoing will ensure compliance with the Privacy Act. Administrative and clerical personnel assigned to legal assistance offices shall maintain the confidential nature of matters handled.

[42 FR 35957, July 13, 1977, as amended at 65 FR 26749, May 9, 2000]

### § 727.9 Referrals to civilian lawyers.

(a) *General.* If it is determined that the legal assistance requested is beyond the scope of this part, or if no available legal assistance officer is qualified to give the assistance requested, the client should be referred to a civilian lawyer. When the client does not know of a lawyer whom he wishes to represent him, his case may be referred to an appropriate bar organization, lawyer referral service, legal aid society, or other local organization for assistance in obtaining reliable, competent, and sympathetic counsel, or to a civilian lawyer designated by such organization.

(b) *Fees charged by civilian lawyers.* Legal assistance clients being referred to a civilian lawyer should be advised that, even when the fee to be charged is set by statute or subject to court approval, it should be one of the first items discussed to avoid later misunderstandings and eliminate uncertainty. Legal assistance officers should exercise caution in discussing possible fees to be charged by civilian lawyers so as to avoid embarrassment or misunderstanding between the client and his civilian lawyer.

### § 727.10 Fees, compensation, solicitation, and representation in civilian courts.

(a) *General.* Active duty military personnel and civilian employees of the Navy and Marine Corps are prohibited from accepting or receiving, directly or indirectly, any fee or compensation of any nature, in cash or otherwise, for legal services rendered to any person

entitled to legal assistance under this part whether or not the service rendered is normally provided or available to such person under this part and whether or not the service is rendered during duty hours as part of official duties. Reserve judge advocates on inactive duty are prohibited from accepting or receiving any fee or compensation of any nature, in cash or otherwise, for legal services rendered to any person entitled to legal assistance under this part with respect to matters about which they consulted or advised said person in an official capacity.

(b) *Solicitation.* Active duty military personnel, civilian employees of the Navy and Marine Corps, and inactive reservists, acting in an official capacity, are prohibited from soliciting, or advising that any person entitled to legal assistance under this part retain, consult, or seek legal services from themselves in their private capacities, or from any attorney who is a partner or associate of a law firm of which they are partners or associates, or from any attorney with whom they share office spaces; *Provided* that nothing herein shall prevent such person from being referred to civilian counsel as provided in § 727.9.

(c) *Representation before civilian courts or agencies.* No active duty Navy or Marine Corps judge advocate may appear as counsel on behalf of any person entitled to legal assistance, except as provided in paragraph (a)(3) of § 727.6, or the Expanded Legal Assistance Program, or under guidelines prescribed in the Manual of the Judge Advocate General, before any civil court, civil administrative tribunal, civil regulatory body, or civil governmental agency, in any proceeding, whether or not a fee or other compensation is accepted or received, without prior written approval of the Judge Advocate General, the administrator of the applicable program, or the Commander, Naval Legal Service Command, as appropriate. Requests for such permission may be in the form prescribed in the Manual of the Judge Advocate General.

[47 FR 41561, Sept. 21, 1982, as amended at 65 FR 26749, May 9, 2000]

### § 727.11 Supervision.

The Judge Advocate General will exercise supervision over all legal assistance activities in the Department of the Navy. Subject to the supervision of the Judge Advocate General, officers in charge of Naval Legal Service Offices, and all Marine Corps commanders exercising general court-martial authority, acting through their judge advocates, shall exercise supervision over all legal assistance activities within their respective areas of responsibility and shall ensure that legal assistance services are made available to all eligible personnel within their areas. The Judge Advocate General will collaborate with the American Bar Association, the Federal Bar Association, and other civilian bar organizations as he may deem necessary or advisable in the accomplishment of the objectives and purposes of the legal assistance program.

[42 FR 35957, July 13, 1977]

### § 727.12 Communications.

(a) Legal assistance officers are authorized to communicate directly with the Judge Advocate General, with each other, and with other appropriate organizations and persons concerning legal assistance matters.

(b) The use of a legal assistance office letterhead within the Department of the Navy is authorized as an exception to the standard letterhead requirements contained in Department of Defense Instructions. Naval Legal Service Offices and other commands having authorized legal assistance officers are authorized to print and use letterheads without seal or official command designation in those matters in which the correspondence pertains solely to legal assistance matters. Legal assistance officers are directed to ensure that their correspondence does not imply United States Navy or command sponsorship or approval of the substance of the correspondence. Such correspondence is considered a private matter arising from the attorney-client relationship as indicated in § 727.8.

[42 FR 35958, July 13, 1977, as amended at 65 FR 26749, May 9, 2000]

### § 727.13 Reports.

Each legal assistance office shall, by the 10th day of October of each year, prepare and submit to the Judge Advocate General one copy of the Legal Assistance Report (NAVJAG 5801/3 Rev. 12–78)) covering the preceding fiscal year. A final report shall be submitted on the disestablishment of the legal assistance office. Special reports shall be submitted when requested by the Judge Advocate General. Information copies of all reports shall be furnished to the supervising commander referred to in § 727.11. Reports symbol JAG–5801–1 is assigned for this reporting requirement.

[38 FR 6026, Mar. 6, 1973, as amended at 47 FR 41561, Sept. 21, 1982]

### § 727.14 Files and records.

(a) *Case files*. The material contained in legal assistance case files is necessarily limited to private unofficial matters and such material is privileged and protected under the attorney-client relationship. Each legal assistance office should therefore maintain only such files as are necessary for the proper operation of the office.

(b) [Reserved]

[38 FR 6026, Mar. 6, 1973, as amended at 43 FR 17355, Apr. 24, 1978]

### § 727.15 Liberal construction of part.

The provisions of this part are intended to be liberally construed to aid in accomplishing the mission of legal assistance.

## PART 728—MEDICAL AND DENTAL CARE FOR ELIGIBLE PERSONS AT NAVY MEDICAL DEPARTMENT FACILITIES

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AUTHORITY: 5 U.S.C. 301 and 8101; 10 U.S.C. 1071–1095, 1201–1221, 2104, 2107, 2109, 2110, 5031, 5537, 6011, 6201–6203; 22 U.S.C. 1158, 2357, 2504, 2505, 2507, 2522; 24 U.S.C. 15, 34, 35; 31 U.S.C. 1535; 42 U.S.C. 249, 253; and 32 CFR 700.1202.

SOURCE: 52 FR 33718, Sept. 4, 1987, unless otherwise noted.

## Subpart A—General

### § 728.1 Mission of Navy Medical Department facilities.

The primary mission of Navy Medical Department facilities is to provide medical and dental care for members of the Navy and Marine Corps and for members of the other uniformed services who may be sick, injured, or disabled. In addition, Navy Medical Department facilities may provide medical and dental care to dependents of military personnel, to members not on active duty, and to such other persons as authorized by law, U.S. Navy regulations, and Department of Defense directives. These authorizations also provide that Navy Medical Department facilities may be called upon to furnish medical and dental care, under laws of humanity or principles of international courtesy, to civilians and to other persons not otherwise entitled to medical and dental care.

### § 728.2 Definitions.

Unless otherwise qualified in this part, the following terms, when used throughout, are defined as follows:

(a) *Active duty*. Full-time duty in the active military service of the United States. This 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. It does not include full-time National Guard duty.

(b) *Active duty for training*. A tour of active duty for reserves for training under orders that provide for automatic reversion to non-active status when the specified period of active duty is completed. It includes annual training, special tours, and the initial tour performed by enlistees without prior military service.

(c) *CHAMPUS*. Civilian Health and Medical Program of the Uniformed Services.

(d) *Catchment area*. A specified geographic area surrounding each Uniformed Services Medical Treatment Facility (USMTF) or designated Uniformed Services Treatment Facility (USTF). In the United States, catchment areas are defined by zip

codes and are based on an area of approximately 40 miles in radius for inpatient care and 20 miles in radius for ambulatory care. Zip codes designating such areas in the United States are specified in Volumes I and II of the Military Health Services System (MHSS) Catchment Area Directory. Catchment areas for facilities outside the United States are defined in Volume III of the MHSS Catchment Area Directory. These directories exclude certain areas because of geographic barriers.

(e) *Chronic condition*. Any medical or surgical condition marked by long duration or frequent recurrence—or likely to be so marked—which, in light of medical information available, will ordinarily resist efforts to eradicate it completely; a condition which needs health benefits to achieve or maintain stability that can be provided safely only by, or under the supervision of, physicians, nurses, or persons authorized by physicians.

(f) *Civilian employee*. Under 5 U.S.C. 2105, a nonmilitary individual (1) appointed in the civil service, (2) engaged in the performance of a Federal function, or (3) engaged in the performance of his or her duties while subject to the supervision of The President, a Member or Members of Congress, or the Congress, a member of a uniformed service, an individual who is an employee under 5 U.S.C. 2105, the head of a Government controlled corporation, or an adjutant general designated by the Secretary concerned under section 709c of title 32. Included are justices and judges of the United States, appointed and engaging in the performance of duties per 5 U.S.C. 2104.

(g) *Cooperative care*. Medical services and supplies for which CHAMPUS will share in the cost under circumstances specified in § 728.4(z), even though the patient remains under the primary control of a USMTF.

(h) *Cooperative care coordinator*. Designated individual in a CHAMPUS contractor's office who serves as the point of contact for health benefits advisors on all matters related to supplemental-cooperative care or services provided or ordered for CHAMPUS-eligible beneficiaries by USMTF providers.

(i) *Dental care*. Treatment which will prevent or remedy diseases, disabilities, and injuries to the teeth, jaws, and related structures and thereby contribute to maintenance or restoration of the dental health of an individual.

(j) *Dependent*. A spouse, an unremarried widow or widower, a child, or a parent who bears that legal relationship to his or her sponsor. For the purpose of rendering care under title 10, U.S.C., chapter 55, this category may also include an unremarried former spouse. However, each beneficiary must also meet the eligibility criteria in § 728.31(b) and § 728.31(c).

(k) *Designated USTFs*. The following former U.S. Public Health Service (USPHS) facilities operate as ''designated USTFs'' for the purpose of rendering medical and dental care to active duty members and to all CHAMPUS-eligible individuals.

(1) *Sisters of Charity of the Incarnate Word Health Care System*, 6400 Lawndale, Houston, TX 77058 (713) 928–2931 operates the following facilities:

(i) St. John Hospital, 2050 Space Park Drive, Nassau Bay, TX 77058, telephone (713) 333–5503. Inpatient and outpatient services.

(ii) St. Mary's Hospital Outpatient Clinic, 404 St. Mary's Boulevard, Galveston, TX 77550, telephone (409) 763–5301. Outpatient services only.

(iii) St. Joseph Hospital Ambulatory Care Center, 1919 La Branch, Houston, TX 77002, telephone (713) 757–1000. Outpatient services only.

(iv) St. Mary's Hospital Ambulatory Care Center, 3600 Gates Boulevard, Port Arthur, TX 77640 (409) 985–7431. Outpatient services only.

(2) *Inpatient and outpatient services*. (i) Wyman Park Health System, Inc., 3100 Wyman Park Drive, Baltimore, MD 21211, telephone (301) 338–3693.

(ii) Alston-Brighton Aid and Health Group, Inc., Brighton Marine Public Health Center, 77 Warren Street, Boston, MA 02135, telephone (617) 782–3400.

(iii) Bayley Seton Hospital, Bay Street and Vanderbilt Avenue, Staten Island, NY 10304, telephone (718) 390–5547 or 6007.

(iv) Pacific Medical Center, 1200 12th Avenue South, Seattle, WA 98144, telephone (206) 326–4100.

(3) *Outpatient services only*. (i) Coastal Health Service, 331 Veranda Street, Portland, ME 04103, telephone (207) 774–5805.

(ii) Lutheran Medical Center, Downtown Health Care Services, 1313 Superior Avenue, Cleveland, OH 44113, telephone (216) 363–2065.

(l) *Disability retirement or separation*. Temporary or permanent retirement or separation for physical disability as provided in title 10, U.S.C., 1201–1221.

(m) *Elective care*. Medical, surgical, or dental care desired or requested by the individual or recommended by the physician or dentist which, in the opinion of other cognizant professional authority, can be performed at another place or time without jeopardizing life, limb, health, or well-being of the patient, e.g., surgery for cosmetic purposes and nonessential dental prosthetic appliances.

(n) *Emergency care*. Medical treatment of patients with severe, life-threatening, or potentially disabling conditions that require immediate intervention to prevent undue suffering or loss of life or limb and dental treatment of painful or acute conditions.

(o) *Health benefits advisors (HBA)*. Designated individuals at naval facilities who are responsible for advising and assisting beneficiaries covered in this part concerning medical and dental benefits in uniformed services facilities and under CHAMPUS. They also provide information regarding Veterans' Administration, Medicare, MEDICAID, and such other local health programs known to be available to beneficiaries (see § 728.4(n)).

(p) *Hospitalization*. Inpatient care in a medical treatment facility.

(q) *Inactive duty training*. Duty prescribed for Reserves by the Secretary concerned under section 206 of title 37, U.S.C. or any other provision of law. Also includes special additional duties authorized for Reserves by an authority designated by the Secretary concerned and performed on a voluntary basis in connection with the prescribed training or maintenance activities of the units to which they are assigned. It includes those duties when performed by Reserves in their status as members of the National Guard.

(r) *Legitimate care*. Those medical and dental services under the cooperative/supplemental care program of CHAMPUS that are legally performed and not contrary to governing statutes.

(s) *Maximum hospital benefit*. That point during inpatient treatment when the patient's progress appears to have stabilized and it can be anticipated that additional hospitalization will not directly contribute to any further substantial recovery. A patient who will continue to improve slowly over a long period without specific therapy or medical supervision, or with only a moderate amount of treatment on an outpatient basis, may be considered as having attained maximum hospital benefit.

(t) *Medical care*. Treatment required to maintain or restore the health of an individual. Medical care may include, but is not limited to, the furnishing of inpatient treatment, outpatient treatment, nursing service, medical examinations, immunizations, drugs, subsistence, transportation, and other adjuncts such as prosthetic devices, spectacles, hearing aids, orthopedic footwear, and other medically indicated appliances or services.

(u) *Medically inappropriate*. A situation arising when denial of a Nonavailability Statement could result in significant risk to the health of a patient or significant limitation to the patient's reasonable access to needed health care.

(v) *Medically necessary*. The level of services and supplies (*i.e.*, frequency, extent, and kinds) adequate for the diagnosis and treatment of illness or injury, including maternity care. Medically necessary, includes the concept of appropriate medical care.

(w) *Medical treatment facility (MTF)*. Any duly authorized medical department center, hospital, clinic, or other facility that provides medical, surgical, or dental care.

(x) *Member or former member*. Includes:

(1) Members of the uniformed services ordered to active duty for more than 30 days.

(2) Retired members as defined in § 728.2(bb).

(3) Members of a uniformed service ordered to active duty for more than 30 days who died while on that duty.

(4) Deceased retired members.

(y) *Military patient.* A member of a United States uniformed service on active duty, active duty for training, or inactive duty training, or an active duty member of the armed forces of a foreign government who is receiving inpatient or outpatient care.

(z) *Occupational health services.* Includes medical examinations and tests related to preemployment, preplacement, periodic, and pretermination; tests required for protecting the health and safety of naval personnel; job-related immunizations and chemoprophylaxis; education and training related to occupational health; and other services provided to avoid lost time or to improve effectiveness of employees. The latter will include the furnishing of emergency treatment of illnesses or injuries occurring at work. Furnish such health services to both active duty military personnel and naval civilian employees per current directives.

(aa) *Retired member.* A member or former member of a uniformed service who is entitled to retired or retainer pay, or equivalent pay, as a result of service in a uniformed service. This includes a member or former member who is: (1) Retired for length of service; (2) permanently or temporarily retired for physical disability; (3) on the emergency officers' retired list and is entitled to retired pay for physical disability; or (4) otherwise in receipt of retired pay under chapter 67 of title 10.

(bb) *Routine care.* Medical and dental care necessary to maintain health or dental functions other than care of an emergency or elective nature.

(cc) *Supplemental care or services.* When medical or dental management is retained by a naval MTF and required care is not available at the facility retaining management, any additional material, professional diagnostic or consultative services, or other personal services ordered by qualified uniformed service providers, and obtained for the care of that patient are supplemental. See § 728.12 concerning the management of active duty member patients.

(dd) *Uniformed services.* The Navy, Marine Corps, Air Force, Army, Coast Guard, Commissioned Corps of the Public Health Service, and the Commissioned Corps of the National Oceanic and Atmospheric Administration.

(ee) *USMTF.* Uniformed services medical treatment facility.

(ff) *Visit, outpatient.* Appearance by an eligible beneficiary at a separate, organized clinic or specialty service for: Examination, diagnosis, treatment, evaluation, consultation, counseling, or medical advice; or treatment of an eligible beneficiary in quarters; and a signed and dated entry is made in the patient's health record. Specifically excluded are personnel in an inpatient status at the time of such a visit.

## § 728.3 General restrictions and priorities.

(a) *Restrictions.* (1) Naval MTFs provide care to all eligible beneficiaries subject to the capabilities of the professional staff and the availability of space and facilities.

(2) Hospitalization and outpatient services may be provided outside the continental limits of the United States and in Alaska to officers and employees of any department or agency of the Federal Government, to employees of a contractor with the United States or the contractor's subcontractor, to accompanying dependents of such persons, and in emergencies to such other persons as the Secretary of the Navy may prescribe: *Provided,* such services are not otherwise available in reasonably accessible and appropriate non-Federal facilities. Hospitalization of such individuals in a naval MTF is limited to the treatment of acute medical and surgical conditions, exclusive of nervous, mental, or contagious diseases, or those requiring domiciliary care. Routine dental care, other than dental prosthesis or orthodontia, may be rendered on a space available basis outside the continental limits of the United States and in Alaska, *Provided,* such services are not otherwise available in reasonably accessible and appropriate non-Federal facilities.

(b) *Priorities.* When care cannot be rendered to all eligible beneficiaries, the priorities in the following chart will prevail. Make no distinction as to the sponsoring uniformed service when providing care or deciding priorities.

PRIORITIES FOR THE VARIOUS CATEGORIES OF PERSONNEL ELIGIBLE FOR CARE IN NAVY MEDICAL DEPARTMENT FACILITIES

| Priority | Category | Degree of entitlement |
|---|---|---|
| 1 ..... | A. Members of the uniformed services on active duty (including active duty for training and inactive duty training) and comparable personnel of the NATO nations meeting the conditions prescribed in this part. | See subpart B. |
| | B. Members of a Reserve Component of the Armed Forces and National Guard personnel under orders. | See subpart C. |
| 2 ..... | Dependents of active duty members of the uniformed services, dependents of persons who died while in such a status, and the dependents of active duty members of NATO nations meeting the conditions prescribed in subpart E of this part. | See subparts D and E. |
| 3 ..... | Members ot the Senior Reserve Officers' Training Corps of the Armed Forces. | See § 728.23. |
| 4 ..... | Retired members of the uniformed services and their dependents and dependents of deceased retired members. | See subpart D. |
| 5 ..... | Civilian employees of the Federal Government under the limited circumstances covered by the Federal Employees' Health Service program. | See § 728.80. |
| 6 ..... | All others, including ex-service maternity eligibles ..... | See subparts F and G. |

## § 728.4 Policies.

(a) *Admissions to closed psychiatric wards*. Admit patients to closed psychiatric wards only when they have a psychiatric or emotional disorder which renders them dangerous to themselves or others, or when a period of careful closed psychiatric observation is necessary to determine whether such a condition exists. When a patient is admitted to a closed psychiatric ward, the reason for admission must be clearly stated in the patient's clinical record by the physician admitting the patient to the ward. These same policies apply equally in those instances when it becomes necessary to place a patient under constant surveillance while in an open ward.

(b) *Absence from the sick list*. See § 728.4 (d), (x), and (y).

(c) *Charges and collection*. Charges for services rendered vary and are set by the Office of the Assistant Secretary of Defense (Comptroller) and published in a yearly NAVMEDCOMNOTE 6320, (Cost elements of medical, dental, subsistence rates, and hospitalization bills). Billing and collection actions also vary according to entitlement or eligibility and are governed by the provisions of NAVMED P-5020, Resource Management Handbook. See subpart J on the initiation of collection action on pay patients.

(d) *Convalescent leave*. Convalescent leave, a period of authorized absence of active duty members under medical care when such persons are not yet fit for duty, may be granted by a member's commanding officer (CO) or the hospital's CO per the following:

(1) Unless otherwise indicated, grant such leave only when recommended by COMNAVMEDCOM through action taken upon a report by a medical board, or the recommended findings of a physical evaluation board or higher authority.

(2) Member's commanding officer (upon advice of attending physician); commanding officers of Navy, Army, or Air Force medical facilities; commanders of regional medical commands for persons hospitalized in designated USTFs or in civilian facilities within their respective areas of authority; and managers of Veterans Administration hospitals within the 50 United States or in Puerto Rico may grant convalescent leave to active duty naval patients, with or without reference to a medical board, physical evaluation board, or higher authority provided the:

(i) Convalescent leave is being granted subsequent to a period of hospitalization.

(ii) Member is not awaiting disciplinary action or separation from the service for medical or administrative reasons.

(iii) Medical officer in charge:

(A) Considers the convalescent leave beneficial to the patient's health.

(B) Certifies that the patient is not fit for duty, will not need hospital treatment during the contemplated convalescent leave period, and that such leave will not delay final disposition of the patient.

(3) When considered necessary by the attending physician and approved on an individual basis by the commander of the respective geographic regional medical command, convalescent leave in excess of 30 days may be granted. The authority to grant convalescent leave in excess of 30 days may not be redelegated to hospital commanding officers. Member's permanent command must be notified of such extensions (see MILPERSMAN 3020360).

(4) Exercise care in granting convalescent leave to limit the duration of such leave to that which is essential in relation to diagnosis, prognosis, estimated duration of treatment, and patient's probable final disposition.

(5) Upon return from convalescent leave;

(i) Forward one copy of original orders of officers, bearing all endorsements, to the Commander, Naval Military Personnel Command (COMNAVMILPERSCOM) (NMPC–4) or the Commandant of the Marine Corps (CMC), as appropriate.

(ii) Make an entry on the administrative remarks page (page 13 for Navy personnel) of the service records of enlisted personnel indicating that convalescent leave was granted and the dates of departure and return.

(6) lf considered beneficial to the patient's health, commanding officers of hospitals may grant convalescent leave as a delay in reporting back to the parent command.

(e) *Cosmetic surgery*. (1) Defined as that surgery which is done to revise or change the texture, configuration, or relationship of contiguous structures of any feature of the human body which would be considered by the average prudent observer to be within the broad range of ''normal'' and acceptable variation for age or ethnic origin, and in addition, is performed for a condition which is judged by competent medical opinion to be without potential for jeopardy to physical or mental health of an individual.

(2) Commanding officers will monitor, control, and assure compliance with the following cosmetic surgery policy:

(i) Certain cosmetic procedures are a necessary part of training and retention of skills to meet the requirements of certification and recertification.

(ii) Insofar as they meet minimum requirements and serve to improve the skills and techniques needed for reconstructive surgery, the following cosmetic procedures may be performed as low priority surgery on active duty members only when time and space are available.

(A) Cosmetic facial rhytidectomies (face lifts) will be a part of all training programs required by certifying boards.

(B) Cosmetic augmentation mammaplasties will be done only by properly credentialed surgeons and residents within surgical training programs to meet requirements of certifying boards.

(f) *Cross-utilization of uniformed services facilities*. To provide effective cross-utilization of medical and dental facilities of the uniformed services, eligible persons, regardless of service affiliation, will be given equal opportunity for health benefits. Catchment areas have been established by the Department of Defense for each USMTF (see § 728.2(d)). Eligible beneficiaries residing within such a catchment area are expected to use that inpatient facility for care. Make provisions to assure that:

(1) Eligible beneficiaries residing in a catchment area served by a USMTF not of the sponsor's own service may obtain care at that facility or at a facility of the sponsor's service located in another catchment area.

(2) If the facility to which an eligible beneficiary applies cannot furnish needed care, the other facility or facilities in overlapping catchment areas are contacted to determine whether care can be provided thereat.

(g) *Disengagement*. Discontinuance of medical management by a naval MTF for only a specific episode of care.

(1) *General*. Disengagement is accomplished only after alternative sources

of care (*i.e.*, transfer to another USMTF, a USTF, or other Federal source via the aeromedical evacuation system, if appropriate) and attendant costs, if applicable, have been fully explained to patient or responsible family member. Counselors may arrange for counseling by other appropriate sources when the patient is or may be eligible for VA, Medicare, MEDICAID, etc. benefits. With the individual's permission, counselors may also contact State programs, local health organizations, or health foundations to determine if care is available for the condition upon which disengagement is based. After the disengagement decision is made, the patient to be disengaged or the responsible family member should be advised to return to the naval MTF for any care required subsequent to receiving the care that necessitated disengagement.

(2) *CHAMPUS-eligible individuals.* (i) Issue a Nonavailability Statement (DD 1251) per § 728.33, when appropriate, to patients released to civilian sources for total care (disengaged) under CHAMPUS. CHAMPUS-eligible patients disengaged for total care, who do not otherwise require a DD 1251 (released for outpatient care or those released whose residence is outside the inpatient catchment area of all USMTFs and USTFs) will be given the original of a properly completed DD 2161, Referral For Civilian Medical Care, which clearly indicates that the patient is released for total care under CHAMPUS. CHAMPUS-eligible beneficiaries will be disengaged for services under CHAMPUS when:

(A) Required services are beyond your capability and these services cannot be appropriately provided through one of the alternatives listed in § 728.4(z), or

(B) You cannot effectively provide required services or manage the overall course of care even if augmented by services procured from other Government or civilian sources using naval MTF operation and maintenance funds as authorized in subpart § 728.4(z).

(ii) When a decision is made to disengage a CHAMPUS-eligible individual, commanding officers (CO) or officers-in-charge (OIC) are responsible for assuring that counseling and documentation of counseling are appropriately accomplished. Complete a NAVMED 6320/30. Disengagement for Civilian Medical Care, to document that all appropriate disengagement procedures have been accomplished.

(iii) After obtaining the signature of the patient or responsible family member, the counselor will file a copy of the DD 2161 and the original of the NAVMED 6320/30 in the patient's Health Record.

(3) *Patients other than active duty or CHAMPUS-eligible individuals*—(i) *Categories of patients.* The following are categories of individuals who also may be disengaged:

(A) Medicare-eligible individuals.

(B) MEDICAID-eligible individuals.

(C) Civilians (U.S. and foreign) admitted or treated as civilian humanitarians.

(D) Secretarial designees.

(E) All other individuals, with or without private insurance, who are not eligible for care at the expense of the Government.

(ii) *Disengagement decision.* Disengage such individuals when:

(A) Required services are beyond the capability of the MTF, and services necessary for continued treatment in the MTF cannot be appropriately provided by another USMTF, a USTF, or another Federal source. (Explore alternative sources, for individuals eligible for care from these sources, before making the disengagement decision.)

(B) The MTF cannot, within the facility's capability, effectively provide required care or manage the overall course of treatment even if augmented by services procured from other Government sources or through procurement from civilian sources using supplemental care funding.

(iii) *Counseling.* The initial step in the disengagement process is appropriate counseling and documentation. In an emergency, or when the individual cannot be appropriately counseled prior to leaving the MTF, establish procedures to ensure counseling and documentation are accomplished during the next working day. Such ''follow-up'' counseling may be in person or via a witnessed telephone conversation. In either instance, the counselor will document counseling on a

NAVMED 6320/30, Disengagement for Civilian Medical Care. The disengagement decision making authority must assure the accomplishment of counseling by personally initiating this service or by referring the patient or responsible family member to the HBA for counseling. As a minimum, counseling will consist of:

(A) Explaining that the patient is being disengaged from treatment at the facility and the reason therefor. Assure that the individual understands the meaning of ''disengagement'' by explaining that the MTF is unable to provide for the patient's present needs and must therefore relinquish medical management of the patient to a health care provider of the individual's choice.

(B) Assuring the individual that the disengagement action is taken to provide for the patient's immediate medical needs. Also assure that the individual understands that the disengagement is not indicative of whether care is or will be available in the MTF for other aspects of past, current, or future medical conditions.

(C) Explaining Medicare, MEDICAID, or other known programs as they relate to the particular circumstance of the patient, including cost-sharing, deductibles, allowable charges, participating and authorized providers, physicians accepting assignment, claim filing procedures, etc. Explain that once disengagement is accomplished, the Navy, is not responsible for any costs for care received from a health care provider of the patient's or responsible family member's choice.

(iv) *Documentation*. Commanding officers are responsible for ensuring that proper documentation procedures are started and that providers and counselors under their commands are apprised of their individual responsibilities for counseling and documenting each disengagement. Failure to properly counsel and document counseling may result in the naval MTF having to absorb the cost of the entire episode of care. Document counseling on a NAVMED 6320/30. Disengagement for Civilian Medical Care. Completion of all items on the form assures documentation and written acknowledgement of appropriate disengagement and counseling. If the patient or responsible family member refuses to acknowledge receipt of counseling by signing the form, state this fact on the bottom of the form and have it witnessed by an officer. Give the patient or responsible family member a copy and immediately file the original in the patient's Health Record.

(4) *Active duty members*. When an active duty member seeks care at a USMTF, that USMTF retains some responsibility (e.g., notification, medical cognizance, supplemental care, etc.) for that member even when the member must be transferred to another facility for care. Therefore, relinquishment of total management of an active duty member (disengagement) cannot be accomplished.

(h) *Domiciliary/custodial care*. The type of care designed essentially to assist an individual in meeting the normal activities of daily living, *i.e.*, services which constitute personal care such as help in walking and getting in or out of bed, help in bathing, dressing, feeding, preparation of special diets, and supervision over medications which can usually be self-administered and which does not entail or require the continuing attention of trained medical or paramedical personnel. The essential characteristics to be considered are the level of care and medical supervision that the patient requires, rather than such factors as diagnosis, type of condition, or the degree of functional limitation. Such care will not be provided in naval MTFs except when required for active duty members of the uniformed services.

(i) *Emergency care*. Treat patients authorized only emergency care and those admitted as civilian emergencies only during the period of the emergency. Initiate action to effect appropriate disposition of such patients as soon as the emergency period ends.

(j) *Evaluation after admission*. Evaluate each patient as soon as possible after admission and continue reevaluation until disposition is made. Anticipate each patient's probable type and date of disposition. Necessary processing by the various medical and administrative entities will take place

concurrently with treatment of the patient. Make the medical disposition decision as early as possible for U.S. military patients inasmuch as immediate transfer to a specialized VA center or to a VA spinal cord injury center may be in their best interest (see NAVMEDCOMINST 6320.1.2). Make disposition decisions for military personnel of NATO nations in conformance with § 728.42(d).

(k) *Extent of care.* Subject to the restrictions and priorities in § 728.3, eligible persons will be provided medical and dental care to the extent authorized, required, and available. When an individual is accepted for care, all care and adjuncts thereto, such as nonstandard supplies, as determined by the CO to be necessary, will be provided from resources available to the CO unless specifically prohibited elsewhere in this part. When a patient has been accepted and required care is beyond the capability of the accepting MTF, the CO thereof will arrange for the required care by one of the means shown below. The method of choice will be based upon professional considerations and travel economy.

(1) Transfer the patient per § 728.4(bb).

(2) Procure from civilian sources the necessary material or professional personal services required for the patient's proper care and treatment.

(3) Care authorized in § 728.4(k)(2) will normally be accomplished in the naval MTF. However, when such action is not feasible, supplementation may be obtained outside the facility. Patients may be sent to other Federal or civilian facilities for specific treatment or services under § 728.4(k)(3) *provided* they remain under medical management of the CO of the sending facility during the entire period of care.

(l) *Family planning services.* Provide family planning services following the provisions of SECNAVINST 6300.2A.

(m) *Grouping of patients.* Group hospitalized patients according to their requirements for housing, medical, or dental care. Provide gender identified quarters, facilities, and professional supervision on that basis when appropriate. Individuals who must be retained under limited medical supervision (medical hold) solely for administrative reasons or for medical conditions which can be treated on a clinic basis will be provided quarters and messing facilities, where practicable, separately from those hospitalized. Provide medical care for such patients on a periodic clinic appointment basis (see § 728.4(p) for handling enlisted convalescent patients). Make maximum use of administrative versus medical personnel in the supervision of such patients.

(n) *Health benefits advising*—(1) *General.* A Health Benefits Advising program must be started at all shore commands having one or more medical officers. While health benefits advisors are not required aboard every ship with a medical officer, the medical department representative can usually provide services to personnel requiring help. The number of health benefits advisors (HBAs) of a command will be commensurate with counseling and assistance requirements. The program provides health benefits information and counseling to beneficiaries of the Uniformed Services Health Benefits Program (USHBP) and to others who may or may not qualify for care in USMTFs. Office location of HBAs, their names, and telephone numbers will be widely publicized locally. If additional help is required, contact MEDCOM–333 on AUTOVON 294–1127 or commercial (202) 653–1127. In addition to the duties described in § 728.4(n)(2), HBAs will:

(i) Maintain a depository of up-to-date officially supplied health benefits information for availability to all beneficiaries.

(ii) Provide information and guidance to beneficiaries and generally support the medical and dental staff by providing help to eligible beneficiaries seeking or obtaining services from USMTFs, civilian facilities, VA facilities, Medicare, MEDICAID, and other health programs.

(iii) Assure that when a referral or disengagement is required, patients or responsible family members are:

(A) Fully informed that such action is taken to provide for their immediate medical or dental requirements and that the disengagement or referral has no bearing on whether care may be available in the naval MTF for other

aspects of current or other future medical conditions.

(B) Provided the services and counseling outlined in § 728.4(n)(2) or § 728.3(g)(3)(ii), as appropriate, *prior* to their departure from the facility when such beneficiaries are referred or disengaged because care required is beyond the naval MTF's capability. In an emergency, or when the patient or sponsor cannot be seen by the HBA prior to leaving, provide these benefits as soon thereafter as possible.

(2) *Counseling and assisting CHAMPUS-eligible individuals.* HBAs, as a minimum, will:

(i) Explain alternatives available to the patient.

(ii) If appropriate, explain CHAMPUS as it relates to the particular circumstance, including the cost-sharing provisions applicable to the patient, allowable charges, provider participation, and claim filing procedures. Fully inform the patient or responsible family member that when a patient is disengaged for care under CHAMPUS or when cooperative care is to be considered for payment under the provisions of § 728.4(z) (5) and (6), the naval MTF is not responsible for monetary amounts above the CHAMPUS-determined allowable charge or for charges CHAMPUS does not allow.

(iii) Explain why the naval MTF is paying for the supplemental care, if appropriate (see § 728.4(z) (3) and (4)), and how the bill will be handled. Then:

(A) Complete a DD 2161, Referral For Civilian Medical Care, marking the appropriate source of payment with the concurrence of the naval MTF commanding officer or CO's designee.

(B) If referred for a specified procedure with a consultation report to be returned to the naval MTF retaining medical management, annotate the DD 2161 in the consultation report section to state this requirement. Advise patient or responsible family member to arrange for a completed copy of the DD 2161 to be returned to the naval MTF for payment, if appropriate, and inclusion in patient's medical record.

(iv) Brief patient or responsible family member on the use of the DD 2161 in USMTF payment procedures and CHAMPUS claims processing, as appropriate. Provide sufficient copies of DD 2161 and explain that CHAMPUS contractors will return claims submitted without a required DD 2161. Obtain signature of patient or responsible family member on the form.

(v) Arrange for counseling from appropriate sources when the patient is eligible for VA, Medicare, or MEDICAID benefits.

(vi) Serve as liaison between civilian providers and naval MTF on administrative matters related to the referral and disengagement process.

(vii) Serve as liaison between naval MTF and cooperative care coordinators on matters relating to care provided or recommended by naval MTF providers, as appropriate.

(viii) Explain why the patient is being disengaged and, per § 728.4(g)(2), provide a DD 1251, Nonavailability Statement, or DD 2161, Referral For Civilian Medical Care, as appropriate.

(o) *Immunizations.* Administer immunizations per BUMED INST 6230.1H.

(p) *Medical holding companies.* Medical holding companies (MHC) have been established at certain activities to facilitate handling of enlisted convalescent patients whose medical conditions are such that, although they cannot be returned to full duty, they can perform light duty ashore commensurate with their condition while completing their medical care on an outpatient basis. Where feasible, process such patients for transfer.

(q) *Notifications.* The interests of the Navy, Marine Corps, and DOD have been adversely affected by past procedures which emphasized making notifications only when an active duty member's condition was classed as either seriously ill or injured or classed as very seriously ill or injured. However, even temporary disabilities which preclude communication with the next of kin have generated understandable concern and criticism, especially when emergency hospitalization has resulted. Accordingly, naval MTFs will effect procedures to make notifications required in § 728.4(q) (2), (3), and (4) upon admission or diagnosis of individuals specified. The provisions of § 728.4(q) supplement articles 1810520 and 4210100 of the Naval Military Personnel Manual and chapter 1 of Marine Corps Order

P3040.4B, Marine Corps Casualty Procedures Manual; they do not supersede them.

(1) *Privacy Act*. The right to privacy of individuals for whom hospitalization reports and other notifications are made will be safeguarded as required by the Privacy Act, implemented in the Department of the Navy by SECNAVINST 5211.5C, U.S. Navy Regulations, the Manual of the Judge Advocate General, the Marine Corps Casualty Procedures Manual, and the Manual of the Medical Department.

(2) *Active duty flag or general officers and retired Marine Corps general officers*. Upon admission of subject officers, make telephonic contact with MEDCOM–33 on AUTOVON 294–1179 or commercial (202) 653–1179 (after duty hours, contact the command duty officer on AUTOVON 294–1327 or commercial (202) 653–1327) to provide the following information:

(i) *Initial*. Include in the initial report:

(A) Officer's name, grade, social security number, and designator.

(B) Duty assignment in ship or station, or other status.

(C) Date of admission.

(D) Present condition, stating if serious or very serious.

(E) Diagnosis, prognosis, and estimated period of hospitalization. To prevent possible invasion of privacy, report the diagnosis only in International Classification of Diseases—9th Edition (ICD–9–CM) code designator.

(ii) *Progress reports*. Call frequency and content will be at the discretion of the commanding officer. However, promptly report changes in condition or status.

(iii) *Termination report*. Make a termination of hospitalization report to provide appropriate details for informational purposes.

(iv) *Additional commands to apprise*. The geographic naval medical region serving the hospital and, if different, the one serving the officer's command will also be apprised of such admissions.

(3) *Active duty members*—(i) *Notification of member's command*. The commanding officer of naval medical treatment facilities has responsibility for notifying each member's commanding officer under the conditions listed below. Make COMNAVMILPERS COM or CMC, as appropriate, information addressees on their respective personnel:

(A) *Direct admissions*. Upon direct admission of an active duty member, with or without orders regardless of expected length of stay. The patient administration department (administrative watch officer after hours) is responsible for preparation, per § 728.4(q)(4), and release of these messages. If the patient is attached to a local command (CO's determination), initial notification may be made telephonically. Record the name, grade or rate, and position of the person receiving the call at the member's command on the back of the NAVMED 6300/5, Inpatient Admission/Disposition Record and include the name and telephone number of the MTF's point of contact as given to the patient's command.

(B) *Change in medical condition*. Upon becoming aware of any medical condition, including pregnancy, which will now or in the foreseeable future result in the loss of a member's full duty services in excess of 72 hours. Transmit this information in a message, prepared per § 728.4(q)(4), marked ''Commanding Officer's Eyes Only.''

(ii) *Notification of next of kin (NOK)*—(A) *Admitted members*. As part of the admission procedure, encourage all patients to communicate expeditiously and regularly with their NOK. When an active duty member's incapacity makes timely personal communication impractical, *i.e.*, fractures, burns, eye pathology, psychiatric or emotional disorders, etc., MTF personnel will initiate the notification process. Do not start the process if the patient specifically declines such notification or it is clear that the NOK already has knowledge of the admission (commands should develop a local form for such patients to sign attesting their desire or refusal to have their NOK notified). Once notification has been made, the facility will make progress reports, at least weekly, until the patient is again able to communicate with the NOK.

(*1*) *Navy personnel*. Upon admission of Navy personnel, effect the following notification procedures.

(*i*) *In the contiguous 48 states.* Patient administration department personnel will notify the NOK in person, by telephone, telegraph, or by other expeditious means. Included are notifications of the NOK upon arrival of all Navy patients received in the medical air-evacuation system.

(*ii*) *Outside the contiguous 48 states.* If the next of kin has accompanied the patient on the tour of duty and is in the immediate area, hospital personnel will notify the next of kin in person, by telephone, telegraph, or by other expeditious means. If the next of kin is located in the 48 contiguous United States, use telegraphic means to notify COMNAVMILPERSCOM who will provide notification to the NOK.

(*2*) *Marine Corps personnel.* When Marine Corps personnel are admitted, effect the following notification procedures.

(*i*) *In the contiguous 48 states.* The commander of the unit or activity to which the casualty member is assigned is responsible for initiating notification procedures to the NOK of seriously or very seriously ill or injured Marine Corps personnel. Patient administration department personnel will assure that liaison is established with the appropriate command or activity when such personnel are admitted. Patient administration personnel will notify the Marine's command by telephone and request that cognizance be assumed for in-person initial notification of the NOK of Marine Corps patients admitted with an incapacity that makes personal and timely communication impractical and for those arriving via the medical air-evacuation system. If a member's command is unknown or cannot be contacted, inform CMC (MHP–10) on AUTOVON 224–1787 or commercial (202) 694–1787.

(*ii*) *Outside the contiguous 48 states.* Make casualty notification for Marine Corps personnel hospitalized in naval MTFs outside the contiguous 48 States to the individual's command. If the command is unknown or not located in close proximity to the MTF, notify CMC (MHP–10). When initial notification to the individual's command is made via message, make CMC (MHP–10) an information addressee.

(*iii*) *In and outside the United States.* In life-threatening situations, the Commandant of the Marine Corps desires and encourages medical officers to communicate with the next of kin. In other circumstances, request that the Marine Corps member communicate with the NOK if able. If unable, the medical officer should communicate with the NOK *after* personal notification has been effected.

(B) *Terminally ill patients.* As soon as a diagnosis is made and confirmed (on inpatients or outpatients) that a Navy member is terminally ill, MILPERSMAN 4210100 requires notification of the primary and secondary next of kin. Accomplish notification the same as for Navy members admitted as seriously or very seriously ill or injured, *i.e.*, by priority message to the Commander, Naval Military Personnel Command and to the Casualty Assistance Calls/Funeral Honors Support Program Coordinator, as appropriate, who has cognizance over the geographical area in which the primary and secondary NOK resides (see OPNAVINST 1770.1). Submit followup reports when appropriate. See MILPERSMAN 4210100 for further amplification and for information addressees.

(*1*) *In the contiguous 48 states.* Notification responsibility is assigned to the USMTF making the diagnosis and to the member's duty station if diagnosed in a civilian facility.

(*2*) *Outside the contiguous 48 states.* Notification responsibility is assigned to the naval medical facility making the diagnosis. When diagnosed in nonnaval facilities or aboard deployed naval vessels, notification responsibility belongs to the Commander, Naval Military Personnel Command.

(C) *Other uniformed services patients.* Establish liaison with other uniformed services to assure proper notification upon admission or diagnosis of active duty members of other services.

(D) *Nonactive duty patients.* At the discretion of individual commanding officers, the provisions of § 728.4(q)(3)(ii) on providing notification to the NOK may be extended to admissions or diagnosis of nonactive duty patients; e.g., admission of dependents of members on duty overseas.

(4) *Messages*—(i) *Content*. Phrase contents of messages (and telephonic notifications) in lay terms and provide sufficient details concerning the patient's condition, prognosis, and diagnosis. Messages will also contain the name and telephone number of the facility's point of contact. When appropriate for addressal, psychiatric and other sensitive diagnoses will be related with discretion. When indicated, also include specific comment as to whether the presence of the next of kin is medically warranted.

NOTE: In making notification to the NOK of patients diagnosed as having Acquired Immune Deficiency Syndrome (AIDS) or Human Immunodeficiency Virus (HIV), use one of the symptoms of the disease as the diagnosis (e.g., pneumonia) rather than ''HIV'', ''AIDS'', or the diagnostic code for AIDS.

(ii) *Information addressees*. Make the commander of the geographic naval medical region servicing the member's command and the one servicing the hospital, if different, information addressees on all messages. For Marine Corps personnel, also include CMC (MHP–10) and the appropriate Marine Corps district headquarters as information addressees, COMNAVMEDCOM WASHINGTON DC requires information copies of messages *only* when a patient has been placed on the seriously ill or injured or very seriously ill or injured list or diagnosed as terminally ill.

(r) *Outpatient care*. Whenever possible, perform diagnostic procedures and provide preoperative and post operative care, surgical care, convalescence, and followup observations and treatment on an outpatient basis.

(s) *Performance of duties while in an inpatient status*. U.S. military patients may be assigned duties in and around naval MTFs when such duties will be, in the judgement of the attending physician, of a therapeutic value. Physical condition, past training, and other acquired skills must all be considered before assigning any patient a given task. Do not assign patients duties which are not within their capabilities or which require more than a very brief period of orientation.

(t) *Prolonged definitive medical care*. Prolonged definitive medical care in naval MTFs will not be provided for U.S. military patients who are unlikely to return to duty. The time at which a patient should be processed for disability separation must be determined on an individual basis, taking into consideration the interests of the patient as well as those of the Government. A long-term patient roster will be maintained and updated at least once monthly to enable commanding officers and other appropriate staff members to monitor the progress of all patients with 30 or more continuous days of hospitalization. Include on the roster basic patient identification data (name, grade or rate, register number, ward or absent status, clinic service, and whether assigned to a medical holding company), projected disposition (date, type, and profile), diagnosis, and cumulative hospital days (present facility and total).

(u) *Remediable physical defects of active duty members*—(1) *General*. When a medical evaluation reveals that a Navy or Marine Corps patient on active duty has developed a remediable defect while on active duty, the patient will be offered the opportunity of operative repair or other appropriate remediable treatment, if medically indicated.

(2) *Refusal of treatment*. Per MANMED art. 18–15, when a member refuses to submit to recommended therapeutic measures for a remediable defect or condition which has interfered with the member's performance of duty and following prescribed therapy, the member is expected to be fit for full duty, the following procedures will apply:

(i) Transfer the member to a naval MTF for further evaluation and appearance before a medical board. After counseling per MANMED art. 18–15, any member of the naval service who refuses to submit to recommended medical, surgical, dental, or diagnostic measures, other than routine treatment for minor or temporary disabilities, will be asked to sign a completed NAVMED 6100/4, Medical Board Certificate Relative to Counseling on Refusal of Surgery and/or Treatment, attesting to the counseling.

(ii) The board will study all pertinent information, inquire into the merits of the individual's refusal to submit to treatment, and report the facts with appropriate recommendations.

(iii) As a general rule, refusal of minor surgery should be considered unreasonable in the absence of substantial contraindications. Refusal of major surgical operations may be reasonable or unreasonable, according to the circumstances, The age of the patient, previous unsuccessful operations, existing physical or mental contraindications, and any special risks should all be taken into consideration.

(iv) Where surgical procedures are involved, the board's report will contain answers to the following questions:

(A) Is surgical treatment required to relieve the incapacity and restore the individual to a duty status, and may it be expected to do so?

(B) Is the proposed surgery an established procedure that qualified and experienced surgeons ordinarily would recommend and undertake?

(C) Considering the risks ordinarily associated with surgical treatment, the patient's age and general physical condition, and the member's reason for refusing treatment, is the refusal reasonable or unreasonable? (Fear of surgery or religious scruples may be considered, along with all the other evidence, for whatever weight may appear appropriate.)

(v) If a member needing surgery is mentally competent, do not perform surgery over the member's protestation.

(vi) In medical, dental, or diagnostic situations, the board should show the need and risk of the recommended procedure(s).

(vii) If a medical board decides that a diagnostic, medical, dental, or surgical procedure is indicated, these findings must be made known to the patient. The board's report will show that the patient was afforded an opportunity to submit a written statement explaining the grounds for refusal. Forward any statement with the board's report. Advise the patient that even if the disability originally arose in line of duty, its continuance may be attributable to the member's unreasonable refusal to cooperate in its correction; and that the continuance of the disability might, therefore, result in the member's separation without benefits.

(viii) Also advise the patient that:

(A) Title 10 U.S.C. 1207 precludes disposition under chapter 61 of 10 U.S.C. if such a member's disability is due to intentional misconduct, willful neglect, or if it was incurred during a period of unauthorized absence. A member's refusal to complete a recommended therapy regimen or diagnostic procedure may be interpreted as willful neglect.

(B) Benefits from the Veterans Administration will be dependent upon a finding that the disability was incurred in line of duty and is not due to the member's willful misconduct.

(ix) The Social Security Act contains special provisions relating to benefits for ''disabled'' persons and certain provisions relating to persons disabled ''in line of duty'' during service in the Armed Forces. In many instances persons deemed to have ''remediable'' disorders have been held not ''disabled'' within the meaning of that term as used in the statute, and Federal courts have upheld that interpretation. One who is deemed unreasonably to have refused to undergo available surgical procedures may be deemed both ''not disabled'' and to have incurred the condition ''not in the line of duty.''

(x) Forward the board's report directly to the Central Physical Evaluation Board with a copy to MEDCOM–25 except in those instances when the convening authority desires referral of the medical board report for Departmental review.

(xi) Per MANMED art. 18–15, a member who refuses medical, dental, or surgical treatment for a condition that existed prior to entry into the service (EPTE defect), not aggravated by a period of active service but which interferes with the performance of duties, should be processed for reason of physical disability, convenience to the Government, or enlisted in error rather than under the refusal of treatment provisions. Procedures are delineated in BUMEDINST 1910.2G and SECNAVINST 1910.4A.

(3) *Other uniformed services patients.* When a patient of another service is found to have a remediable physical defect developed in the military service, refer the matter to the nearest headquarters of the service concerned.

(v) *Responsibilities of the commanding officer*. In connection with the provisions of this part, commanding officers of naval MTFs will:

(1) Determine which persons within the various categories authorized care in a facility will receive treatment in, be admitted to, and be discharged from that specific facility.

(2) Supervise care and treatment, including the employment of recognized professional procedures.

(3) Provide each patient with the best possible care in keeping with accepted professional standards and the assigned primary mission of the facility.

(4) Provide for counseling patients and naval MTF providers when care required is beyond the naval MTF's capability. This includes:

(i) Establishing training programs to acquaint naval MTF providers and HBAs with the uniformed services' referral for supplemental/cooperative care or services policy outlined in § 728.4(z).

(ii) Implementing control measures to ensure that:

(A) Providers requesting care under the provisions § 728.4(z) are qualified to maintain physician case management when required.

(B) Care requested under the supplemental/cooperative care criteria is medically necessary, legitimate, and otherwise permissible under the terms of that part of the USHBP under which it will be considered for payment.

(C) Providers explain to patients the reason for a referral and the type of referral being made.

(D) Attending physicians properly refer beneficiaries to the HBA for counseling and services per § 728.4(n).

(E) Uniform criteria are applied in determining cooperative care situations without consideration of rate, grade, or uniformed service affiliation.

(F) All DD 2161's are properly completed and approved by the commanding officer or designee.

(G) A copy of the completed DD 2161 is returned to the naval MTF for inclusion in the medical record of the patient.

(w) *Sick call*. A regularly scheduled assembly of sick and injured military personnel established to provide routine medical care. Subsequent to examination, personnel medically unfit for duty will be admitted to an MTF or placed sick in quarters; personnel not admitted or placed sick in quarters will be given such treatment as is deemed necessary. When excused from duty for medical reasons which do not require hospitalization, military personnel may be authorized to remain in quarters, not to exceed 72 hours.

(x) *Sicklist—authorized absence from*. Commanding officers of naval MTFs may authorize absences of up to 72 hours for dependents and retired personnel without formal discharge from the sicklist. When absences are authorized in excess of 24 hours, subsistence charges or dependent's rate, as applicable, for that period will not be collected and the number of reportable occupied bed days will be appropriately reduced. Prior to authorizing such absences, the attending physician will advise patients of their physical limitations and of any necessary safety precautions, and will annotate the clinical record that patients have been so advised. For treatment under the Medical Care Recovery Act, make reporting consistent with § 728.4(aa).

(y) *Subsisting out*. A category in which officer and enlisted patients on the sicklist of a naval MTF may be placed when their daily presence is not required for treatment nor examination, but who are not yet ready for return to duty. As a general rule, patients placed in this category should reside in the area of the facility and should be examined by the attending physician at least weekly. Enlisted personnel in a subsisting out status should be granted commuted rations.

(1) Granting of subsisting out privileges is one of many disposition alternatives; however, recommend that other avenues (medical holding company, convalescent leave, limited duty, etc.) be considered before granting this privilege.

(2) Naval MTF patients in a subsisting out status should not be confused with those enlisted personnel in a rehabilitation program who are granted liberty and are drawing commuted rations, but are required to be present at the treating facility during normal working hours. These personnel are not

subsisting out and must have a bed assigned at the naval MTF.

(3) Naval MTF patients who are required to report for examinations or treatment more often than every 48 hours should not be placed in a subsisting out status.

(z) *Supplemental/cooperative care or services*—(1) *General*. When such services as defined in § 728.2(cc) are rendered to other than CHAMPUS-eligible individuals, the cost thereof is chargeable to operation and maintenance funds available for operation of the facility requesting care or services. Cooperative care applies to CHAMPUS-eligible patients receiving inpatient or outpatient care in a USMTF who require care or services beyond the capability of that USMTF. The following general principles apply to such CHAMPUS-eligible patients:

(i) *Cooperation of uniformed services physicians*. USMTF physicians are required to cooperate in providing CHAMPUS contractors and OCHAMPUS additional medical information. SECNAVINST 5211.5C delineates policies, conditions, and procedures that govern safeguarding, using, accessing, and disseminating personal information kept in a system of records. Providing information to CHAMPUS contractors and OCHAMPUS will be governed thereby.

(ii) *Physician case management*. Where required by NAVMEDCOMINST 6320.18 (CHAMPUS Regulation; implementation of), uniformed services physicians are required to provide case management (oversight) as would an attending or supervising civilian physician.

(iii) *CHAMPUS-authorized providers*. CHAMPUS contractors are responsible for determining whether a civilian provider is CHAMPUS-authorized and for providing such information, upon request, to USMTFs.

(iv) *Phychiatric or psychotherapeutic services*. If psychiatric care is being rendered by a psychiatric or clinical social worker, a psychiatric nurse, or a marriage and family counselor, and the uniformed services facility has made a determination that it does not have the professional staff competent to provide required physician case management, the patient may be (partially) disengaged for the psychiatric or psychotherapeutic service, yet have the remainder of required medical care provided by the naval MTF.

(v) *Forms and documentation*. A DD 2161, Referral For Civilian Medical Care, will be provided to each patient who is to receive supplemental or cooperative care or services. When supplemental care is required under the provisions of § 728.4(z) (3) and (4), the provisions of § 728.4(z)(3)(iii) apply. When cooperative care or services are required under the provisions of § 728.4(z) (5) and (6), the provisions of § 728.4(z)(5)(iv) apply.

(vi) *Clarification of unusual circumstances*. Commanding officers of naval MTFs will submit requests for clarification of unusual circumstances to OCHAMPUS or CHAMPUS contractors via the Commander, Naval Medical Command (MEDCOM–33) for consideration.

(2) *Care beyond a naval MTF's capability*. When, either during initial evaluation or during the course of treatment of CHAMPUS-eligible beneficiaries, required services are beyond the capability of the naval MTF, the commanding officer will arrange for the services from an alternate source in the following order, subject to restrictions specified. The provisions of § 728.4(z)(2)(i) through (iii) must be followed before either supplemental care, authorized in § 728.4(z)(4), is considered for payment from Navy Operations and Maintenance funds, or cooperative care, authorized in § 728.4(z)(6), is to be considered for payment under the terms of CHAMPUS.

(i) Obtain from another USMTF or other Federal MTF the authorized care necessary for continued treatment of the patient within the naval MTF, when such action is medically feasible and economically advantageous to the Government.

(ii) When the patient is a retired member or dependent, transfer per § 728.4(bb)(3) (i), (ii), (iii), or (iv), in that order. When the patient is a dependent of a member of a NATO nation, transfer per § 728.4(bb)(4) (i), (ii), or (iii), in that order.

(iii) With the patient's permission, the naval MTF may contact State programs, local health agencies, or health

foundations to determine if benefits are available.

(iv) Obtain such supplemental care or services as delineated in §728.4(z)(4) from a civilian source using local operation and maintenance funds, or

(v) Obtain such cooperative care or services as delineated in §728.4(z)(6) from a civilian source under the terms of CHAMPUS.

(3) *Operation and maintenance funds.* When local operation and maintenance funds are to be used to obtain supplemental care or services, the following guidelines are applicable:

(i) Care or services must be legitimate, medically necessary, and ordered by a qualified USMTF provider.

(ii) The naval MTF must make the necessary arrangements for obtaining required care or services from a specific source of care.

(iii) Upon approval of the naval MTF commanding officer or designee, provide the patient or sponsor with a properly completed DD 2161, Referral For Civilian Medical Care. The DD 2161 will be marked by the health benefits advisor or other designated individual to show the naval MTF as the source of payment. Forward a copy to the MTF's contracting or supply officer who is the point of contact for coordinating obligations with the comptroller and thus is responsible for assuring proper processing for payment.

(iv) Authorize care on an inpatient or outpatient basis for the minimum period necessary for the civilian provider to perform the specific test, procedure, treatment, or consultation requested. Patients receiving inpatient services in civilian medical facilities will not be counted as an occupied bed in the naval MTF, but will be continued on the naval MTF's inpatient census. Continue to charge pay patients the USMTF inpatient rate appropriate for their patient category.

(v) Naval MTF physicians will maintain professional contact with civilian providers.

(4) *Care and services authorized.* Use local operation and maintenance funds to defray the cost of the following when CHAMPUS-eligible patients are referred to civilian sources for the following types of care or services;

(i) All specialty consultations for the purpose of establishing or confirming diagnoses or recommending a course of treatment.

(ii) All diagnostic tests, diagnostic examinations, and diagnostic procedures (including genetic tests and CAT scans), ordered by qualified USMTF providers.

(iii) Prescription drugs and medical supplies.

(iv) Civilian ambulance service ordered by USMTF personnel.

(5) *CHAMPUS funds.* When payment is to be considered under the terms of CHAMPUS for cooperative care, even though the beneficiary remains under naval MTF control, the following guidelines are applicable:

(i) Process charges for care under the terms of CHAMPUS.

(A) If the charge for a covered service or supply is above the CHAMPUS-determined reasonable charge, the direct care system will not assume any liability on behalf of the patient where a civilian provider is concerned, although a USMTF physician recommended or prescribed the service or supply.

(B) Payment consideration for all care or services meeting cooperative care criteria will be under the terms of CHAMPUS and payment for such care or services will not be made from naval MTF funds. Conversely, any care or services meeting naval MTF supplemental care or services payment criteria will not be considered under the terms of CHAMPUS.

(ii) Care must be legitimate and otherwise permissible under the terms of CHAMPUS and must be ordered by a qualified USMTF provider.

(iii) Provide assistance to beneficiaries referred or disengaged under CHAMPUS. Although USMTF personnel are not authorized to refer beneficiaries to a specific civilian provider for care under CHAMPUS, health benefits advisors are authorized to contact the cooperative care coordinator of the appropriate CHAMPUS contractor for aid in determining authorized providers with the capability of rendering required services. Such information may be given to beneficiaries. Also encourage beneficiaries to obtain required services only from providers willing to participate in CHAMPUS.

Subject to the availability of space, facilities, and capabilities of the staff, USMTFs may provide consultative and such other ancillary aid as required by the civilian provider selected by the beneficiary.

(iv) Provide a properly completed DD 2161, Referral For Civilian Medical Care, to patients who are referred (versus disengaged) to civilian sources under the terms of CHAMPUS for cooperative care. (A Nonavailability Statement (DD 1251) may also be required. Provide this form when required under § 728.33.) The DD 2161 will be marked by the health benefits advisor, or other designated individual, to show CHAMPUS as the source of payment consideration. All such DD 2161's must be approved by the commanding officer or designee. Give the patient sufficient copies to ensure a copy of the DD 2161 accompanies each CHAMPUS claim. Advise patients that CHAMPUS contractors will return claims received without the DD 2161. Also advise patients to arrange for return of a completed copy of the DD 2161 to the naval MTF for inclusion in their medical record.

(v) Such patients receiving inpatient or outpatient care or services will pay the patient's share of the costs as specified under the terms of CHAMPUS for their beneficiary category. Patients receiving inpatient services will not be continued on the naval MTF's census and will not be charged the USMTF inpatient rate.

(vi) Certain ancillary services authorized under CHAMPUS require physician case management during the course of treatment. USMTF physicians will manage the provision of ancillary services by civilian providers when such services are obtained under the terms of CHAMPUS. Examples include physical therapy, private duty (special) nursing, rental or lease/purchase of durable medical equipment, and services under the CHAMPUS Program for the Handicapped. USMTF providers exercising physician case management responsibility for ancillary services under CHAMPUS are subject to the same benefit limitations and certification of need requirements applicable to civilian providers under the terms of CHAMPUS for the same types of care. USMTF physicians exercising physician case management responsibility will maintain professional contact with civilian providers of care.

(6) *Care and services authorized*. Refer CHAMPUS-eligible patients to civilian sources for the following under the terms of CHAMPUS:

(i) Authorized nondiagnostic medical services such as physical therapy, speech therapy, radiation therapy, and private duty (special) nursing.

(ii) Preauthorized (by OCHAMPUS) adjunctive dental care, including orthodontia related to surgical correction of cleft palate.

(iii) Durable medical equipment. (CHAMPUS payment will be considered only if the equipment is not available on a loan basis from the naval MTF.)

(iv) Prosthetic devices (limited benefit), orthopedic braces and appliances.

(v) Optical devices (limited benefit).

(vi) Civilian ambulance service to a USMTF when service is ordered by other than direct care personnel.

(vii) All CHAMPUS Program for the Handicapped care.

(viii) Psychotherapeutic or psychiatric care.

(ix) Except for those types of care or services delineated in § 728.4(z)(4), all other CHAMPUS authorized medical services not available in the naval MTF (for example, neonatal intensive care).

(aa) *Third party liability case*. Per chapter 24, section 2403, JAG Manual, use the following guidelines to complete and submit a NAVJAG 5890/12, Hospital and Medical Care, 3rd Party Liability Case, when a third party may be liable for the injury or disease being treated:

(1) *Preparation*. All naval MTFs will use the front of NAVJAG 5890/12 to report the value of medical care furnished to any patient when (i) a third party may be legally liable for causing the injury or disease, or (ii) when a Government claim is possible under workmen's compensation, no-fault insurance (see responsibilities for apprising the insurance carrier in § 728.4(aa)(5)), uninsured motorist insurance, or under medical payments insurance (e.g., in all automobile accident cases). Block 4 of this form requires an appended statement of the patient or

an accident report, if available. Prior to requesting such a statement from a patient, the person preparing the front side of NAVJAG 5890/12 will show the patient the Privacy Act statement printed at the bottom of the form and have the patient sign his or her name beneath the statement.

(2) *Submission*—(i) *Naval patients*. For naval patients, submit the completed front side of the NAVJAG 5890/12 to the appropriate action JAG designee listed in section 2401 of the JAG Manual at the following times:

(A) *Initial*. Make an initial submission as soon as practicable after a patient is admitted for any period of inpatient care, or if it appears that more than 7 outpatient treatments will be furnished. This submission should not be delayed pending the accumulation of all potential charges from the treating facility. This submission need not be based upon an extensive investigation of the cause of the injury or disease, but it should include all known facts. Statements by the patient, police reports, and similar information (if available), should be appended to the form.

(B) *Interim*. Make an interim submission every 4 months after the initial submission until the patient is transferred or released from the facility, or changed from an inpatient status to an outpatient status.

(C) *Final*. Make a final submission upon completion of treatment or upon transfer of the patient to another facility. The facility to which the patient is transferred should be noted on the form. Report control symbol NAVJAG 5890–1 is assigned to this report.

(ii) *Nonnaval patients*. When care is provided to personnel of another Federal agency or department, that agency or department generally will assert any claim in behalf of the United States. In such instances, submit the NAVJAG 5890/12's (initial, interim, and final) directly to the appropriate of the following:

(A) *U.S. Army*. Commanding general of the Army or comparable area commander in which the incident occurred.

(B) *U.S. Air Force*. Staff judge advocate of the Air Force installation nearest the location where the initial medical care was provided.

(C) *U.S. Coast Guard*. Commandant (G-K-2). U.S. Coast Guard, Washington, DC 20593–0001.

(D) *Department of Labor*. The appropriate Office of Workers' Compensation Programs (OWCP).

(E) *Veterans Administration*. Director of the Veterans Administration hospital responsible for medical care of the patient being provided treatment.

(F) *Department of Health and Human Services (DHHS)*. Regional attorney's office in the area were the incident occurred.

(3) *Supplementary documents*. An SF 502 should accompany the final submission in all cases involving inpatient care. Additionally, when Government care exceeds $1,000, inpatient facilities should complete and submit the back side of NAVJAG 5890/12 to the action JAG designee. On this side of the form, the determination of ''patient status'' may be used on local hospital usage.

(4) *Health record entries*. Retain copies of all NAVJAG 5890/12's in the Health Record of the patient. Immediately notify action JAG designees when a patient receives additional treatment subsequent to the issuance of a final NAVJAG 5890/12 if the subsequent treatment is related to the condition which gave rise to the claim.

(5) *No-fault insurance*. When no-fault insurance is or may be involved, the naval legal service office at which the JAG designee is located is responsible for apprising the insurance carrier that the Federal payment for the benefits of this part is secondary to any no-fault insurance coverage available to the injured individual.

(6) *Additional guidance*. Chapter 24 of the JAG Manual and BUMEDINST 5890.1A contain supplemental information.

(bb) *Transfer of patients*—(1) *General*. Treat all patients at the lowest echelon equipped and staffed to provide necessary care; however, when transfer to another MTF is considered necessary, use Government transportation when available. Accomplish medical regulating per the provisions of OPNAVINST 4630.25B and BUMEDINST 6320.1D.

(2) *U.S. military patients*. Do not retain U.S. military patients in acute care MTFs longer than the minimum

time necessary to attain the mental or physical state required for return to duty or separation from the service. When required care is not available at the facility providing area inpatient care, transfer patients to the most readily accessible USMTF or designated USTF possessing the required capability. Transportation of the patient and a medical attendant or attendants, if required, is authorized at Government expense. Since the VA is staffed and equipped to provide care in the most expeditious manner, follow the administrative procedures outlined in NAVMEDCOMINST 6320.12 when:

(i) A patient has received the maximum benefit of hospitalization in a naval MTF but requires a protracted period of nursing home type care. The VA can provide this type care or arrange for it from a civilian source for individuals so entitled.

(ii) Determined that there is or may be spinal cord injury necessitating immediate medical and psychological attention.

(iii) A patient has sustained an apparently severe head injury or has been blinded necessitating immediate intervention beyond the capabilities of naval MTFs.

(iv) A determination has been made by the Secretary concerned that a member on active duty has an alcohol or drug dependency or drug abuse disability.

(3) *Retired members and dependents.* When a retired member of a dependent requires care beyond the capabilities of a facility and a transfer is necessary, the commanding officer of that facility may:

(i) Arrange for transfer to another USMTF or designated USTF located in an overlapping inpatient catchment area of the transferring facility if either has the required capability.

(ii) If the patient or sponsor agrees, arrange for transfer to the nearest USMTF or designated USTF with required capability, regardless of its location.

(iii) Arrange for transfer of retired members to the Veterans Administration MTF nearest the patient's residence.

(iv) Provide aid in releasing the patient to a civilian provider of the patient's choice under the terms of Medicare, if the patient is entitled. Beneficiaries entitled to Medicare, Part A, because they are 65 years of age or older or because of a disability or chronic renal disease, lose CHAMPUS eligibility but remain eligible for care in USMTFs and designated USTFs.

(v) If the patient is authorized benefits under CHAMPUS, disengage from medical management and issue a Nonavailability Statement (DD 1251) per the provisions of § 728.33, for care under CHAMPUS. This step should only be taken after due consideration is made of the supplemental/cooperative care policy addressed in § 728.4(z).

(4) *Dependents of members of NATO nations.* When a dependent, as defined in § 728.41, of a member of a NATO nation requires care beyond the capabilities of a facility and a transfer is necessary, the commanding officer of that facility may:

(i) Arrange for transfer to another USMTF or designated USTF with required capability if either is located in an overlapping inpatient catchment area of the transferring facility.

(ii) If the patient or sponsor agrees, arrange for transfer to the nearest USMTF or designated USTF with required capability, regardless of its location.

(iii) Effect disposition per § 728.42(d).

(5) *Others*—(i) *Medical care.* Section 34 of title 24, United States Code, provides that hospitalization and outpatient services may be provided outside the continental limits of the United States and in Alaska to officers and employees of any department or agency of the Federal Government, to employees of a contractor with the United States or the contractor's subcontractor, to dependents of such persons, and in emergencies to such other persons as the Secretary of the Navy may prescribe: *Provided,* such services are not otherwise available in reasonably accessible and appropriate non-Federal facilities. Hospitalization of such persons in a naval MTF is further limited by 24 U.S.C. 35 to the treatment of acute medical and surgical conditions, exclusive of nervous, mental, or contagious diseases, or those requiring domiciliary care.

(ii) *Dental care.* Section 35 of title 24 provides for space available routine dental care, other than dental prosthesis and orthodontia, for the categories of individuals enumerated in § 728.4(bb)(5)(i): *Provided,* that such services are not otherwise available in reasonably accessible and appropriate non-Federal facilities.

(iii) *Transfer.* Accomplish transfer and subsequent treatment of individuals in § 728.4(bb)(5)(i) per the provisions of law enumerated in § 728.4(bb)(5)(i) and (ii).

(cc) *Verification of patient eligibility*—(1) *DEERS.* (i) The Defense Enrollment Eligibility Reporting System (DEERS) was implemented by OPNAVINST 1750.2. Where DEERS has been started at naval medical and dental treatment facilities, commanding officers will appoint, in writing, a DEERS project officer to perform at the base level. The project officer's responsibilities and functions include coordinating, executing, and maintaining base-level DEERS policies and procedures; providing liaison with line activities, base-level personnel project officers, and base-level public affairs project officers; meeting and helping the contractor field representative on site visits to each facility under the project officer's cognizance; and compiling and submitting reports required within the command and by higher authority.

(ii) Commanding officers of afloat and deployable units are encouraged to appoint a unit DEERS medical project officer as a liaison with the hospital project officer providing services to local medical and dental treatment facilities. Distribute notice of such appointments to all concerned facilities.

(iii) When a DEERS project officer has been appointed by a naval MTF or DTF, submit a message (report control symbol MED 6320–42) to COMNAVMEDCOM, with information copies to appropriate chain of command activities, no later than 10 October annually, and situationally when changes occur. As a minimum, the report will provide:

(A) Name of reporting facility. If the project officer is responsible for more than one facility, list all such facilities.

(B) Mailing address including complete zip code (zip + 4) and unit identification code (UIC). Include this information for all facilities listed in § 728.4(cc)(1)(iii)(A).

(C) Name, grade, and corps of the DEERS project officer designated.

(D) Position title within parent facility.

(E) AUTOVON and commercial telephone numbers.

(2) *DEERS and the identification card.* This subpart includes DEERS procedures for eligibility verification checks to be used in conjunction with the identification card system as a basis for verifying eligibility for medical and dental care in USMTFs and uniformed services dental treatment facilities (USDTFs). For other than emergency care, certain patients are required to have a valid ID card in their possession and, under the circumstances described in § 728.4(cc)(3), are also required to meet DEERS criteria before treatment or services are rendered. Although DEERS and the ID card system are interrelated, there will be instances where a beneficiary is in possession of an apparently valid ID card and the DEERS verification check shows that eligibility has terminated or vice versa. Eligibility verification via an ID card does not override an indication of ineligibility in DEERS without some other collateral documentation. Dependents (in possession of or without ID cards) who undergo DEERS checking will be considered ineligible for the reasons stated in § 728.4(cc)(4)(v) (A) through (G). For problem resolution, refer dependents of active duty members to the personnel support detachment (PSD) servicing the sponsor's command; refer retirees, their dependents, and survivors to the local PSD.

(3) *Identification cards and procedures.* All individuals, including members of uniformed services in uniform, must provide valid identification when requesting health benefits. Although the most widely recognized and acceptable forms of identification are DD 1173, DD 2, Form PHS–1866–1, and Form PHS–1866–3 (Ret), individuals presenting for care without such identification may be rendered care upon presentation of other identification as outlined in this

part. Under the circumstances indicated, the following procedures will be followed when individuals present without the required ID card.

(i) *Children under 10.* Although a DD 1173 (Uniformed Services Identification and Privilege Card) may be issued to children under 10 years of age, under normal circumstances they are not. Accordingly, certification and identification of children under 10 years of age are the responsibility of the member, retired member, accompanying parent, legal guardian, or acting guardian. Either the DD 1173 issued the spouse of a member or former member or the identification card of the member or former member (DD 2, DD 2 (Ret), Form PHS–1866–1, or Form PHS–1866–3 (Ret)) is acceptable for the purpose of verifying eligibility of a child under 10 years of age.

(ii) *Indefinite expiration.* The fact that the word ''indefinite'' may appear in the space for the expiration date on a *member's* card does not lessen its acceptability for identification of a child. See §728.4(cc)(3)(iii) for dependent's cards with an indefinite expiration date.

(iii) *Expiration date.* To be valid, a dependent's DD 1173 *must* have an expiration date. Do not honor a dependent's DD 1173 with an expiration date of ''indefinite''. Furthermore, such a card should be confiscated, per NAVMILPERSCOMINST 1750.1A, and forwarded to the local PSD. The PSD may then forward it to the Commander, Naval Military Personnel Command, (NMPC (641D)/Pers 7312), Department of the Navy, Washington, DC 20370–5000 for investigation and final disposition. Render necessary emergency treatment to such a person. The patient administration department must determine such a patient's beneficiary status within 30 calendar days and forward such determination to the fiscal department. If indicated, billing action for treatment will then proceed following NAVMED P–5020.

(iv) *Without cards or with expired cards.* (A) When parents or parents-in-law (including step-parents and step-parents-in-law) request care in naval MTFs or DTFs without a DD 1173 in their possession or with expired DD 1173's, render care if they or their sponsor sign a statement that the individual requiring care has a valid ID card or that an application has been submitted for a renewal DD 1173. In the latter instance, include in the statement the allegation that: (*1*) The beneficiary is dependent upon the service member for over one-half of his or her support, and (*2*) that there has been no material change in the beneficiary's circumstances since the previous determination of dependency and issuance of the expired card. Place the statement in the beneficiary's medical record. Inform the patient or sponsor that if eligibility is not verified by presentation of a valid ID card to the patient administration department within 30 calendar days, the facility will initiate action to recoup the cost of care. If indicated, billing action for the cost of treatment will then proceed following NAVMED P–5020.

(B) When recent accessions, National Guard, reservists, or Reserve units are called to active duty for a period greater than 30 days and neither the members nor their dependents are at yet in receipt of their identification cards, satisfactory collateral identification may be accepted in lieu thereof, *i.e.*, official documents such as orders, along with a marriage license, or birth certificate which establish the individual's status as a dependent of a member called to duty for a period which is not specified as 30 days or less. For a child, the collateral documentation must include satisfactory evidence that the child is within the age limiting criteria outlined in §728.31(b)(4). An eligible dependent's entitlement, under the provisions of this subpart, starts on the first day of the sponsor's active service and ends as of midnight on the last day of active service.

(4) *DEERS checking.* Unless otherwise indicated, all DEERS verification procedures will be accomplished in conjunction with possession of a valid ID card.

(i) *Prospective DEERS processing*—(A) *Appointments.* To minimize difficulties for MTFs, DTFs, and patients, DEERS checks are necessary for prospective patients with future appointments made through a central or clinic appointment desk. Without advance DEERS checking, patients could arrive

at a facility with valid ID cards but may fail the DEERS check, or may arrive without ID cards but be identified by the DEERS check as eligible. Records, including full social security numbers, of central and clinic appointment systems will be passed daily to the DEERS representative for a prospective DEERS check. This enables appointment clerks to notify individuals with appointments of any apparent problem with the DEERS or ID card system and refer those with problems to appropriate authorities prior to the appointment.

(B) *Prescriptions*. Minimum checking requirements of the program require prospective DEERS checks on all individuals presenting prescriptions of civilian providers (see §728.4(cc)(4)(iv)(D)).

(ii) *Retrospective DEERS processing*. Pass daily logs (for walk-in patients, patients presenting in emergencies, or patients replacing last minute appointment cancellations) to the DEERS representative for retrospective batch processing if necessary for the facility to meet the minimum checking requirements in §728.4(cc)(4)(iv). For DEERS processing, the last four digits of a social security number are insufficient. Accordingly, when retrospective processing is necessary, the full social security number of each patient must be included on daily logs.

(iii) *Priorities*. With the following initial priorities, conduct DEERS eligibility checks using a CRT terminal, single-number dialer telephone, or 800 number access provided for the specific purpose of DEERS checking to:

(A) Determine whether a beneficiary is enrolled.

(B) Verify beneficiary eligibility. Eastablishment of eligibility is under the cognizance of personnel support activities and detachments.

(C) Identify any errors on the data base.

(iv) *Minimum checking requirements*. Process patients presenting at USMTFs and DTFs in the 50 States for DEERS eligibility verification per the following minimum checking requirements.

(A) Twenty five percent of all outpatient visits.

(B) One hundred percent of all admissions.

(C) One hundred percent of all dental visits at all DTFs for other than active duty members, retired members, and dependent.

(*1*) Active duty members are exempt from DEERS eligibility verification checking at DTFs.

(*2*) Retired members will receive a DEERS vertification check at the initial visit to any DTF and annually thereafter at time of treatment at the same facility. To qualify for care as a result of the annually performed verification check, the individual performing the eligibility check will make a notation to this effect on an SF 603, Health Record—Dental. Include in the notation the date and result of the check.

(*3*) Dependents will have a DEERS eligibility verification check upon initial presentation for evaluation or treatment. This check will be valid for up to 30 days if, when the check is conducted, the period of eligibility requested is 30 days. A 30-day eligibility check may be accomplished online or via telephone by filling in or requesting the operator to fill in a 30 day period in the requested treatment dates on the DEERS eligibility inquiry screen. Each service or clinic is expected to establish auditable procedures to trace the date of the last eligibility verification on a particular dependent.

(D) One hundred percent of pharmacy outpatients presenting new prescriptions written by a civilian provider. Prospective DEERS checks are required for all patients presenting prescriptions of civilian providers. A DEERS check is not required upon presentation of a request for refill of a prescription of a civilian provider if the original prescription was filled by a USMTF within the past 120 days.

(E) One hundred percent of all individuals requesting treatment without a valid ID card if they represent themselves as individuals who are eligible to be included in the DEERS data base.

(v) *Ineligibility determinations*. When a DEERS verification check is performed and eligibility cannot be verified for

any of the following reasons, deny routine nonemergency care unless the beneficiary meets the criteria for a DEERS eligibility override as noted in § 728.4(cc)(4)(viii).

(A) Sponsor not enrolled in DEERS.

(B) Dependent not enrolled in DEERS.

(C) ''End eligibility date'' has passed. Each individual in the DEERS data base has a date assigned on which eligibility is scheduled to end.

(D) Sponsor has separated from active duty and is no longer entitled to benefits.

(E) Spouse has a final divorce decree from sponsor and is not entitled to continued eligibility as a former spouse.

(F) Dependent child is married.

(G) Dependent becomes an active duty member of a uniformed service. (Applies only to CHAMPUS benefits since the former dependent becomes entitled to direct care benefits in his or her own right as an active duty member and must enroll in DEERS.)

(vi) *Emergency situations*. When a physician determines that emergency care is necessary, initiate treatment. If admitted after emergency treatment has been provided, a retrospective DEERS check is required. If an emergency admission or emergency outpatient treatment is accomplished for an individual whose proof of eligibility is in question, the patient administration department must determine the individual's beneficiary status within 30 calendar days of treatment and forward such determination to the fiscal department. Eligibility verifications will normally consist of presentation of a valid ID card along with either a positive DEERS check or a DEERS override as noted in § 728.4(cc)(4)(viii). If indicated, billing action for treatment will then proceed per NAVMED P–5020.

(vii) *Eligibility verification for nonemergency care*. When a prospective patient presents without a valid ID card and:

(A) DEERS does not verify eligibility, deny nonemergency care. Care denial will only be accomplished by supervisory personnel designated by the commanding officer.

(B) The individual is on the DEERS data base, do not provide nonemergency care until a NAVMED 6320/9, Dependent's Eligibility for Medical Care, is signed by the member, patient, patient's parent, or patient's legal or acting guardian. This form attests the fact that eligibility has been established per appropriate directives and includes the reason a valid ID card is not in the prospective patient's possession. Apprise the aforementioned responsible individual of the provisions on the form NAVMED 6320/9 now requiring presentation of a valid ID card within 30 calendar days. Deny treatment or admission in physician determined nonemergency situations of persons refusing to sign the certification on the NAVMED 6320/9. For persons rendered treatment, patient administration department personnel must determine their eligibility status within 30 calendar days and forward such determination to the fiscal department. If indicated, billing action for treatment will then proceed following NAVMED P–5020.

(viii) *DEERS overrides*. Possession of an ID card alone does not constitute sufficient proof of eligibility when the DEERS check does not verify eligibility. What constitutes sufficient proof will be determined by the reason the patient failed the DEERS check. For example, groups most expected to fail DEERS eligibility checks are recent accession members and their dependents, Guard or Reserve members recently activated for training periods of greater than 30 days and their dependents, and parents and parents-in-law with expired ID cards. Upon presentation of a valid ID card, the following are reasons to ''override'' a DEERS check either showing the individual as ineligible or when an individual does not appear in the DEERS data base.

(A) *DD 1172*. Patient presents an original of a copy of a DD 1172, Application for Uniformed Services Identification and Privilege Card, which is also used to enroll beneficiaries in DEERS. If the original is used, the personnel support detachment (PSD) furnishing the original will list the telephone number of the verifying officer to aid in verification. Any copy presented

must have an original signature in section III; printed name of verifying officer, his or her grade, title, and telephone number; and the date the copy was issued. For treatment purposes, this override expires 120 days from the date issued.

(B) *Recently issued identification cards—(1) DD 1173.* Patient presents a recently issued DD 1173, Uniformed Services Identification and Privilege Card. Examples are spouses recently married to sponsor, newly eligible stepchildren, family members of sponsors recently entering on active duty for a period greater than 30 days, parents or parents-in-law, and unremarried spouses recently determined eligible. For treatment purposes, this override expires 120 days from the date issued.

(2) *Other ID cards.* Patient presents any of the following ID cards with a date of issue within the previous 120 days: DD 2, DD 2 (Ret), Form PHS 1866–1, or Form PHs 1866–3 (Ret). When these ID cards are used for the purpose of verifying eligibility for a child, collateral documentation is necessary to ensure the child is actually the alleged sponsor's dependent and in determining whether the child is within the age limiting criteria outlined in § 728.31(b)(4).

(C) *Active duty orders.* Patient or sponsor presents recently issued orders to active duty for a period greater than 30 days. Copies of such orders may be accepted up to 120 days of their issue date.

(D) *Newborn infants.* Newborn infants for a period of 1 year after birth provided the sponsor presents a valid ID card.

(E) *Recently expired ID cards.* If the DEERS data base shows an individual as ineligible due to an ID card that has expired within the previous 120 days (shown on the screen as ''Elig with valid ID card''), care may be rendered when the patient has a new ID card issued within the previous 120 days.

(F) *Sponsor's duty station has an FPO or APO number or sponsor is stationed outside the 50 United States.* Do not deny care to bona fide dependents of sponsors assigned to a duty station outside the 50 United States or assigned to a duty station with an FPO or APO address as long as the sponsor appears on the DEERS data base. Before initiating nonemergency care, request collateral documentation showing relationship to sponsor when the relationship is or may be in doubt.

(G) *Survivors.* Dependents of deceased sponsors when the deceased sponsor failed to enroll in or have his or her dependents enrolled in DEERS. This situation will be evidenced when an eligibility check on the surviving widow or widower (or other dependent) finds that the sponsor does not appear (screen shows ''Sponsor SSN Not Found'') or the survivor's name appears as the sponsor but the survivor is not listed separately as a dependent. In any of these situations, if the survivor has a valid ID card, treat the individual on the first visit and refer him or her to the local personnel support detachment for correction of the DEERS data base. For second and subsequent visits prior to appearance on the DEERS data base, require survivors to present a DD 1172 issued per § 728.4(cc)(4)(viii)(A).

(H) *Patients not eligible for DEERS enrollment.* (*1*) Secretarial designees are not eligible for enrollment in DEERS. Their eligibility determination is verified by the letter, on one of the service Secretaries' letterhead, of authorization issued.

(*2*) When it becomes necessary to make a determination of eligibility on other individuals not eligible for entry on the DEERS data base, patient administration department personnel will obtain a determination from the purported sponsoring agency, if appropriate. When necessary to treat or admit a person who cannot otherwise present proof of eligibility for care at the expense of the Government, do not deny care based only on the fact that the individual is not on the DEERS data base. In such instances, follow the procedures in NAVMED P–5020 to minimize, to the fullest extent possible, the write-off of uncollectible accounts.

## Subpart B—Members of the Uniformed Services on Active Duty

### § 728.11 Eligible beneficiaries.

(a) A member of a uniformed service, as defined in subpart A, who is on active duty is entitled to and will be provided medical and dental care and adjuncts thereto. For the purpose of this part, the following are also considered on active duty:

(1) Members of the National Guard in active Federal service pursuant to a ''call'' under 10 U.S.C. 3500 or 8500.

(2) Midshipmen of the U.S. Naval Academy.

(3) Cadets of the U.S. Military Academy.

(4) Cadets of the Air Force Academy.

(5) Cadets of the Coast Guard Academy.

(b) The following categories of personnel who are on active duty are entitled to and will be provided medical and dental care and adjuncts thereto to the same extent as is provided for active duty members of the Regular service (except reservists when on active duty for training as delineated in § 728.21).

(1) Members of the Reserve components.

(2) Members of the Fleet Reserve.

(3) Members of the Fleet Marine Corps Reserve.

(4) Members of the Reserve Officers' Training Corps.

(5) Members of all officer candidate programs.

(6) Retired members of the uniformed services.

### § 728.12 Extent of care.

Members who are away from their duty stations or are on duty where there is no MTF of their own service may receive care at the nearest available Federal MTF (including designated USTFs) with the capability to provide required care. Care will be provided without regard to whether the condition for which treatment is required was incurred or contracted in line of duty.

(a) *All uniformed services active duty members.* (1) All eligible beneficiaries covered in this subpart are entitled to and will be rendered the following treatment and services upon application to a naval MTF whose mission includes the rendering of the care required. This entitlement provides that when required care and services are beyond the capabilities of the facility to which the member applies, the commanding officer of that facility will arrange for care from another USMTF, designated USTF, or other Federal source or will authorize and arrange for direct use of supplemental services and supplies from civilian non-Federal sources out of operation and maintenance funds.

(i) Necessary hospitalization and other medical care.

(ii) Occupational health services as defined in § 728.2(z).

(iii) Necessary prosthetic devices, prosthetic dental appliances, hearing aids, spectacles, orthopedic footwear, and other orthopedic appliances (see subpart H). When these items need repair or replacement and the items were not damaged or lost through negligence, repair or replacement is authorized at Government expense.

(iv) Routine dental care.

(2) When a USMTF, with a mission of providing the care required, releases the medical management of an active duty member of the Navy, Marine Corps, Army, Air Force, or a commissioned corps member of USPHS or NOAA, the resulting civilian health care costs will be paid by the referring facility.

(3) The member's uniformed service will be billed for care provided by the civilian facility only when the referring MTF is not organized nor authorized to provide needed health care (see part 732 of this chapter for naval members). Saturation of service or facilities does not fall within this exception. When a naval MTF retains medical management, the costs of supplemental care obtained from civilian sources is paid from funds available to operate the MTF which manages care of the patient. When it becomes necessary to refer a USPHS or NOAA commissioned corps member to a non-Federal source of care, place a call to the Department of Health and Human Services (DHHS), Chief, Patient Care Services on (301) 443–1943 or FTS 443–1943 if DHHS is to

assume financial responsibility. Patient Care Services is the sole source for providing authorization for non-Federal care at DHHS expense.

(b) *Maternity episode for active duty female members.* A pregnant active duty member who lives outside the MHSS inpatient catchment area of all USMTFs is permitted to choose whether she wishes to deliver in a closer civilian hospital or travel to the USMTF for delivery. If such a member chooses to deliver in a naval MTF, makes application, and presents at that facility at the time for delivery, the provisions of paragraph (a) of this section apply with respect to the furnishing of needed care, including routine newborn care (*i.e.*, nursery, newborn examination, PKU test, etc.); arrangements for care beyond the facility's capabilities; or the expenditure of funds for supplemental care or services. Pay expenses incurred for the infant in USMTFs or civilian facilities (once the mother has been admitted to the USMTF) from funds available for care of active duty members, *unless* the infant becomes a patient in his or her own right either through an extension of the birthing hospital stay because of complications, subsequent transfer to another facility, or subsequent admission. If the Government is to assume financial responsibility for:

(1) Care of pregnant members residing within the MHSS inpatient catchment area of a uniformed services hospital or in the inpatient catchment area of a designated USTF, such members are required to:

(i) Make application to that facility for care, or

(ii) Obtain authorization, per part 732 of this chapter, for delivery in a civilian facility.

(2) Non-Federal care of pregnant members residing outside inpatient catchment areas of USMTFs and USTFs, the member must request and receive authorization per part 732 of this chapter. Part 732 of this chapter also provides for cases of precipitious labor necessitating emergency care. OPNAVINST 6000.1, Management of Pregnant Servicewomen, contains medical-administrative guidelines on management prior to admission and after discharge from admission for delivery.

(c) *Reserve and National Guard personnel.* In addition to those services covered in paragraphs (a) and (b) of this section, Reserve and National Guard personnel are authorized the following under conditions set forth. (See § 728.25 for additional benefits for National Guard personnel.)

(1) Personnel whose units have an active Army mission of manning missile sites are authorized spectacle inserts for protective field masks.

(2) Personnel assigned to units designated for control of civil disturbances are authorized spectacle inserts for protective field masks M17.

### § 728.13 Application for care.

Possession of an ID card (a green colored DD 2 (with letter suffix denoting branch of service), Armed Forces Identification Card; a green colored PHS 1866–1, Identification Card; or a red colored DD 2 Res (Reservists on active duty for training)) alone does not constitute sufficient proof of eligibility. Accordingly, make a DEERS check, per § 728.4(cc), before other than emergency care is rendered to the extent that may be authorized.

### § 728.14 Pay patients.

Care is provided on a reimbursable basis to: Coast Guard active duty officers, enlisted personnel, and academy cadets; Public Health Service Commissioned Corps active duty officers; and Commissioned Corps active duty officers of the National Oceanic and Atmospheric Administration. Accordingly, patient administration personnel will initiate the collection action process in subpart J in each instance of inpatient or outpatient care provided to these categories of patients.

## Subpart C—Members of Reserve Components, Reserve Officers' Training Corps, Navy and Marine Corps Officer Candidate Programs, and National Guard Personnel

### § 728.21 Navy and Marine Corps reservists.

(a) *Scope.* This section applies to reservists, as those terms are defined in

§ 728.2, ordered to active duty for training or inactive duty training for 30 days or less. Reservists serving under orders specifying duty in excess of 30 days, such as Sea and Air Mariners (SAMS) while on initial active duty for training, will be provided care as members of the Regular service per subpart B.

(b) *Entitlement*. Per 10 U.S.C. 1074a(a), reservists who incur or aggravate an injury, illness, or disease in line of duty while on active duty for training or inactive duty training for a period of 30 days or less, including travel to and from that duty, are entitled to medical and dental care appropriate for the treatment of that injury, disease, or illness until the resulting disability cannot be materially improved by further hospitalization or treatment. Care is authorized for such an injury, illness, or disease beyond the period of training to the same extent as care is authorized for members of the Regular service (see subpart B) subject to the provisions of § 728.21(e).

(c) *Questionable circumstances*. If the circumstances are questionable, referral to the OMA or ODA is appropriate. If necessary, make referral to the Naval Medical Command (MEDCOM–33 for medical and MEDCOM–06 for dental) on determinations of entitlements.

(d) *Line of duty*. For the purpose of providing treatment under laws entitling reservists to care, an injury, illness, or disease which is incurred, aggravated, or becomes manifest while a reservist is employed in the performance of active duty for training or inactive duty training (including authorized leave, liberty and travel to and from either duty) will be considered to have been incurred in line of duty (LOD) unless the condition was incurred as a result of the reservist's own misconduct or under other circumstances enumerated in JAG Manual, chapter VIII. While the LOD investigation is being conducted, such reservists remain entitled to care. If the investigation determines that the injury or illness was not incurred in line of duty, the civilian humanitarian nonindigent rate is applicable if further care is required in naval MTFs. (See DOD Military Pay and Allowances Entitlement Manual for allowable constructive travel times.)

(e) *Treatment and services authorized*. In addition to those services delineated above, the following may be rendered under circumstances outlined:

(1) Prosthetic devices, including dental appliances, hearing aids, spectacles, and orthopedic appliances that are lost or have become damaged during training duty, not through negligence of the individual, may be repaired or replaced at Government expense.

(2) Reservists covered by this subpart may be provided the following only if approved by the appropriate OMA or ODA, or by the Commander, Naval Medical Command (MEDCOM–33 for medical and MEDCOM–06 for dental) *prior* to initiation of services.

(i) Treatment for acute exacerbations of conditions that existed prior to a reservist's period of training duty. Limit care to that necessary for the prevention of pain or undue suffering until the patient can reasonably return to control of the member's private physician or dentist.

(A) Remediable physical defects and remediable treatment for other conditions.

(B) Elective surgery.

(ii) All dental care other than emergency treatment and that necessary to correct an injury incurred in the line of duty.

(f) *Authorization for care*. (1) Reservists covered by this subpart may be provided inpatient or outpatient care during a period of training duty without written authorization.

(2) Except in emergencies or when inpatient care initiated during a period of training duty extends beyond such period, reservists will be required to furnish written official authorization from their unit commanding officer, or higher authority, incident to receiving inpatient or outpatient care beyond the period of training duty. The letter of authorization will include name, grade or rate, social security number, and organization of the reservist; type of training duty being performed or that was being performed when the condition manifested; diagnosis (if known); and a statement that the condition was incurred in line of duty and that the reservist is entitled to care. If

the reservist has been issued a notice of eligibility (NOE) (subpart I), the NOE may then be accepted in lieu of the letter of authorization. When authorization has not been obtained beforehand, care may be provided on a civilian humanitarian basis (see subpart G) pending final determination of eligibility.

### § 728.22 Members of other reserve components of the uniformed services.

(a) Members of reserve components of the Coast Guard may be provided care the same as Navy and Marine Corps reservists.

(b) Members of reserve components of the Army and Air Force may be provided care in naval MTFs to the same extent that they are eligible for such care in MTFs of their respective services. Consult current Army Regulation 40–3, Medical, Dental, and Veterinary Care, or Air Force Regulation 168–6, Persons Authorized Medical Care, as appropriate, for particular eligibility requirements or contact the nearest appropriate service facility.

(c) When the service directive requires written authorization, obtain such authorization from the reservist's unit commanding officer or other appropriate higher authority.

(d) Naval MTFs in the United States are authorized to conduct physical examinations of and administer immunizations to inactive reserve Public Health Service commissioned officers upon presentation of a written request from the Commissioned Personnel Operations Division, OPM/OAM, 5600 Fishers Lane, Rockville, MD 20852.

### § 728.23 Reserve Officers' Training Corps (ROTC).

(a) *Eligible beneficiaries.* (1) Members of the Senior Reserve Officers' Training Corps of the Armed Forces including students enrolled in the 4-year Senior ROTC Program or the 2-year Advanced Training Senior ROTC Program.

(2) Designated applicants for membership in the Navy, Army, and Air Force Senior ROTC Programs during their initial 6-weeks training period (practice cruises or field training).

(3) Medical, dental, pharmacy, veterinary or science allied to medicine students who are commissioned officers of a reserve component of an Armed Force who have been admitted to and training in a unit of a Senior Reserve Officers' Training Corps.

(b) *Extent of care.* (1) While attending or en route to or from field training or practice cruises:

(i) Medical care for a condition incurred without reference to line of duty.

(ii) Routine dental care.

(iii) Prosthetic devices, including dental appliances, hearing aids, spectacles, and orthopedic appliances that have become damaged or lost during training duty, not through negligence of the individual, may be repaired or replaced as necessary at government expense.

(iv) Care of remediable physical defects, elective surgery or other remediable treatment for conditions that existed prior to a period of training duty are not authorized without approval from the appropriate OMA or ODA, or from the Commander, Naval Medical Command (MEDCOM–33 for medical and MEDCOM–06 for dental).

(v) Medical examinations and immunizations.

(vi) ROTC members are authorized continued medical care, including hospitalization, upon expiration of their field training or practice cruise period, the same as reservists in § 728.21(b) and § 728.22.

(2) While attending a civilian educational institution:

(i) Medical care in naval MTFs, including hospitalization, for a condition incurred in line of duty while at or traveling to or from a military installation for the purpose of undergoing medical or other examinations or for purposes of making visits of observation, including participation in service-sponsored sports, recreational, and training activities.

(ii) Medical examinations, including hospitalization necessary for the proper conduct thereof.

(iii) Required immunizations, including hospitalization for severe reactions therefrom.

(c) *Authorization.* The individual's commanding officer will prepare a letter of authorization addressed to the commanding officer of the MTF concerned.

(d) *ROTC members as beneficiaries of the Office of Workers' Compensation Programs (OWCP).* Under circumstances described therein, render care as outlined in § 728.53 to members of the ROTC as beneficiaries of OWCP.

### § 728.24 Navy and Marine Corps Officer Candidate Programs.

Members of the Reserve Officers Candidate Program and Platoon Leaders Class are entitled to the same medical and dental benefits as are provided members of the Navy and Marine Corps Reserve Components. Accordingly, the provisions of § 728.21 are applicable for such members. Additionally, candidates for, or persons enrolled in such programs are authorized access to naval MTFs for the purpose of conducting special physical examination procedures which have been requested by the Commander, Naval Medical Command to determine their physical fitness for appointment to, or continuation in such a program. Upon a request from the individual's commanding officer, the officer in charge of cognizant Navy and Marine Corps recruiting stations, or officer selection officer, naval MTFs are authorized to admit such persons when, in the opinion of the cognizant officer, hospitalization is necessary for the proper conduct of the special physical examinations. Hospitalization should be kept to a minimum and treatment other than for humanitarian reasons, except as provided in this part, is not authorized.

### § 728.25 Army and Air Force National Guard personnel.

(a) *Medical and dental care.* Upon presentation of a letter of authorization, render care as set forth in AR 40–3 (Medical, Dental, and Veterinary Care) and AFR 168–6 (Persons Authorized Medical Care) to members of the Army and Air Force National Guard who contract a disease or become ill in line of duty while on full-time National Guard duty, (including leave and liberty therefrom) or while traveling to or from that duty. The authorizing letter will include name, social security number, grade, and organization of the member; type and period of duty in which engaged (or in which engaged when the injury or illness occurred); diagnosis (if known); and will indicate that the injury suffered or disease contracted was in line of duty and that the individual is entitled to medical or dental care. Limit care to that appropriate for the injury. disease, or illness until the resulting disability cannot be materially improved by further hospitalization or treatment.

(b) *Physical examinations.* AR 40–3 and AFR 168–6 also authorize physical examinations for National Guard personnel. Accordingly, when requested by an Army or Air Force National Guard unit's commanding officer, naval MTFs may perform the requested physical examination per the appropriate service directive, subject to the availability of space, facilities, and the capabilities of the staff.

## Subpart D—Retired Members and Dependents of the Uniformed Services

### § 728.31 Eligible beneficiaries and health benefits authorized.

(a) *Retired members of the uniformed services.* Retired members, as defined in § 728.2(aa), are authorized the same medical and dental benefits as active duty members subject to the availability of space and facilities, capabilities of the professional staff, and the priorities in § 728.3, except that:

(1) Periodic medical examinations for members on the Temporary Disability Retired List, including hospitalization in connection with the conduct thereof, will be furnished on the same priority basis as care to active duty members.

(2) When vision correction is required, one pair of standard issue spectacles, or one pair of nonstandard spectacles, are authorized when required to satisfy patient needs. Two pairs of spectacles may be furnished only when professionally determined to be essential by the examining officer. Military ophthalmic laboratories will not furnish occupational type spectacles, such as aviation, industrial safety, double segment, and mask insert, to retired

military personnel (NAVMEDCOMINST 6810.1 refers).

(b) *Dependents of members of former members*. Include:

(1) The spouse.

(2) The unremarried widow.

(3) The unremarried widower.

(4) An unmarried legitimate child, including an adopted child or a stepchild, who either—

(i) Has not passed his or her 21st birthday;

(ii) Is incapable of self-support because of a mental or physical incapacity that existed before the 21st birthday and is, or was at the time of the member's or former member's death, in fact dependent on the member for over one-half of his or her support; or

(iii) Has not passed the 23rd birthday, is enrolled in a full-time course of study in an institution of higher learning approved by the administering Secretary and is, or was at the time of the member's or former member's death, in fact dependent on the member for over one-half of his or her support. (If such a child suffers a disabling illness or injury and is unable to return to school, the child remains eligible for benefits until 6 months after the disability is removed, or until the 23rd birthday is reached, whichever comes first.)

(5) An unmarried illegitimate child or illegitimate step-child who is, or was at the time of sponsor's death, dependent on the sponsor for more than one-half of his or her support; residing with or in a home provided by the sponsor or the sponsor's spouse, as applicable, and is—

(i) Under 21 years of age; or

(ii) Twenty-one years of age or older but incapable of self-support because of a mental or physical incapacity that existed prior to the individual's 21st birthday; or

(iii) Twenty-one or 22 years of age and pursuing a full-time course of education that is approved per § 728.31(b)(4)(iii).

(6) A parent or parent-in-law, who is, or was at the time of the member's or former member's death, in fact dependent on the member for over one-half of such parent's support and residing in the sponsor's household.

(7) An unremarried former spouse of a member or former member who does not have medical coverage under an employer-sponsored health plan, and who:

(i) On the date of the final decree of divorce, dissolution, or annulment, had been married to the member or former member at least 20 years during which period the member of former member performed at least 20 years of service creditable in determining that member's or former member's eligibility for retired or retainer pay, or equivalent pay.

(ii) Had been married to the member of former member at least 20 years, at least 15 of which were during the period the member of former member performed service creditable in determining the member's eligibility for retired or retainer pay, or equivalent pay. The former spouse's sponsor must have performed at least 20 years of service creditable in determining the sponsor's eligibility for retired or retainer pay, or equivalent pay.

(A) Eligibility for such former spouses continue until remarriage if the final decree of divorce, dissolution, or annulment occurred before 1 April 1985.

(B) Eligibility terminates the later of: Either 2 years from the date of the final decree of divorce, dissolution, or annulment; or 1 April 1988 for such former spouses whose final decree occured on or after 1 April 1985.

(iii) An unremarried former spouse of a deceased member of former member who meets the requirements of § 728.31(b)(7)(i) or (ii) may be provided medical and dental care as a dependent when the sponsor:

(A) Died before attaining age 60.

(B) At the time of death would have been eligible for retired pay under 10 U.S.C. 1331–1337 except that the sponsor was under 60 years of age; but the former spouse is not eligible for care until the date the sponsor would have attained age 60;

(C) Whether or not the sponsor elected participation in the Survivor Benefit Plan of 10 U.S.C. 1447–1455.

(c) *Eligibility factors*. Care that may be rendered to all dependents in this subpart D is subject to the availability of space and facilities, capabilities of

the professional staff, and priorities in § 728.3. Additionally:

(1) Members of the uniformed services must be serving under orders specifying active duty for more than 30 days before their dependents are authorized benefits delineated in § 728.31(d).

(2) A dependent's eligibility begins on the date the member enters on active duty and ends as of midnight of the date the sponsor's period of active duty ends for any reason other than retirement or death. Dependents lose eligibility as of midnight of the date a member is officially place in a deserter status. Eligibility is restored on the date a deserter is returned to military control.

(3) A dependent (other than a former spouse) of a member or former member who died before attaining age 60 and at the time of death—

(i) Would have been eligible for retired pay under chapter 67 of title 10 U.S.C. but for the fact that the member of former member was under 60 years of age, and

(ii) Had elected to participate in the Survivor Benefit Plan, may not be rendered medical or dental care under the sponsor's entitlement until the date on which such member of former member would have attained age 60.

(4) A spouse, not qualifying as a former spouse, who is divorced from a member loses eligibility for benefits as of midnight of the date the divorce becomes final. This includes loss of maternity care benefits for wives who are pregnant at the time a divorce becomes final. A spouse does not lose eligibility through issuance of an interlocutory decree of divorce even when a property settlement has been approved which releases the member from responsibility for the spouse's support. A spouse's eligibility depends upon the relationship of the spouse to the member; so long as the relationship of husband and wife is not terminated by a final divorce or annulment decree, eligibility continues.

(5) Eligibility of children is not affected by the divorce of parents except that a stepchild relationship ceases upon divorce or annulment of natural parent and step-parent. A child's eligibility for health benefits is not affected by the remarriage of the divorced spouse maintaining custody unless the marriage is to an eligible service member.

(6) A stepchild relationship does not cease upon death of the member stepparent but does cease if the natural parent subsequently remarries.

(7) A child of an active duty or retired member, adopted after that member's death, retains eligibility for health benefits. However, the adoption of a child of a living member (other than by a person whose dependents are eligible for health benefits at USMTFs) terminates the child's eligibility.

(8) If a member's child is married before reaching age 21 to a person whose dependents are not eligible for health benefits in USMTFs, eligibility ceases as of midnight on the date of marriage. Should the marriage be terminated, the child again becomes eligible for benefits as a dependent child if otherwise eligible.

(d) *Health benefits authorized*. (1) Inpatient care including services and supplies normally furnished by the MTF.

(2) Outpatient care and services.

(3) Drugs (see chapter 21, MANMED).

(i) Prescriptions written by officers of the Medical and Dental Corps, civilian physicians and dentists employed by the Navy, designated officers of the Medical Service Corps and Nurse Corps, independent duty hospital corpsmen, and others designated to write prescriptions will be filled subject to the availability of pharmaceuticals, and consistent with control procedures and applicable laws.

(ii) Prescriptions written by civilian physicians and dentists (non-Navy employed) for eligible beneficiaries may be filled if:

(A) The commanding officer or CO's designee determines that pharmacy personnel and funds are available.

(B) The items requested are routinely stocked.

(C) The prescribed quantity is within limitations established by the command.

(D) The prescriber is in the local area (limits designated by the commanding officer).

(E) The provisions of chapter 21, MANMED are followed when such services include the dispensing of controlled substances.

(4) Treatment on an inpatient or outpatient basis of:

(i) Medical and surgical conditions.

(ii) Contagious diseases.

(iii) Nervous, mental, and chronic conditions.

(5) Physical examinations, including eye examinations and hearing evaluations, and all other tests and procedures necessary for a complete physical examination.

(6) Immunizations.

(7) Maternity (obstetrical) and infant care, routine care and examination of the newborn infant, and well-baby care for mothers and *infants* meeting the eligibility requirements of § 728.31(b). If a newborn infant of an unmarried dependent minor daughter becomes a patient in his or her own right after discharge of the mother, classify the infant as civilian humanitarian nonindigent inasmuch as § 728.31(b) does not define the infant as a dependent of the active duty or retired service member. Therefore, the minor daughter's sponsor (parent) should be counseled concerning the possibility of Secretarial designee status for the infant (see § 728.77).

(8) Diagnostic tests and services, including laboratory and x-ray examinations. Physical therapy, laboratory, x-ray, and other ambulatory diagnostic or therapeutic measures requeted by non-Navy employed physicians may be provided upon approval of the commanding officer or designated department heads. Rendering of such srvices is subordinate to and will not unduly interfere with providing inpatient and outpatient care to active duty personnel and others whose priority to receive care is equal to or greater than such dependents. Ensure that the release of any information to non-Navy employed physicians is in consonance with applicable provisions of SECNAVINST 5211.5C.

(9) Family planning services as delineated in SECNAVINST 6300.2A. Abortions, at the expense of the Government, may not be performed except where the life of the mother would be endangered if the fetus were carried to term.

(10) Dental care worldwide on a space available basis.

(11) Government ambulance services, surface or air, to transport dependents to, from, or between medical facilities when determined by the medical officer in charge to be medically necessary.

(12) Home calls when determined by the medical officer in charge to be medically necessary.

(13) Artificial limbs and artificial eyes, including initial issue, fitting, repair, replacement, and adjustment.

(14) Durable equipment such as wheelchairs, hospital beds, and resuscitators may be issued on a loan basis.

(15) Orthopedic aids, braces, crutches, elastic stockings, walking irons, and similar aids.

(16) Prosthetic devices (other than artificial limbs and eyes), hearing aids, orthopedic footwear, and spectacles or contact lenses for the correction of ordinary refractive error may not be provided dependents. These items, however, may be sold to dependents at cost to the Government at facilities outside the United States and at specific installations within the United States where adequate civilian facilities are unavailable.

(17) Special lenses (including intraocular lenses) or contact lenses for those eye conditions which require these items for complete medical or surgical management of the condition.

(18) One wig if the individual has alopecia resulting from treatment of a malignant disease: *Provided* the individual has not previously received a wig at the expense of the United States.

(e) *Dependents of reserves.* (1) A dependent, as defined in § 728.31(b), of a deceased member of the Naval Reserve, the Fleet Reserve, the Marine Corps Reserve, or the Fleet Marine Corps Reserve, who—

(i) Was ordered to active duty or to perform inactive-duty training for any period of time.

(ii) Was disabled in the line of duty from an injury while so employed, and

(iii) Dies from such a specific injury, illness, or disease is entitled to the same care as provided for dependents in § 728.31(c).

(2) The provisions of this subpart D are not intended to authorize medical and dental care precluded for dependents of members of Reserve components who receive involuntary orders to active duty under 10 U.S.C. 270b.

(f) *Unauthorized care.* In addition to the devices listed in § 728.31(d)(16) as unauthorized, dependents are not authorized care for elective correction of minor dermatological blemishes and marks or minor anatomical anomalies.

### § 728.32 Application for care.

Possession of an ID card alone (DD 2 (Retired), PHS–1866–3 (Retired), or DD 1173 (Uniformed Services Identification and Privilege Card)) does not constitute sufficient proof of eligibility. Accordingly, a DEERS check will be instituted per § 728.4 (cc) before medical and dental care may be rendered except in emergencies. When required inpatient or outpatient care is beyond the capabilities of the naval MTF, the provisions of § 728.34 apply. When required inpatient care cannot be rendered and a decision is made to disengage a CHAMPUS-eligible beneficiary, the provisions of § 728.33 apply.

### § 728.33 Nonavailability statement (DD 1251).

(a) *General.* Per DODINST 6015.19 of 26 Nov. 1984, the following guidelines are effective as of 1 Jan. 1985. All previously issued Nonavailability Statement guidelines and reporting requirements are superseded.

(b) *Applicability.* The following provisions are applicable to nonemergency inpatient care only. A DD 1251 is not required:

(1) For emergency care (see paragraph (d)(1)) of this section.

(2) When the beneficiary has other insurance (including Medicare) that provides primary coverage for a covered service.

(3) For medical services that CHAMPUS clearly does not cover.

(c) *Reasons for issuance.* DD 1251's may be issued for only the following reasons:

(1) Proper facilities are not available.

(2) Professional capability is not available.

(3) It would be medically inappropriate (as defined in § 728.2(u)) to require the beneficiary to use the USMTF and the attending physician has specific prior approval from the facility's commanding officer or higher authority to make such determination.

(i) Issuance for this reason should be restricted to those instances when denial of the DD 1251 could result in a significant risk to the health of any patient requiring any clinical specialty.

(ii) Issuing authorities have discretionary authority to evaluate each situation and issue a DD 1251 under the ''medically inappropriate'' reason if:

(A) In consideration of individual medical needs, personal constraints on an individual's ability to get to the USMTF results in an unreasonable limitation on that individual's ability to get required medical care, and

(B) The issuing authority determines that obtaining care from a civilian source selected by the individual would result in significantly less limitations on that individual's ability to get required medical care than would result if the individual was required to obtain care from a USMTF.

(C) A beneficiary is in a travel status. The commanding officer of the first facility contacted, in either the beneficiary's home catchment area or the catchment area where hospital care was obtained, has this discretionary authority. Travel in this instance means the beneficiary is temporarily on a trip away from his or her permanent residence. The reason the patient is traveling, the distance involved in the travel, and the time away from the permanent residence is not critical to the principle inherent in the policy. The issuing officer to whom the request for a Nonavailability Statement is made should reasonably determine that the trip was not made, and the civilian care is not (was not) obtained, with the primary intent of avoiding use of a USMTF or USTF serving the beneficiary's home area.

(d) *Guidelines for issuing*—(1) *Emergency care.* Emergency care claims do not require an NAS; however, the nature of the service or care must be certified as an emergency by the attending physician, either on the claim form or in a separate signed and dated statement. Otherwise, a DD 1251 is required by CHAMPUS-eligible beneficiaries

who are subject to the provisions of this section.

(2) *Emergency maternity care.* Unless substantiated by medical documentation and review, a maternity admission would not be deemed as an emergency since the fact of the pregnancy would have been established well in advance of the admission. In such an instance, the beneficiary would have had sufficient opportunity to obtain a DD 1251 if required in her residence catchment area.

(3) *Newborn infant(s) remaining in hospital after discharge of mother.* A newborn infant remaining in the hospital continuously after discharge of the mother does not require a separate DD 1251 for the first 15 days after the mother is discharged. Claims for care beyond this 15-day limitation must be accompanied by a valid DD 1251 issued in the infant's name. This is due to the fact that the infant becomes a patient in his or her own right (the episode of care for the infant after discharge of the mother is not considered part of the initial reason for admission of the mother (delivery), and is therefore considered a separate admission under a different diagnosis).

(4) *Cooperative care program.* When a DD 2161, Referral for Civilian Medical Care, is issued for inpatient care in connection with the Cooperative Care Program (§ 728.4(z)(5)(iv)) for care under CHAMPUS, a DD 1251 must also be issued.

(5) *Beneficiary responsibilities.* Beneficiaries are responsible for determining whether an NAS is necessary in the area of their residence and for obtaining one, if required, by first seeking nonemergency inpatient care in the USMTF or USTF serving the catchment area. Beneficiaries cannot avoid this requirement by arranging to be away from their residence when nonemergency inpatient care is obtained, e.g., staying with a relative or traveling. Individuals requiring an NAS because they reside in the inpatient catchment area of a USMTF or USTF also require an NAS for nonemergency care received while away from their inpatient catchment area.

(e) *Issuing authority.* Under the direction of the Commander, Naval Medical Command, exercised through commanders of naval geographic medical commands, naval MTFs will issue Nonavailability Statements only when care required is not available from the naval MTF and the beneficiary's place of residence is within the catchment area (as defined in § 728.2(d)) of the issuing facility or as otherwise directed by the Secretary of Defense. When the facility's inpatient catchment area overlaps the inpatient catchment area of one or more other USMTFs or USTFs with inpatient capability and the residence of the beneficiary is within the same catchment area of one or more other USMTFs or USTFs with inpatient capability, the issuing authority will:

(1) Determine whether required care is available at any other USMTFs or USTFs whose inpatient catchment area overlaps the beneficiary's residence. If care is available, refer the beneficiary to that facility and do not issue a DD 1251.

(2) Implement measures ensuring that an audit trail related to each check and referral is maintained, including the check required before retroactive issuance of a DD 1251 as delineated in paragraph (g) of this section. When other than written communication is made to ascertain capability, make a record in the log required in paragraph (h) of this section that ''Telephonic (or other) determination was made on (date) that required care was not available at (name of other USMTF(s) or USTF(s) contacted)''. The individual ascertaining this information will sign this notation.

(3) Once established that a DD 1251 is authorized and will be issued, the following will apply:

(i) Do not refer patients to a specific source of care.

(ii) Nonavailability Statements issued at commands outside the United States are not valid for care received in facilities located within the United States. Statements issued within the United States are not valid for care received outside the United States.

(iii) The issuing authority will:

(A) If capability permits, prepare a DD 1251 via the automated application of DEERS. Where this system is operational, it provides for transmitting quarterly reports to the Office of the

Assistant Secretary of Defense for Health Affairs (OASD(HA)) by electronic means. System users should refer to their DEERS/NAS Users Manual for specific guidance on the use of the automated system. At activities where the DEER/NAS automated system is not operational, prepare each DD 1251 per instructions on the reverse of the form. After completion, if authorized by the facility CO, the issuing authority will sign the DD 1251. Give a copy to the patient for presentation to a participating civilian provider, or for submission with the claim of a nonparticipating provider. Retain a copy for the issuing activity's records. Retain the original for subsequent transmittal to the Naval Medical Data Services Center per paragraph (j) of this section.

(B) Explain to the patient or other responsible family member the validity period of the DD 1251 (see paragraph (f) of this section).

(C) Ensure that beneficiaries are clearly advised of the cost-sharing provisions of CHAMPUS and of the fact that the issuance of a Nonavailability Statement does not imply that CHAMPUS will allow any and all costs incurred through the use of the DD 1251. The issuance of a DD 1251 indicates only that care requested is not available at a USMTF or USTF serving the beneficiary's residence inpatient catchment area.

(D) Review, with the patient or responsible family member, instructions 1 through 6 on the face of the DD 1251 and have the patient or responsible family member sign acknowledgement that such review has been made and is understood.

(E) Advise recipients that CHAMPUS fiscal intermediaries may deny claims of individuals who are not enrolled in the Defense Enrollment Eligibility Reporting System (DEERS).

(f) *Validity period.* DD 1251's issued for:

(1) Other than maternity care are valid for a hospital admission occurring within 30 days of issuance and remain valid from the date of admission until 15 days after discharge from the facility rendering inpatient care. This allows for any follow-on treatment related directly to the original admission.

(2) Maternity episodes are valid if outpatient of inpatient treatment related to the pregnancy is initiated within 30 days of its issuance. They remain valid for care of the mother through termination of the pregnancy and for 42 days thereafter to allow for postnatal care to be included in the maternity episode. (See paragraph (d)(3) of this section for the validity period of DD 1251's for infants remaining after discharge of the mother.)

(g) *Retroactive issuance.* Issue Nonavailability Statements retroactively only if required care could not have been rendered in a USMTF or USTF as specified in paragraph (e) of this section at the time services were rendered in the civilian sector. At the time a retroactive issuance is requested, the facility receiving the request will determine whether capability existed at the USMTF or USTF serving the inpatient catchment area wherein the beneficiary resides (resided) or at any of the facilities in the overlapping area described in paragraph (e) of this section. While the date of service will be recorded on the DD 1251, send the retained original to the Naval Medical Data Services Center along with others issued during the week of issuance (paragraph (j) of this section refers).

(h) *Annotating DD 1251's.* Before issuance, annotate each DD 1251 per the instructions for completion on the reverse of the form. DD 1251's issued under the CO's discretionary authority for the ''medically inappropriate reason (paragraph (c)(3)(ii) of this section) will be annotated in the remarks section documenting the special circumstances necessitating issuance, the name and location of the source of care selected by the beneficiary, and approximate distance from the source selected to the nearest USMTF or USTF with capability (see instruction number 2 on the reverse of the DD 1251). Establish and maintain a consecutively numbered log to include for each individual to whom a DD 1251 is issued:

(1) Patient's name and identifying data.

(2) The facility unique NAS number (block number 1 on the DD 1251).

(i) *Appeal procedures.* Beneficiaries may appeal the denial of their request for a DD 1251. This procedure consists of four levels within Navy, any one of which may terminate action and order issuance of a Nonavailability Statement if deemed warranted:

(1) The first level is the chief of service, or director of clinical services if the chief of service is the cognizant authority denying the beneficiary's original request.

(2) The second level is the commanding officer of the naval MTF denying the issuance. Where the appeal is denied and denial is upheld at the commanding officer's level, inform beneficiaries that their appeal may be forwarded to the geographic commander having jurisdictional authority.

(3) The third level is the appropriate geographic commander, if the appeal is denied at this level, inform beneficiaries that their appeal may be forwarded to the Commander, Naval Medical Command, Washington, DC 20372–5120.

(4) The Commander, Naval Medical Command, the fourth level of appeal, will evaluate all documentation submitted and arrive at a decision. The beneficiary will be notified in writing of this decision and the reasons therefor.

(j) *Data collection and reporting.* Do not issue the original of each DD 1251 prepared at activities where the DEER/NAS automated system is not operational. Send the retained originals to the Commanding Officer, Naval Medical Data Services Center (Code–03), Bethesda, MD 20814–5066 for reporting under report control symbol DD-HA (Q) 1463(6320).

### § 728.34 Care beyond the capabilities of a naval MTF.

When either during initial evaluation or during the course of treatment of an individual authorized care in this subpart, a determination is made that required care or services are beyond the capability of the naval MTF, the provisions of § 728.4(z)(2) apply.

### § 728.35 Coordination of benefits—third party payers.

Title 10 U.S.C. 1095 directs the services to collect from third-party payers the reasonable costs of inpatient hospital care incurred by the United States on behalf of retirees and dependents. Naval hospital collection agents have been provided instructions relative to this issue and are responsible for initiating claims to third-party payers for the cost of such care. Admission office personnel must obtain insurance, medical service, or health plan (third-party payer) information from retirees and dependents upon admission and forward this information to the collection agent.

### § 728.36 Pay patients.

Care is provided on a reimbursable basis to retired Coast Guard officers and enlisted personnel, retired Public Health Service Commissioned Corps officers, retired Commissioned Corps officers of the National Oceanic and Atmospheric Administration, and to the dependents of such personnel. Accordingly, patient administration personnel will follow the provisions of subpart J to initiate the collection action process when inpatient or outpatient care is provided to these categories of beneficiaries.

## Subpart E—Members of Foreign Military Services and Their Dependents

### § 728.41 General provisions.

(a) *Dependent.* As used in this subpart, the term ''dependent'' denotes a person who bears one of the following relationships to his or her sponsor:

(1) A wife.

(2) A husband if dependent on his sponsor for more than one-half of his support.

(3) An unmarried legitimate child, including an adopted or stepchild who is dependent on the sponsor for over one-half of his or her support and who either:

(i) Has not passed the 21st birthday; or

(ii) Is incapable of self-support due to a physical or mental incapacity that existed prior to reaching the age of 21; or

(iii) Has not passed the 23rd birthday and is enrolled in a full-time course of study in an accredited institution of higher learning.

(b) *Transfer to naval MTFs in the United States.* Do not transfer personnel covered in this subpart to the United States solely for the purpose of obtaining medical care at naval MTFs. Consideration may be given however, in special circumstances following laws of humanity or principles of international courtesy. Transfer to naval MTFs in the United States of such persons located outside the United States requires approval of the Secretary of the Navy. Naval commands, therefore, should not commit the Navy by a promise of treatment in the United States. Approval generally will not be granted for treatment of those who suffer from incurable afflictions, who require excessive nursing or custodial care, or those who have adequate facilities in their own country. When a request is received concerning transfer for treatment at a naval MTF in the United States, the following procedures apply:

(1) Forward the request to the Chief of Naval Operations (OP–61), with a copy to the Commander, Naval Medical Command, Washington, DC 20372–5120 for administrative processing. Include:

(i) Patient's full name and grade or rate (if dependent, the sponsor's name and grade or rate also).

(ii) Country of which a citizen.

(iii) Results of coordination with the chief of the diplomatic mission of the country involved.

(iv) Medical report giving the history, diagnosis, clinical findings, results of diagnostic tests and procedures, and all other pertinent medical information.

(v) Availability or lack thereof of professional skills and adequacy of facilities for treatment in the member's own country.

(vi) Who will assume financial responsibility for costs of hospitalization and travel.

(2) The Chief of Naval Operations (OP–61) will, if appropriate, obtain State Department clearance and guidance and advise the Secretary of the Navy accordingly. The Commander, Naval Medical Command will furnish the Chief of Naval Operations information and recommendations relative to the medical aspects and the name of the naval MTF with the capability to provide required care. If approved, the Chief of Naval Operations will furnish, through the chain of command, the commanding officer of the designated naval MTF authorization for admission of the beneficiary for treatment.

**§ 728.42 NATO.**

(a) *NATO SOFA nations.* Belgium, Canada, Denmark, Federal Republic of Germany, France, Greece, Iceland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Turkey, the United Kingdom, and the United States.

(b) *Beneficiaries.* The following personnel are beneficiaries under the conditions set forth.

(1) *Members of NATO military services and their dependents.* Military personnel of NATO nations, who, in connection with their official duties, are stationed in or passing through the United States, and their dependents residing in the United States with the sponsor may be provided care in naval MTFs to the same extent and under the same conditions as comparable U.S. uniformed services personnel and their dependents. Accordingly, the provisions of § 728.12 are applicable to military personnel and § 728.31(d) through § 728.34 to accompanying dependents.

(2) *Military ships and aircraft personnel.* Crew and passengers of visiting military aircraft and crews of ships of NATO nations which land or come into port at NATO or U.S. military airfields or ports within NATO countries.

(3) *NATO liaison officers.* In overseas areas, liaison officers from NATO Army Forces or members of a liaison detachment from such a Force.

(c) *Application for care.* Military personnel of NATO nations stationed in the United States and their dependents will present valid Uniformed Services Identification and Privilege Cards (DD 1173) when applying for care. For other eligible persons passing through the United States on official business and those enumerated in paragraph (b) (2) and (3) of this section, orders or other official identification may be accepted in lieu of the DD 1173.

(d) *Disposition.* When it becomes necessary to return individuals to their home country for medical reasons, make immediate notification to the

NATO unit sponsoring the member or dependent's sponsor. Include all pertinent information regarding the physical and mental condition of the individual concerned. Following are details of agreements among the Armed Forces of NATO, CENTO, and SEATO Nations on procedures for disposition of allied country patients by DOD medical installations.

(1) *Transfer of patients.* (i) The patient's medical welfare must be the paramount consideration. When deciding upon transfer of a patient, give due consideration to any increased medical hazard which the transfer might involve.

(ii) Arrangements for disposition of patients should be capable of being implemented by existing organizations. Consequently, no new establishment should be required specially for dealing with the transferring of allied casualties.

(iii) Transfer patients to their own national organization at the earliest practicable opportunity consistent with the observance of principles established in paragraph (d)(1) (i) and (ii) of this section and under any of the following conditions:

(A) When a medical facility of their own nation is within reasonable proximity of the facility of the holding nation.

(B) When the patient is determined to require hospitalization in excess of 30 days.

(C) Where there is any question as to the ability of the patient to perform duty upon release from the MTF.

(iv) The decision as to whether a patient, other than one requiring transfer under paragraph (d)(1)(iii) of this section, is fit for release from the MTF is the responsibility of the facility's commanding officer.

(v) All clinical documents, to include x-rays, relating to the patient will accompany such patients on transfer to their own national organization.

(vi) The decision of suitability for transfer and the arrangements for transfer will be the responsibility of the holding nation.

(vii) Final transfer channels should be arranged by local liaison before actual movement.

(viii) Patients not suitable for transfer to their own national organization must be dealt with for treatment and disposition purposes as patients of the holding nation until they are transferred, *i.e.*, they will be dealt with in military hospitals, military medical installations, or in civilian hospitals that are part of the military medical evacuation system of the holding nation.

(2) *Classification of patients.* Different channels for disposition will be required for the following two types of patients:

(i) *Patients not requiring admission.* Patients not requiring admission to an MTF will be returned to their nearest national unit under arrangements to be made locally.

(ii) *Patients admitted to medical installations.* All such patients will be dealth with per paragraph (d)(1) of this section.

(e) *Care authorized outside the 48 contiguous United States.* Major overseas commanders may authorize care in naval MTFs subject to the availability of space, facilities, and the capabilities of the professional staff in emergency situations only, *Provided*, the required care cannot reasonably be obtained in medical facilities of the host country or in facilities of the patient's own country, or if such facilities are inadequate. Provide hospitalization only for acute medical and surgical conditions, exclusive of nervous, mental, or contagious diseases or those requiring domiciliary care. Administer dental treatment only as an adjunct to authorized inpatient care. Do not include dental prostheses or orthodontia.

### § 728.43 Members of other foreign military services and their dependents.

(a) *Foreign military service members.* For the purpose of § 728.43, members of foreign military services include only:

(1) Military personnel carried on the current Diplomatic List (Blue) or on the List of Employees of Diplomatic Missions (White) published by the Department of State.

(2) Military personnel assigned or attached to United States military units for duty; military personnel on foreign military supply missions accredited to and recognized by one of the military

departments; and military personnel on duty in the United States at the invitation of the Secretary of Defense or one of the military departments. For the purpose of § 728.43, members of foreign Security Assistance Training Programs (SATP) and Foreign Military Sales (FMS) are not included (see § 728.44).

(3) Foreign military personnel accredited to joint United States defense boards or commissions when stationed in the United States.

(4) Foreign military personnel covered in agreements entered into by the Secretary of State, Secretary of Defense, or one of the military departments to include, but not limited to, United Nations forces personnel of foreign governments exclusive of NATO nations.

(b) *Care authorized in the United States*. Military personnel of foreign nations not covered in § 728.42 and their dependents residing in the United States with the sponsor may be routinely provided only outpatient medical care in naval MTFs on a reimbursable basis. *Provided*, the sponsor is in the United States in a status officially recognized by an agency of the Department of Defense. Dental care and hospitalization for such members and their dependents are limited to emergencies. All outpatient care and hospitalization in emergencies are subject to reimbursement as outlined in § 728.46.

(c) *Application for care*. All personnel covered by § 728.43 will present orders or other official U.S. identification verifying their status when applying for care.

(d) *Disposition*. When it becomes necessary to return individuals covered by § 728.43 to their home country for medical reasons, make immediate notification to the sponsoring unit of the patient or patient's sponsor with a copy to the Chief of Naval Operations (OP–61). Include all pertinent information regarding the physical and mental condition of the individual concerned and full identification, diagnosis, prognosis, estimated period of hospitalization, and recommended disposition. Additionally, the provisions of § 728.42(d)(1) and (2) apply.

(e) *Care authorized outside the 48 contiguous United States*. Major overseas commanders may authorize care in naval MTFs subject to the availability of space, facilities, and the capabilities of the professional staff in emergency situations only. *Provided*, the required care cannot reasonably be obtained in medical facilities of the host country or in facilities of the patient's own country, or if such facilities are inadequate. Provide hospitalization only for acute medical and surgical conditions, exclusive of nervous, mental, or contagious diseases or those requiring domiciliary care. Administer dental treatment only as an adjunct to authorized inpatient care. Do not include dental prostheses or orthodontia.

### § 728.44 Members of security assistance training programs, foreign military sales, and their ITO authorized dependents.

(a) *Policies*—(1) *Invitational travel orders screening*. Prior to determining the levels of care authorized or the government or person responsible for payment for care rendered, carefully screen ITOs to detect variations applicable to certain foreign countries. For example, unless orders state differently, Kuwait has a civilian health plan to cover medical expenses of their trainees; trainees from the Federal Republic of Germany are personally responsible for reimbursing for inpatient care provided to their dependents; and all inpatient medical services for trainees from France and their dependents are to be borne by the individual trainee.

(2) *Elective and definitive surgery*. The overall policy with respect to elective and definitive surgery for Security Assistance Training Program (SATP), Foreign Military Sales (FMS) personnel and their dependents is that conservatism will at all times prevail, except bona fide emergency situations which might threaten the life or health of an individual. Generally, elective care is not authorized nor should be started. However, when a commanding officer of a naval MTF considers such care necessary to the early resumption and completion of training, submit the complete facts to the Chief of Naval

Operations (OP–63) for approval. Include the patient's name (sponsor's also if patient is an ITO authorized dependent), grade or rate, country of origin, diagnosis, type of elective care being sought, and prognosis.

(3) *Prior to entering training*. Upon arrival of an SATP or FMS trainee in the United States or at an overseas training site, it is discovered that the trainee cannot qualify for training by reason of a physical or mental condition which will require a significant amount of treatment before entering or completing training, return such trainees to their home country immediately or as soon thereafter as travel permits.

(4) *After entering training*. When trainees require hospitalization or are disabled after entering a course of training, return them to their home country as soon as practicable when, in the opinion of the commanding officer of the medical facility, hospitalization or disability will prevent training for a period in excess of 30 days. Forward a copy of the patient's clinical records with the patient. When a trainee is accepted for treatment that is not expected to exceed 30 days, notify the commanding officer of the training acvitity. Further, when a trainee is scheduled for consecutive training sessions convening prior to the expected data of release from a naval MTF, make the next scheduled training activity an information addressee. Upon release from the MTF, direct such trainees to resume training.

(b) *Care authorized*. Generally, all SATP and FMS personnel and their ITO authorized dependents are entitled to care to the same extent. However, certain agreements require that they be charged differently and that certain exclusions apply.

(1) *NATO members and their ITO authorized dependents*—(i) *Foreign military sales (FMS)*. Subject to reimbursement per § 728.46, FMS personnel of NATO nations who are in the United States or at U.S. Armed Forces installations outside the United States and their accompanying ITO authorized dependents will be provided medical and dental care in naval MTFs to the same extent and under the same conditions as comparable United States military personnel and their dependents except that:

(A) Dependent dental care is not authorized.

(B) Dependents are not authorized cooperative care under CHAMPUS.

(ii) *International military education and training (IMET)*. Subject to reimbursement for inpatient care at the appropriate IMET rate for members or at the full reimbursement rate for dependents, IMET personnel of NATO nations who are in the United States or at U.S. Armed Forces installations outside the United States and accompanying dependents will be provided medical and dental care in naval MTFs to the same extent and under the same conditions as comparable United States military personnel and their dependents except that:

(A) Dependent dental care is not authorized.

(B) Dependents are not authorized cooperative care under CHAMPUS.

(2) *Other foreign members and ITO authorized dependents*—(i) *Foreign military sales*. Subject to reimbursement by the trainee or the trainee's government for both inpatient and outpatient care at the full reimbursement rate, FMS personnel of non-NATO nations and ITO authorized accompanying dependents may be provided medical and dental care on a space available basis when facilities and staffing permit except that:

(A) Prosthetic devices, hearing aids, orthopedic footwear, and similar adjuncts are not authorized.

(B) Spectacles may be furnished when required to enable trainees to perform their assigned duties, *Provided* the required spectacles are not available through civilian sources.

(C) Dental care is limited to emergency situations for the military member and is not authorized for dependents.

(D) Dependents are not authorized cooperative care under CHAMPUS.

(ii) *International military education and training*. Subject to reimbursement for both inpatient and outpatient care at the appropriate rates for members and dependents, IMET personnel of non-NATO nations may be provided medical and dental care on a space available basis when facilities and staffing permit except that:

(A) Prosthetic devices, hearing aids, orthopedic footwear, and similar adjuncts are not authorized.

(B) spectacles may be furnished when required to enable trainees to perform their assigned duties, *Provided* the required spectacles are not available through civilian sources.

(C) Dental care is limited to emergency situations for military members and is not authorized for dependents.

(D) Dependents are not authorized cooperative care under CHAMPUS.

(c) *Application for care.* Trainees and accompanying dependents will present official U.S. identification or orders verifying their status when applying for care. If any doubt exists as to the extent of care authorized, ITOs should be screened (see paragraph (a)(1) of this section).

(d) *Notification.* When trainees require hospitalization as a result of illness or injury prior to or after entering training, the training activity (the hospital if patient has been admitted) will make a message report through the normal chain of command to the Chief of Naval Operations (OP–63) with information copies to MAAG, COMNAV MEDCOM, Navy International Logistics Control Office (NAVIL CO), Unified Commander, the affected office, and the foreign naval attache concerned. Include details of the incident, estimated period of hospitalization, physical or mental condition of the patient, and diagnosis. For further amplification, see OPNAVINST 4950.1H and NAVCOMPTMAN 032103.

### § 728.45 Civilian components (employees of foreign military services) and their dependents.

(a) *Care authorized.* Beneficiaries covered in this section are only authorized care in naval MTFs in the United States and then only civilian humanitarian emergency care on a reimbursable basis (subpart J) rendered at installations which have been designated as remote by the Secretary of the Navy. Make arrangements to transfer such beneficiaries to a civilian facility as soon as their condition permits.

(b) *Potential beneficiaries*—(1) *NATO.* Civilian employee personnel (and their dependents residing with them) accompanying military personnel in § 728.42(b)(1), *Provided*, the beneficiaries are not stateless persons nor nationals of any state which is not a party to the North Atlantic Treaty, nor nationals of, nor ordinarily residents in the United States.

(2) *Others.* Civilian personnel not covered in § 728.45(b)(1) (and their dependents residing with them) accompanying personnel of foreign nations on duty in the United States at the invitation of the Department of Defense or one of the military departments.

(c) *Application for care.* Personnel covered by the provisions of § 728.45 will present orders or other official U.S. identification verifying their status when applying for care.

### § 728.46 Charges and collection.

(a) *Policy.* Pub. L. 99–591, section 9029, contains provisions prohibiting the expenditure of appropriated funds ". . . to provide medical care in the United States on an inpatient basis to foreign military and diplomatic personnel or their dependents unless the Department of Defense is reimbursed for the costs of providing such care: *Provided,* That reimbursements . . . shall be credited to the appropriations against which charges have been made for providing such care, except that inpatient medical care may be provided in the United States without cost to military personnel and their dependents from a foreign country if comparable care is made available to a comparable number of United States military personnel in that foreign country."

(b) *Canadian agreement.* On 3 November 1986, the Department of National Defence of Canada and DOD concluded a comparable care agreement that covers certain military personnel. The agreement stipulates that:

(1) DOD will, upon request, provide Canadian Forces members the same range of medical and dental services under the same conditions and to the same extent as such services are provided comparable United States military personnel. Inasmuch as the agreement covers only certain military personnel, the reimbursement provisions

of Pub. L. 99–591 remain in effect for inpatient care provided to Canadian diplomatic personnel, Canadian dependents, and Canadian foreign military sales trainees who receive care in the United States. Further:

(2) Permanently stationed Canadian units with established strengths of more than 150 personnel are expected to have integral health care capability. Any health care services which members of such units receive from the host nation will be provided on a full reimbursement basis. Groups of larger than 150 personnel, which conduct collective training in the United States, are expected to deploy with an organic unit medical capability. Naval MTFs may be requested to provide services, beyond the capability of the organic unit, at full reimbursement rates.

(c) *Procedures.* (1) Until otherwise directed, naval MTFs in the 50 United States will collect the full reimbursement rate (FRR) for inpatient care provided to all foreign military personnel (except Canadians covered by the comparable care agreement in § 728.46(b), and military personnel connected with a Foreign Military Sales (FMS) case number), foreign diplomatic personnel, and to the dependents of both whether they are in the United States on official duty or for other reasons.

(2) Subpart J contains procedures for the initiation of collection action when inpatient care is rendered to beneficiaries from NATO nations and when either inpatient or outpatient care is rendered to all others enumerated in this part. Chapter II, part 4 of NAVMED P–5020 is applicable to the collection of and accounting for such charges.

## Subpart F—Beneficiaries of Other Federal Agencies

### § 728.51 General provisions—the "Economy Act."

The Economy Act, 31 U.S.C. 1535, generally permits agency heads, or heads of major organizational units of agencies, to procure goods and services from other agencies or within their own agency so long as funds for procurement are available, the order is in the best interest of the Government, the source from which the goods or services are ordered can produce them or obtain them by contract, and the internal or inter-agency procurement is more convenient, or less expensive, than commercial procurement. Provisions of the Economy Act apply to requests from other Federal agencies for medical and dental care for beneficiaries for whom they are responsible. Consult specific provisions of the Act respecting financial and acounting limitations and requirements.

### § 728.52 Veterans Administration beneficiaries (VAB).

(a) *Eligible beneficiaries*—Those who have served in the Armed Forces, have been separated under conditions other than dishonorable, and have been determined by the Veterans Administration (VA) to be eligible for care at VA expense. Prior to 7 September 1980, veterans status could be obtained by virtue of 1 day's honorable service. The following restrictions do not apply to individuals who are discharged from active duty because of a disability or who were discharged for reasons of "early out" or hardship program under 10 U.S.C. 1171 and 1173.

(1) For individuals with an original enlistment in the military service after 7 September 1980, the law generally denies benefits, including medical care.

(2) For individuals entering service after 16 October 1981, the law generally denies medical benefits when such individuals do not complete the shorter of:

(i) Twenty-four months of continuous active duty, or

(ii) The full period for which that person was called or ordered to active duty.

(b) *Inpatient control*—Each VAB admitted will be required to conform to regulations governing the internal administration of the naval facility. Restrictive or punitive measures, including disciplinary action or denial of privileges, will conform as nearly as possible to VA instructions.

(c) *Resolution of problems*—All problems pertaining to VABs, including admission, medical or other records, and all correspondence will be matters of resolution between the commanding officer of the naval facility and the VA

office of jurisdiction authorizing admission. Questions of policy and administration which cannot be so resolved will be forwarded, through the normal chain of command, to the Administrator of Veterans Affairs via COMNAVMEDCOM for resolution.

(d) *Care in the United States*—(1) *Inpatient care.* An eligible VAB may be admitted to a naval MTF on presentation of a written authorization for admission signed by an official of the VA office of jurisdiction. Neurological and certain neuropsychiatric patients without obvious evidence of psychosis and not requiring restraints, and instances of suspected tuberculosis, may be admitted for diagnosis. When diagnosed, promptly report instances of psychosis, psychoneurosis, and tuberculosis of present clinical significance to the VA office of jurisdiction with a request for transfer to a VA facility.

(i) *Extent of care.* Provide eligible VABs medical and surgical care, including prostheses such as eyes and limbs and appliances such as hearing aids, spectacles, or orthopedic appliances when required for the proper treatment of the condition upon which eligibility is based.

(ii) *Disposition of emergency admission.* Notify the appropriate VA office of jurisdiction by message or other expeditious means within 72 hours after the date and hour of an emergency admission of a potential VAB. Include a request for an authorization for admission and emergency treatment. If VA denies VAB status to such a person admitted in an emergency, the provisions of § 728.81(a) are applicable. Once admitted in an emergency situation, discharage a VAB promptly upon termination of the emergency unless arrangements have been made with the VA office of jurisdiction:

(A) For transfer to a VA treatment facility if further treatment is required.

(B) To retain the patient as a VAB in the naval MTF.

(2) *Outpatient care.* Outpatient care, including post hospitalization outpatient care, may be provided upon authorization by the VA office of jurisdiction. When outpatient followup care is requested, commanding officers are responsible for determining whether capabilities and workload permit providing such care. In an emergency, provide necessary care.

(3) *Physical examinations.* Upon a determination by a naval MTF commanding officer that space, facilities, and capabilities exist, naval MTFs may provide physical examinations when requested by the VA for the purpose of adjudicating claims for VA physical disability compensation. If authorized by the VA, patients may be admitted when the examination requires more than 1 day.

(4) *Dental care.* Limit dental treatment to inpatients who require services adjunctive to medical or surgical conditions for which hospitalized.

(e) *Care outside the United States*—(1) *Eligible beneficiaries.* Beneficiaries described in paragraph (a) of this section who are citizens of the United States and residing or sojourning abroad may, within the capabilities of the facility as determined by the commanding officer, be provided inpatient and outpatient care upon presentation of an authorization from the appropriate VA office of jurisdiction listed in paragraph (e)(3) of this section.

(2) *Emergency care.* Overseas naval MTFs furnishing emergency care to potential VABs will promptly notify the appropriate VA office of jurisdiction and request authorization for treatment and instructions for disposition of the patient.

(3) *Offices of jurisdiction.* The following activities are vested with responsibility for issuing authorizations for care and furnishing dispisition instructions for VABs in overseas naval MTFs:

(i) In the Trust Territory of the Pacific (Micronesia), VA Office, Honolulu, Hawaii.

(ii) In the Philippines, VA Regional Office, Manila, Philippines.

(iii) In Canada, Canadian Department of Veterans Affairs, Ottawa, Canada.

(iv) In all other foreign countries, consular offices of U.S. embassies.

(f) *Forms required.* (1) Complete a VA 10–10 (Application for Medical Benefits) when potential VABs are admitted for emergency care without prior authorization.

(2) Prepare a VA 10–10m (Medical Certificate and History) when care is rendered. All information required in the medical certificate thereon will be furnished whether the admission is subsequently approved or disapproved by the VA office of jurisdiction.

(3) Since the completion of VA 10–10m requires an examination of patients, admissions which are disapproved will be reported as medical examinations on DD 7A, Report of Treatment Furnished Pay Patients, Outpatient Treatment Furnished (part B) (See subpart J).

(4) Prepare and submit a DD 7 (Report of Treatment Furnished Pay Patients, Hospitalization Furnished (part A)) on all VABs and potential VABs admitted (see subpart J).

(5) Complete an SF 502 (Narrative Summary) or SF 539 (Abbreviated Clinical Record), as appropriate, when a VAB or potential VAB is discharged or otherwise released. When an interim report of hospitalization is requested by the VA office of jurisdiction, it may be prepared on an SF 502.

### § 728.53 Department of Labor, Office of Workers' Compensation Programs (OWCP) beneficiaries.

(a) *Potential beneficiaries.* The following may be beneficiaries of one of the programs sponsored by the Office of Workers' Compensation Programs (OWC) under the conditions set forth. They are not beneficiaries of OWCP until authorized as such by the appropriate district officer of OWCP. However, they may be carried as potential beneficiaries pending OWCP determination of eligibility. DOD civilian employees provided medical services under a Defense or service health program are not included under this authority (see subpart G).

(1) Members and applicants for membership in the Reserve Officers' Training Corps of the Navy, Army, and Air Force, provided the condition necessitating treatment was incurred in line of duty during an off-campus training regimen. Such care is authorized for injury (a disease or illness which is the proximate result of performance of training is considered an injury) incurred while engaged in:

(i) Training.

(ii) Flight instructions.

(iii) Travel to or from training or flight instructions.

(2) The following employees of the Government of the United States, regardless of nationality or place of work, are entitled to receive care as outlined in paragraph (e) of this section for work incurred traumatic injuries at the expense of OWCP. (In addition to injury by accident, a disease or illness which is the proximate result of performance of employment duties is considered an injury.) This category includes but is not limited to:

(i) Civilian student employees in training at Navy and Marine Corps facilities.

(ii) Civilian seamen in the service of vessels operated by the Department of the Army (see paragraph (a)(7) of this section and § 728.80(c)(2) for civilian Military Sealift Command (MSC) personnel).

(iii) All civilian employees of the Government except nonappropriated-fund-activity employees. Nonappropriate fund employees may be covered under the Longshore and Harbor Workers' Compensation Act (contact cognizant district office of OWCP).

(3) Civilian members of the Civil Air Patrol (except Civil Air Patrol Cadets) for injury or disease which is the proximate result of active service or travel to and from such service, rendered in performance or support of operational missions of the Civil Air Patrol under the direction and written authority of the Air Force.

(4) Former Peace Corps enrollees for injury or disease which is the proximate result of their former employment with the Peace Corps or which was sustained or contracted while located with the Peace Corps outside the United States and its territories.

(5) Former Job Crops enrollees for injury or disease which is the proximate result of employment with the Job Corps.

(6) Former VISTA (Volunteers in Service to America) enrollees for injury or disease which is the proximate result of employment with VISTA.

(7) Military Sealift Command (MSC) civilian marine personnel (CIVMARPERS or CIVMARS) (including temporary employees, intermittent

employees, and employees with less than 1 year's service) are entitled to occupationally related care at the expense of OWCP. CIVMARS are in a crew status only after reporting to their assigned ship. They are in a travel status from crewing point to ship and return. While in a travel status, they are entitled to the same health care benefits as other Federal civil service employees in a travel status (5 U.S.C. 8101). CIVMARS presenting for treatment with a properly completed CA–16, Request for Examination and/or Treatment, will:

(i) Enter the naval MTF's system through the occupational medicine service.

(ii) Be treated for any injury or disease proximately caused by their employment. Although the actual determination of whether an illness or injury is occupationally related is a function of OWCP, determinations are based on the required injury report along with the treatment record from the attending physician. Therefore, when doubt exists as to the relationship of the condition to the potential patient's employment, the physician should report an unbiased medical conclusion and the medical rationale therefor, indicating the conditions which are responsible for the claimant's disability. As a general rule, the following may be initially considered as occupationally related, however, it should be emphasized that OWCP is the final approval authority:

(A) Any injury or illness occurring as a direct result of employment. May occur on a ship, at a Government installation ashore, or in an aircraft while performing a requirement of employment.

(B) Any injury or illness which becomes manifest while away from work (on leave or liberty) while in a crew status or travel status as long as the condition may be directly related to job activities or to exposures incident to travel to ship assignment.

(C) Required immunizations.

(D) Required physical examinations.

(E) Periodic medical surveillance screening examinations for DOD occupational and industrial health programs, *i.e.*, asbestos medical surveillance, hearing conservation, etc.

(iii) Be referred to a non-Federal source of care where back-to-work care may be provided at the CIVMAR's expense after, if necessary, the immediate emergency is alleviated when a reasonable determination can be made that the injury or illness is not occupationally related.

(A) Per 5 U.S.C. 7901(c)(3), the health service program for Federal civilian employees is limited to referral of employees, upon their request, to private sources of care.

(B) Long term extended care of chronic illnesses such as hypertension, diabetes, etc., is not authorized in naval MTFs at the expense of OWCP nor at the CIVMAR's personal expense.

(C) Patients who cannot be referred, because of medical reasons or because non-Federal sources are not available or available but inadequate, may be retained in naval MTFs at the expense of the CIVMAR or of his or her private insurance until transfer becomes possible. Although the means of access to the naval MTF may have been through the occupational medicine service, retention in the naval MTF is on a civilian humanitarian basis. This is also applicable when OWCP disallows a CIVMAR's claim (see paragraph (c) of this section).

(b) *Authorization required*. Personnel in paragraph (a) (1) through (6) may be rendered inpatient and outpatient care as outlined in paragraph (e) of this section, unless otherwise stipulated in this section, upon presentation of a properly prepared and signed authorization from CA–16 (Request for Examination and/or Treatment). District offices of OWCP will honor these authorizations for 60 days unless written notice of termination of authorization is given earlier. Whereas the CA–16 is used primarily for traumatic injuries, it may also be used to authorize examination and treatment for disease or illness provided the affected agency has obtained prior permission from the cognizant district office of OWCP. If the condition for which treatment is requested appears related to employment, treatment of beneficiaries in paragraph (a) (1) through (7) of this section may be initiated without presentation of a CA–16. Patients provided

treatment without a CA–16 may be carried as OWCP beneficiaries from the time of initial treatment, provided the appropriate district office of OWCP is notified and requested to submit a CA–16 within 48 hours giving authorization as of the date of actual treatment. OWCP will not be liable for payment of bills for unauthorized treatment. Post hospitalization care following authorized inpatient care does not require an additional authorization. First aid treatment rendered civilian employees does not require an authorization form

(c) *Disallowance by OWCP.* When OWCP determines that any claim should be disallowed, OWCP will advise the naval facility rendering care that no further treatment should be rendered at OWCP expense. The patient ceases to be an OWCP beneficiary as of the date of receipt of the notice of disallowance by the naval MTF and the patient will be so notified. Any treatment subsequent to the date of receipt of the notice of disallowance will be at the personal expense of the patient (see § 728.81(a)).

(d) *Authorization for transfer.* Prior approval of OWCP is required before a transfer can be effected, except in an emergency or when immediate treatment is deemed more appropriate in another Federal facility. When transfer is effected without approval, the transferring facility will immediately request such authorization from the appropriate district office of OWCP. When authorized by OWCP, evacuation to the United States can be effected per OPNAVINST 4630.25B. Medical records and a CA–16 will accompany such patients.

(e) *Care authorized*—(1) *Inpatient care.* Medical and surgical care necessary for the proper treatment of the condition upon which eligibility is based. Specific OWCP authorization is required before major surgical procedures can be performed unless the urgency of the situation is such that time does not permit obtaining said authorization. All necessary prostheses, hearing aids, spectacles, and orthopedic appliances will be furnished when required for proper treatment of the condition upon which eligibility is based. Upon specific authorization, damaged or destroyed medical braces, artificial limbs, and other orthopedic and prosthetic devices will be replaced or repaired, except that eyeglasses and hearing aids will not be replaced or repaired unless their damage or destruction is incidental to a personal injury requiring medical services.

(2) *Outpatient care.* Complete medical and surgical care not requiring hospitalization, and posthospitalization services following authorized inpatient care in a naval MTF for the proper treatment of the condition upon which eligibility is based.

(3) *Dental care.* Limit dental treatment to emergencies and that care necessary as an adjunct to inpatient hospital care authorized in advance. Such care will not include dental prostheses, unless specifically authorized, nor orthodontic treatment.

(f) *Reports and records.* (1) Copies of medical records will accompany OWCP patients being transferred from one medical treatment facility to another. Records accompanying OWCP patients to a debarkation hospital will be the same as for military personnel and will clearly identify the patient as an OWCP beneficiary.

(2) Forward a CA–20 (Attending Physician's Report) to the appropriate district office of OWCP on discharge of the patient unless hospitalization exceeds 1 month. In such instances, a report will be submitted every 30 days. When extensive hospitalization is required, use an SF 502 or a narrative format in lieu of CA–20. When submitted to OWCP, the physician's report will include:

(i) History.

(ii) Physical findings.

(iii) Laboratory findings.

(iv) Abstract of hospital records.

(v) Diagnosis for conditions due to injury and not due to injury.

(vi) Rationalized medical opinion for the physician's belief that the illness or disease treated was causally related to a specific condition or set of conditions to which the claimant was subjected.

(vii) Condition on discharge with opinion as to degree of impairment due to injury, if any.

(3) Complete and submit, per subpart J, a DD 7 (Report of Treatment Furnished Pay Patients, Hospitalization

Furnished, part A) or DD 7A (Report of Treatment Furnished Pay Patients, Outpatient Treatment, part B) when outpatient or inpatient care is rendered to any OWCP beneficiary.

### § 728.54 U.S. Public Health Service (USPHS), other than members of the uniformed services.

(a) *Potential beneficiaries.* The following may be beneficiaries of the USPHS for care in naval MTFs upon submission of the necessary form from appropriate officials as outlined in paragraph (b) of this section.

(1) *Within and outside the United States.* Any individuals the USPHS may determine to be eligible for care on an interagency reimbursable basis.

(2) *Within the 48 Contiguous United States and the District of Columbia.* American Indians, Alaska Natives, Eskimos, and Aleuts.

(3) *In Alaska.* American Indians, Eskimos, and Aleuts.

(b) *Authorization required*—(1) *Normal circumstances.* An American Indian or Alaska Native may be rendered inpatient care upon presentation of form HRSA 43 (Contract Health Service Purchase Order for Hospital Services Rendered) or HRSA form 64 (Purchase/Delivery Order for Contract Health Services Other Than Hospital Inpatient or Dental). Either form must be signed by an appropriate Indian Health Service or Alaska Native Health Service area/program official.

(2) *Emergencies.* In an emergency, care may be rendered upon written request of patient's commanding officer or superior officer, or the patient if neither of the above is available. When emergency care is rendered without prior authorization, the facility rendering care must notify the service unit director of the patient's home reservation within 72 hours from the time such care is rendered unless extenuating circumstances preclude prompt notification.

(c) *Care authorized.* Unless limited by the provisions stipulated in paragraph (a) of this section and subject to the provisions of § 728.3, the following care may be rendered, when requested, to all beneficiaries enumerated in paragraph (a) of this section.

(1) *Inpatient care.* Necessary medical and surgical care.

(2) *Outpatient care.* Necessary medical and surgical care.

(3) *Dental care.* (i) Limit dental care in the United States, its territories, possessions, and the Commonwealth of Puerto Rico to emergencies for the relief of pain or acute conditions and that necessary as an adjunct to inpatient hospital care. Prosthetic dental appliances and permanent restorations are not authorized.

(ii) In overseas areas, dental care is authorized to the extent necessary pending the patient's return to the United States, its territories, possessions, or the Commonwealth of Puerto Rico.

(d) *Report.* Complete and submit, per subpart J, a DD 7 (Report of Treatment Furnished Pay Patients, Hospitalization Furnished, part A) or a DD 7A (Report of Treatment Furnished Pay Patients, Outpatient Treatment, part B) when outpatient or inpatient care is rendered.

### § 728.55 Department of Justice beneficiaries.

Upon presentation of a letter of authorization that includes disposition of SF 88 (Report of Medical Examination), SF 93 (Report of Medical History), and address for submission of claim, the following personnel may be furnished requested care as beneficiaries of the Department of Justice. See subpart J on completing and submitting forms for central collection of the cost of care provided.

(a) *Federal Bureau of Investigation.* Investigative employees of the Federal Bureau of Investigation (FBI) and applicants for employment as special agents with the FBI may be provided:

(1) Immunizations.

(2) Physical examinations and hospitalization when required to determine physical fitness. Use this period of hospitalization for diagnostic purposes only. Do not correct disqualifying defects.

(b) *U.S. Marshals.* U.S. Marshals may receive physical examinations and hospitalizations when required to determine physical fitness. Use this period

of hospitalization for diagnostic purposes only. Do not correct disqualifying defects.

(c) *Claimants against the United States.* Claimants whose suits or claims against the United States are being defended by the Department of Justice may be furnished physical examinations to determine the extent and nature of the injuries or disabilities being claimed. Hospitalization is authorized for proper conduct of the examination. Upon completion, forward the report of the examination promptly to the U.S. Attorney involved.

### § 728.56 Treasury Department beneficiaries.

(a) *Potential beneficiaries.* The following may be beneficiaries of the Treasury Department and may be rendered care as set forth below.

(1) Secret Service Special Agents and support personnel.

(2) Secret Service Agents providing protection to certain individuals.

(3) Persons being provided protection by the Secret Service.

(4) Agents of the U.S. Customs Service.

(5) Prisoners (detainees) of the U.S. Customs Service.

(b) *Care authorized.* (1) Secret Service Special Agents may be provided routine annual physical examinations upon request and presentation of a letter of authorization. Conduct and record examinations in the same manner as routine examinations rendered naval officers except that they may be conducted only on an outpatient basis. If hospitalization is considered desirable in connection with an examination, patient administration department personnel will contact the United States Secret Service at (202) 535–5641 at the address in paragraph (c) of this section. Enter a statement, attesting to the fact that hospitalization is desirable, in item 73 or 75 of the SF 88, as appropriate, before forwarding to the United States Secret Service as directed by the letter of authorization.

(2) Secret Service Agents providing protection to certain individuals and those persons being provided such protection may be rendered all required medical services including hospitalization subject to the provisions of § 728.3.

(3) Agents of the U.S. Customs Service and their prisoners (detainees) may be provided emergency medical treatment and evacuation services to the nearest medical facility (military or civilian) in those remote areas of the United States where no other such services are available. Limit evacuation to the continental United States and do not cross borders. The Navy's responsibility for medical care of such prisoners terminates once the medical emergency has been resolved. Guarding of prisoners, while they or their captors are receiving treatment at naval MTFs, remains the responsibility of the U.S. Customs Service or other appropriate Federal (nonmilitary) law enforcement agencies.

(c) *Reports and records.* (1) When examinations are rendered to Secret Service Special Agents and support personnel, forward one copy of the SF 88, one copy of the SF 93, and one copy of any forms provided with the letter of authorization to United States Secret Service, Administrative Operations Division, Safety and Health Branch, 1800 G Street, NW., Room 845, Washington, DC 20223 or as otherwise directed by the letter of authorization. Provide an information copy to the Deputy Comptroller of the Navy.

(2) Complete and submit, per subpart J, a DD 7 (Report of Treatment Furnished Pay Patients, Hospitalization Furnished, part A) or DD 7A (Report of Treatment Furnished Pay Patients, Outpatient Treatment, part B) when outpatient or inpatient care is rendered.

### § 728.57 Department of State and associated agencies.

Eligibility for care under the provisions of this section will be determined by the Department of State, Office of Medical Services.

(a) *Beneficiaries.* Officers and employees of the following agencies, their dependents, and applicants for appointment to such agencies are authorized inpatient and outpatient medical care as set forth below in addition to that care that may be authorized elsewhere within this part (*i.e.*, §§ 728.53, 728.55, 728.56, and 728.58). Limit dental care to that delineated in paragraph (b)(6) of this section.

(1) Department of State-U.S.Arms Control and Disarmament Agency and the Office of International Conferences.

(2) U.S. Agency for International Development.

(3) International Communications Agency.

(4) ACTION—Peace Corps Staff.

(5) Department of Agriculture—Foreign Agriculture Service.

(6) Department of Commerce—Bureau of Public Roads.

(7) Department of Interior—Bureau of Reclamation and the U.S. Geological Survey.

(8) Department of Transportation—Federal Aviation Administration and the Federal Highway Administration.

(9) Department of Justice—Drug Enforcement Agency.

(10) Department of Treasury—U.S. Customs, U.S. Secret Service, Office of International Affairs (OIA), U.S.-Saudi Arabian Joint Commission for Economic Cooperation (JECOR), and the Internal Revenue Service.

(11) National Aeronautics and Space Administration.

(12) Library of Congress.

(13) Beneficiaries of such other agencies as may be included in the Department of State Medical Program.

(b) *Care authorized*—(1) *General*. The Foreign Service Act of 1946, as amended, authorizes care delineated in this section. Subject to the restrictions and priorities of § 728.3 and the restrictions of this section, care may be rendered at the expense of the Department of State or one of the agencies listed in paragraph (a) of this section. The law allows for payment when care is furnished for an illness or injury which results in hospitalization or equal treatment. Outpatient care is only authorized as an adjunct to hospitalization.

(2) *Overseas*. (i) When, in the opinion of the principal or administrative officer of an overseas post of the Department of State, an individual meets the conditions of eligibility, the post will furnish authorization to the naval MTF for care at the expense of the Department of State or one of the agencies listed in paragraph (a) of this section.

(ii) Should the Department of State official determine that the illness or injury does not meet the conditions of eligibility for care at the expense of one of the agencies, all care provided will be at the expense of the patient or patient's sponsor and charged at the full reimbursement rate.

(3) *In the United States*. (i) Care is not authorized for an injury or illness incurred in the United States. Authorizations and other arrangements for care in the United States for individuals incurring injury or illness outside the United States will be provided by the Deputy Assistant Secretary for Medical Services, Department of State, using appropriate authorization form(s). When personnel are admitted in an emergency without prior authorization, the commanding officer of the admitting naval MTF will immediately request authorization from the Deputy Assistant Secretary for Medical Services.

(ii) The extent of care furnished in the United States, to individuals in paragraph (a) of this section who are evacuated to the United States for medical reasons, will be comparable in all respects to that which is authorized or prescribed for these individuals outside the United States. When determined appropriate by the Deputy Assistant Secretary for Medical Services, officers and employees and their accompanying dependents who have returned to the United States for nonmedical reasons may be furnished medical care at the expense of one of the above agencies for treatment of an illness or injury incurred while outside the United States.

(4) *Physical examinations*. The Secretary of State is authorized to provide for comprehensive physical examinations, including dental examinations and other specific testing, of applicants for employment and for officers and employees of the Foreign Service who are U.S. citizens and for their dependents, including examinations necessary to establish disability or incapacity for retirement purposes. An authorization will be executed by an appropriate Department of State official and furnished in duplicate to the naval MTF, listing the type of examination required and stating that the individual is entitled to services at the expense of the Department of State. Furnish reports per the letter of authorization.

(5) *Immunizations.* Inoculations and vaccinations are authorized for officers, employees, and their dependents upon written authorization from an appropriate Department of State official. This authorization, in duplicate, will include the type of inoculation or vaccination required and will state that the individual is entitled to services at the expense of the Department of State. Furnish reports per the letter of authorization.

(6) *Dental care.* Limit dental care to emergencies for the relief of pain or acute conditions, or dental conditions as an adjunct to inpatient care. Do not provide prosthetic dental appliances.

(c) *Evacuation to the United States.* Should a beneficiary in an overseas naval MTF require prolonged hospitalization, the commanding officer of the overseas facility will report the requirement to the nearest Department of State principal or administrative officer and request authority to return the patient to the United States. Release dependents who decline evacuation to the custody of their sponsor. Aeromedical evacuation may be used per OPNAVINST 4630.25B. Travel of an attendant or attendants is authorized at Department of State expense when the patient is too ill or too young to travel unattended.

(d) *Report.* Complete and submit, per subpart J, a DD 7 (Report of Treatment Furnished Pay Patients, Hospitalization Furnished, part A) or DD 7A (Report of Treatment Furnished Pay Patients, Outpatient Treatment, part B) when outpatient or inpatient care is rendered.

### § 728.58 Federal Aviation Agency (FAA) beneficiaries.

(a) *Beneficiaries.* Air Traffic Control Specialists (ATCS) of the FAA when appropriate authorization has been furnished by the FAA regional representative.

(b) *Authorization.* Written authorization from an FAA Regional Flight Surgeon is required and will include instructions for forwarding the results of services rendered.

(c) *Care authorized.* Subject to the provisions of § 728.3, authorized personnel may be rendered chest x-rays, electrocardiograms, basic blood chemistries, and audiograms, without interpretation in support of the medical surveillance program for ATCS personnel established by the FAA.

(d) *Report.* Complete and submit, per subpart J, a DD 7A (Report of Treatment Furnished Pay Patients, Outpatient Treatment, part B) outpatient care is rendered.

### § 728.59 Peace Corps beneficiaries.

(a) *Potential beneficiaries.* (1) Applicants for the Peace Corps.

(2) Peace Corps Volunteers.

(3) Minor children of a Peace Corps volunteer living with the volunteer.

(b) *Care authorized in the United States.* Upon written request of a Peace Corps official, stating care to be provided and disposition of reports, the following may be provided subject to the provisions of § 728.3.

(1) *Physical examinations.* Physical examinations are authorized on an outpatient basis only. Except for interpretation of x-rays, make no assessment of the physical qualifications of examinees.

(i) Preselection physical examination may be provided applicants (volunteers) for the Peace Corps.

(ii) Separation or other special physical examinations may be provided volunteers and their dependents as listed in paragraph (a)(3) of this section. Unless otherwise prescribed in written requests, report such examinations of Peace Corps volunteers on SF–88 and SF–93. Include:

(A) Medical history and systemic review.

(B) Chest x-ray with interpretation.

(C) Complete urinalysis, serology, and blood type.

(D) Pelvic examination and Pap smear for all female volunteers.

(E) Hematocrit or hemoglobin for all females and for all males over 40 years of age.

(F) Electrocardiogram for all volunteers over 40 years of age.

(2) *Immunizations.* Immunizations, as requested, may be provided all beneficiaries listed in paragraph (a) of this section.

(3) *Medical care.* Both inpatient and outpatient care may be provided volunteers for illnesses or injuries occurring

during their period of service which includes all periods of training. Dependents of volunteers specified in paragraph (a)(3) of this section are authorized care to the same extent as their sponsor.

(4) *Dental care.* Limit dental care to emergencies. Render only that care essential to relieve pain or prevent imminent loss of teeth. All beneficiaries seeking dental care will be requested, whenever possible, to furnish advanced authorization.

(c) *Care authorized outside the United States*—(1) *Physical examinations.* Termination physical examinations may be provided volunteers and eligible dependents of volunteers. In most instances, Peace Corps staff physicians will provide these examinations; however, help may be required of naval MTFs for ancillary services.

(2) *Immunizations.* When requested, immunizations may be provided all beneficiaries listed in paragraph (a) of this section.

(3) *Medical care.* When requested in writing by a representative or physician of a Peace Corps foreign service post, volunteers, eligible dependents of volunteers, and trainees of the Peace Corps may be provided necessary medical care at Peace Corps expense. When emergency treatment is rendered without prior approval, forward a request to the Peace Corps foreign service post as soon as possible.

(4) *Dental care.* Limit dental care to emergencies. Render only that care essential to relieve pain or prevent imminent loss of teeth. All beneficiaries seeking dental care will be requested, whenever possible, to furnish advanced authorization.

(5) *Evacuation to the United States.* When a beneficiary in an overseas naval MTF requires prolonged hospitalization, the commanding officer of the overseas facility will report the requirement to the nearest Peace Corps foreign service post and request authorization to return the patient to the United States. Releases custody of dependents to their sponsor when evacuation is declined. Aeromedical evacuation may be used per OPNAVINST 4630.25B. Travel of attendant(s) is authorized when the patient is too ill or too young to travel unattended.

(d) *Report.* Complete and submit, per subpart J, a DD 7 (Report of Treatment Furnished Pay Patients, Hospitalization Furnished, part A) or DD 7A (Report of Treatment Furnished Pay Patients, Outpatient Treatment, part B) when outpatient or inpatient care is rendered.

### § 728.60 Job Corps and Volunteers in Service to America (VISTA) beneficiaries.

(a) *Beneficiaries.* Job Corps and VISTA enrollees and Job Corps applicants may be provided services as set forth. For former members, see § 728.53.

(b) *Authorization required*—(1) *Job Corps enrollees.* Presentation of a Job Corps Identification Card after appointment has been made by the corpsmember's Job Corps center.

(2) *Job Corps applicants.* Presentation of a letter from a screening agency (e.g., State Employment Service) after an appointment has been made by that agency.

(3) *VISTA Volunteers and VISTA Trainees.* A ''Blue-Cross and Blue Shield Identification Card'' is issued to such personnel as identification. Each card has a VISTA identification number which will be used on all records and correspondence.

(c) *Care authorized.* Normally, medical services are provided only when civilian of VA facilities are not available. or if available, are incapable of providing needed services. However, upon presentation of an appropriate authorization, the following services may be rendered subject to the provisions of § 728.3.

(1) Job Corps enrollees are authorized emergency medical care upon presentation of their Job Corps Identification Card; however, the corpsmember's Job Corps center should be notified immediately.

(2) Job Corps applicants may be provided preenrollment physical examinations and immunizations on an outpatient basis only.

(3) Job Corps enrollees, VISTA trainees, and VISTA volunteers are authorized:

(i) Outpatient medical examinations, outpatient treatment, and immunizations.

(ii) Inpatient care for medical and surgical conditions which, in the opinion of the attending physician, will benefit from definitive care within a reasonable period of time. When found probable that a patient will require hospitalization in excess of 45 days, notify the Commander, Naval Medical Command (MEDCOM–33) by the most expeditious means.

(iii) Limit dental care to emergencies. Render only that care essential to relieve pain or prevent imminent loss of teeth. Beneficiaries seeking dental care will be requested to furnish, whenever possible, advanced authorization.

(d) *Report.* Complete and submit, per subpart J, a DD 7 (Report of Treatment Furnished Pay Patients, Hospitalization Furnished, part A) or DD 7A (Report of Treatment Furnished Pay Patients, Outpatient Treatment, part B) when outpatient or inpatient care is rendered.

### § 728.61 Medicare beneficiaries.

(a) *Care authorized.* Emergency hospitalization and other emergency services are authorized for beneficiaries of the Social Security Health Insurance Program for the Aged and Disabled (Medicare) who reside in the 50 United States and the District of Columbia, Guam, Puerto Rico, the Virgin Islands, American Samoa, and the Northern Mariana Islands. Such care in naval MTFs may be rendered when emergency services, as defined in § 728.61(b), are necessary.

(b) *Emergency services.* Services provided in a hospital emergency room after the sudden onset of a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in:

(1) Placing the patient's health in serious jeopardy.

(2) Serious impairment to bodily functions of serious dysfunction of any bodily organ or part.

(c) *General provisions*—(1) *Limitations.* Benefit payments for emergency services under Medicare can be made for only that period of time during which the emergency exists. Therefore, when the emergency is terminated and it is permissible from a medical standpoint, discharge or transfer the patient to a facility that participates in Medicare.

(2) *Notification.* Notify the nearest office of the Social Security Administration as soon as possible when a Medicare beneficiary is rendered treatment.

(d) *Report.* Complete and submit, per subpart J, a DD 7 (Report of Treatment Furnished Pay Patients, Hospitalization Furnished, part A) or DD 7A (Report of Treatment Furnished Pay Patients, Outpatient Treatment, part B) when outpatient or inpatient care is rendered.

## Subpart G—Other Persons

### § 728.71 Ex-service maternity care.

(a) *Eligible beneficiaries.* After separation from the service under honorable conditions because of pregnancy, or separated from the service under honorable conditions and found to have been pregnant at the time of separation, the following former members and their newborn infant(s) may be provided care as set forth below. The rendering of this care is subject to the provisions of § 728.3. When certified by medical authorities that the pregnancy existed prior to entry into service (EPTE), maternity benefits are not authorized.

(1) Former women members of the Army, Air Force, Navy, and Marine Corps.

(2) On or after 12 August 1985, former women members of the Commissioned Corps of the United States Public Health Service (USPHS) and the National Oceanic and Atmospheric Administration (NOAA).

(b) *Care authorized.* (1) Former women members may be rendered medical and surgical care in naval MTFs incident to that pregnancy, prenatal care, hospitalization, postnatal care, and, when requirements of SECNAVINST 6300.2A are met, abortions. Limit postnatal care to 6 weeks following delivery. Do not promise civilian sources under any circumstances for either the mother or the infant as such care is not authorized.

(2) Treatment of the newborn infant in USMTFs includes care, both inpatient and outpatient, only during the

first 6 weeks (42 days) following delivery. If the newborn infant requires care beyond the 6-weeks postnatal period, the mother or other responsible family member must make arrangements for disposition to private, State, welfare, or another Federal facility.

(c) *Application for care.* In making application for care authorized by this section, former women members should apply either in person or in writing to the Armed Forces inpatient MTF nearest their home and present either their DD 214 (Armed Forces of the United States Report of Transfer or Discharge) or DD 256A (Honorable Discharge Certificate) as proof of eligibility for requested care. In areas with more than one Armed Forces MTF available and capable of providing required care, application should be made to the MTF of the service from which separated, as applicable. Disengagement in such areas to MTFs of other services may be made only when space is not available or capability does not exist in the MTF of the services from which the individual was separated.

(d) *Charges and collection.* Charges and reimbursement procedures for care rendered to beneficiaries in paragraph (a)(2) of this section are the same as prescribed by current regulations for active Coast Guard, USPHS, and NOAA members.

### § 728.72 Applicants for enrollment in the Senior Reserve Officers' Training Program.

When properly authorized, designated applicants (including applicants for enrollment in the 2-year program and Military Science II enrollees applying for Military Science III) may be furnished medical examinations at naval MTFs including hospitalization necessary for the proper conduct thereof. Medical care, including hospitalization, is authorized for diseases contracted or injuries incurred in line of duty while at or traveling to or from a military installation for the purpose of undergoing medical or other examinations or for visits of observation.

### § 728.73 Applicants for enlistment or reenlistment in the Armed Forces, and applicants for enlistment in the reserve components.

(a) Upon referral by a commander of a Military Enlistment Processing Station (MEPS), applicants will be furnished necessary medical examinations, including hospitalization when qualifications for service cannot otherwise be determined. Use the hospitalization period only for diagnostic purposes. Do not correct disqualifying defects.

(b) Applicants who suffer injury or acute illness while awaiting or undergoing processing at Navy and Marine Corps facilities or MEPS may be furnished emergency medical and dental care, including emergency hospitalization, for that injury or illness.

### § 728.74 Applicants for appointment in the regular Navy or Marine Corps and reserve components, including members of the reserve components who apply for active duty.

(a) Necessary medical examinations may be furnished, including hospitalization when qualifications for service cannot otherwise be determined. Use such a period of hospitalization only for diagnostic purposes. Do not correct disqualifying defects.

(b) Applicants who suffer injury or acute illness while awaiting or undergoing processing at Navy and Marine Corps facilities or MEPS may be furnished emergency medical and dental care, including emergency hospitalization, for that injury or illness.

### § 728.75 Applicants for cadetship at service academies and applicants for the Uniformed Services University of Health Sciences (USUHS).

(a) Upon presentation of a letter of authorization from the Department of Defense Medical Examination Review Board (DODMERB), applicants for cadetship at Service Academies (Navy, Army, Air Force, Coast Guard, and Merchant Marine) and applicants for the Uniformed Services University of Health Sciences (USUHS) will be furnished medical examinations at facilities designated by the DODMERB. Hospitalization is authorized when qualifications for service cannot otherwise be determined. Use the hospitalization

period for diagnostic purposes only, and not to correct disqualifying or other defects. Perform examinations and make disposition of completed forms per BUMEDINST 6120.3M.

(b) Applicants who suffer injury or acute illness while awaiting or undergoing processing at Navy and Marine Corps facilities or at MEPS may be furnished emergency medical and dental care, including emergency hospitalization, for that injury or illness.

### § 728.76 Naval Home residents.

Provide necessary medical and dental care, both inpatient and outpatient, to residents of the Naval Home when requested by the Governor of the Home. In an emergency, care may be rendered without prior approval of the Governor; however, the Governor of the Home should be contacted immediately and requested to furnish authorization.

### § 728.77 Secretarial designees.

Subject to the capabilities of the professional staff and the availability of space and facilities, naval MTFs and DTFs will provide treatment to individuals that have been granted Secretarial designee status by any of the three service Secretaries (Navy, Army, or Air Force), the Secretary of Commerce for NOAA personnel, the Secretary of Health and Human Services for USPHS personnel, or the Secretary of Transportation for Coast Guard personnel.

(a) *Potential designees.* Upon a showing of sufficient cause, the Secretary of the Navy may authorize individuals, not otherwise authorized by law, to receive such care as is available in naval MTFs in the United States. Designation may be extended on a worldwide basis for preadoptive children and wards of active duty members, and for abused dependents delineated in paragraph (a)(6) of this section. Temporary in loco parents or foster parent status of the member with regard to a minor is insufficient for approval. Also, civilian health care under the CHAMPUS program cannot be authorized for other than abused dependents. The Secretary's discretionary authority is exercised most conservatively, however, favorable action is usually taken on requests involving the following situations:

(1) Preadoption proceedings wherein an active duty member or a retired member has taken affirmative legal action to adopt a child.

(2) Custodianships and guardianships authorized by a court order wherein the member is designated by the court as the custodian or guardian and the child is fully dependent upon the active duty or retired member sponsor.

(3) Evaluation and selection of nonbeneficiaries who are donor candidates for an organ or tissue transplant procedure in behalf of a military service beneficiary.

(4) Nonbeneficiary participants in officially approved clinical research studies.

(5) Unremarried former spouses who: Require care for a condition incurred during or caused/aggravated by conditions associated with the member's or former member's creditable service; do not qualify under the former spouses act; and do not have medical coverage under an employer-sponsored health plan which will provide for the care required.

(6) Abused dependents of discharged or dismissed former uniformed services members in need of medical or dental care resulting from knowledge of the abuse or for an injury or illness resulting from abuse by the former member. Eligibility will terminate the earliest of 1 year after the date on which the member is discharged or dismissed from a uniformed service, or when care is no longer needed.

(7) In other instances wherein the circumstances clearly merit the providing of treatment in naval MTFs, and in which the best interest of the patient, the Navy, *and* the Government will be served, favorable Secretarial action may result. The mere need of medical care by a former beneficiary or other person, alone, will not support approval of such a request.

(b) *Requests for consideration.* Requests for consideration will be submitted to the Commander, Naval Medical Command (MEDCOM–33) by applicants via their command, when applicable, or by the Medical Department command concerned. Requests should include any pertinent information

which will support resolution and a return address. Requests involving:

(1) Preadoption must include a legible reproducible copy of an interim court order or adoption agency placement agreement which names the sponsor and identifies the other participating parties. A petition for a court order is insufficient to support a recommendation for approval.

(2) Custodianships and guardianships must include a legible reproducible copy of the court order, identification of the parties, and also identify any amounts of income to which the ward is entitled.

(3) Participants in clinical research studies must include:

(i) Sufficient clinical information concerning the nature of the study.

(ii) Benefits which may accrue to the individual.

(iii) The extent, if any, to which access by other authorized beneficiaries will be impaired.

(iv) Benefits which will accrue to the command, e.g., enhancement of training, maximum use of specialized facilities, etc.

(v) Recommended duration of designation.

(vi) Whether the consenting individual has been informed concerning the nature of the study, its personal implications, and freely consents.

(4) Unremarried former spouses must include:

(i) A notarized copy of the marriage license.

(ii) A statement attesting to the fact that the sponsoring former spouse achieved 20 or more years of creditable military service.

(iii) Copy of divorce decree with official date.

(5) Abused depdendents must include:

(i) Full name, social security number, grade or rate, branch or service, and date and type of discharge or dismissal of the former member. Such a member must have received a dishonorable or bad-conduct discharge or dismissal from a uniformed service as a result of court-martial conviction for an offense involving abuse of a dependent of the member.

(ii) Full names, social security numbers (if assigned), and relationship to the former member of any dependent in need of medical or dental care to treat adverse health conditions resulting from such dependent's knowledge of the abuse or any injury or illness suffered by the abused person as a result of such abuse.

(c) *Blanket designation.* (1) The Secretary of Defense has granted Secretarial designee status to full-time Schedule ''A'' faculty members of the Uniformed Services University of Health Sciences (USUHS). They have been provided documentation substantiating their eligibility and, where necessary, an eligibility termination date. These personnel are authorized routine care at the Naval Hospital, Bethesda, MD. At other naval MTFs, only emergency treatment is authorized while they are traveling on official university business. The letter of authorization excludes routine dental care, prosthetic appliances, and spectacles.

(2) The following officials within the Government, the Department of Defense, and military departments have been granted blanket Secretarial designation for medical and emergency dental care in naval MTFs in the United States:

(i) The President.

(ii) The Vice President.

(iii) Members of the Cabinet.

(iv) Article III Federal Judges.

(v) U.S. Court of Military Appeals Judges.

(vi) Members of Congress.

(vii) The Secretary, Deputy Secretary, and the Assistant Secretaries of Defense.

(viii) The Under Secretary of Defense for Policy.

(ix) The Under Secretary of Defense for Research and Engineering.

(x) The Secretaries, Under Secretaries, and the Assistant Secretaries of the Military Departments.

(d) *Authorization.* Designees will present a signed letter bearing the letterhead of the designating service. Secretarial designees are not included in the DEERS data base and may not possess Government identification cards. Therefore, the only proof of their eligibility for treatment may be the letter of authorization. When a Secretarial designee presents for treatment:

(1) Ask for identification of the individual presenting the letter of authorization to assure that the person seeking care is the individual to whom the letter was issued.

(2) Check the expiration date on the letter of authorization. Many authorizations are issued for only a specified period of time, e.g., abused dependents—no longer than 1 year.

(3) Check to assure that the individual is applying for care authorized by the letter of authorization. Designation is often granted for a specific diagnosis or specific mode of treatment.

(4) Check to assure that the individual has not been designated for care only as specific facility. Many authorizations are granted for conditions or for care that can be rendered only by a specified physician or under a specific program.

(5) Place a copy of the letter of authorization in the individual's Health Record or outpatient treatment record on the left side at the first visit or admission.

(e) *Charges and collection.* (1) Interagency rates are applicable for inpatient and outpatient care provided outside the National Capital Region to all individuals listed in paragraph (c)(2) of this section with the exception of Members of Congress. Charges are at full reimbursement rates for Members of Congress provided inpatient or outpatient care outside the National Capital Region.

(2) In the National Capital Region:

(i) Charges are waived for outpatient care provided to all categories listed in paragraph (c)(2) of this section.

(ii) Charge interagency rates for inpatient care of all individual in paragraph (c)(2) of this section except Members of Congress. Charge Members of Congress at full reimbursement rates.

(3) Complete and submit, per subpart J, a DD 7 (Report of Treatment Furnished Pay Patients, Hospitalization Furnished, part A) or DD 7A (Report of Treatment Furnished Pay Patients, Outpatient Treatment, part B) when outpatient or inpatient care is rendered to Secretarial designees whose charges for care have not been waived.

## § 728.78 American Red Cross representatives and their dependents.

(a) *Potential beneficiaries.* (1) Volunteer workers.

(2) Full-time, paid employees.

(3) Dependents of personnel enumerated in paragraph (a) (1) and (2) of this section when accompanying their sponsor outside the continental United States, including Alaska, Hawaii, and Puerto Rico.

(b) *Care authorized.* (1) When services of the American Red Cross (ARC) have been accepted in behalf of the Federal Government under applicable DOD regulations, beneficiaries in paragraph (a)(1) of this section are considered ''employees'' of the Government for the purpose of this part and are authorized health care in USMTFs, both in and outside the United States for work-related conditions. See § 728.53(a)(2) regarding the specific application of this authorization.

(2) Beneficiaries enumerated in paragraph (a) (1) and (2) of this section are authorized health care in USMTFs located outside the United States for both work and nonwork-related conditions. See § 728.53(a)(2) for treatment of work-related conditions of those in paragraph (a)(1) of this section.

(3) Beneficiaries identified in paragraph (a) (1), (2), and (3) of this section are authorized emergency care in USMTFs outside the continental United States, including Alaska, Hawaii, and Puerto Rico where facilities are not otherwise available in reasonably accessible and appropriate non-Federal hospitals. Provide hospitalization only for acute medical and surgical conditions, exclusive of nervous, mental, or contagious diseases or those requiring domiciliary care. Routine dental care, other than dental prosthesis and orthodontia, is authorized on a space available basis provided facilities are not otherwise available in reasonably accessible non-Federal facilities.

(c) *Records disposal.* Upon completion of treatment of accredited representatives of the American Red Cross or their dependents, forward medical records, including all clinical records and x-ray films, to the Medical Director, National Headquarters, American

Red Cross, 20th and D Street NW., Washington, DC 20006.

(d) *Charges and collection.* Charge beneficiaries in paragraph (a) (1) and (2) of this section the rate applicable to officer personnel and dependents in paragraph (a)(3) of this section the dependent rate. Complete and submit, per subpart J, a DD 7 (Report of Treatment Furnished Pay Patients, Hospitalization Furnished, part A) or DD 7A (Report of Treatment Furnished Pay Patients, Outpatient Treatment, part B) when outpatient or inpatient care is rendered to ARC personnel or to their dependents.

### § 728.79 Employees of Federal contractors and subcontractors.

(a) *Beneficiaries.* (1) U.S. citizen contractor, engineering, and technical service personnel designated as U.S. Navy Technicians.

(2) Civilian employees of contractors and subcontractors operating under U.S. Government contracts.

(3) Dependents of personnel enumerated in paragraph (a) (1) and (2) of this section when accompanying their sponsor outside the continental United States or in Alaska.

(b) *Care authorized.* (1) Beneficiaries identified in paragraph (a) (1) and (2) of this section may be provided emergency care in naval MTFs for illnesses and injuries occurring at work in or outside the United States.

(2) While serving outside the continental United States or in Alaska, where facilities are not otherwise available in reasonably accessible and appropriate non-Federal facilities, beneficiaries identified in paragraph (a) (1), (2), and (3) of this section may receive hospitalization and necessary outpatient services in naval MTFs on a reimbursable basis. Except for beneficiaries in paragraph (a)(1) of this section who are serving aboard naval vessels, all others enumerated may only be hospitalized for acute medical and surgical conditions, exclusive of nervous, mental, or contagious diseases or those requiring domiciliary care. Routine dental care, other than dental prosthesis and orthodontia, is authorized on a space available basis provided facilities are not otherwise available in reasonably accessible and appropriate non-Federal facilities.

(c) *Charges and collection.* Care is authorized on a reimbursable basis. Complete and submit, per subpart J, a DD 7 (Report of Treatment Furnished Pay Patients, Hospitalization Furnished, part A) or DD 7A (Report of Treatment Furnished Pay Patients, Outpatient Treatment, part B) when outpatient or inpatient care is rendered.

### § 728.80 U.S. Government employees.

(a) Civil service employees of all Federal agencies, including teachers employed by Department of Defense Dependent's Schools (DODDS) and their dependents, may be provided hospitalization and necessary outpatient services, (other than occupational health services), on a reimbursable basis, outside the continental limits of the United States and in Alaska, where facilities are not otherwise available in reasonably accessible and appropriate non-Federal hospitals. Except for employees who are serving aboard naval vessels, hospitalization may be furnished only for acute medical and surgical conditions, exclusive of nervous, mental, or contagious diseases or those requiring domiciliary care. Routine dental care, other than dental prosthesis and orthodontia, is authorized on a space available basis provided facilities are not otherwise available in reasonably accessible and appropriate non-Federal facilities.

(b) Such civilian employees and their dependents may be provided medical, surgical, dental treatment, hospitalization, and optometric care at installations in the United States which have been designated remote by the Secretary of the Navy for the purpose of providing medical care.

(c) The major objective of the following programs for civil service employees, regardless of location, is emergency treatment for relief of minor ailments or injuries to keep the employee on the job:

(1) The Department of Labor, Office of Workers' Compensation Programs (OWCP), governs the overall medical care program for employees of the Government who sustain injuries while in

the performance of duty, including diseases proximately caused by conditions of employment (see § 728.53).

(2) Federal civil service employees and applicants for such employment are authorized services as outlined in chapter 22, section XIII, of the Manual of the Medical Department (MANMED). When appropriated fund and nonappropriated fund employees, including unpaid volunteer employees, require emergency and nonemergency occupational health services due to an illness or an injury on the job, provide this limited care through your occupational health service, emergency room, or evening primary care clinic, as appropriate. This care is rendered free of charge to the employee, the employee's command, or insurance carrier. Included with this group are Military Sealift Command (MSC) civilian marine personnel (authorized additional care and services as outlined in BUMINST 6320.52 and care under § 728.53(a)(7)) and members of the National Oceanic and Atmospheric Administration (NOAA) serving with the Navy.

(3) Under the technical control of the Surgeon General of the Army, the DOD Civilian Employees' Health Service is responsible for administering the health program for all Federal civil service employees in the District of Columbia area.

(d) Care, other than occupational health services, is provided on a reimbursable basis. Complete and submit, per subpart J, a DD 7 (Report of Treatment Furnished Pay Patients, Hospitalization Furnished, part A) or DD 7A (Report of Treatment Furnished Pay Patients, Outpatient Treatment, part B) when outpatient or inpatient care is rendered.

### § 728.81 Other civilians.

(a) *General.* In an emergency, any person may be rendered care in naval MTFs to prevent undue suffering or loss of life or limb. Limit care to that necessary only during the period of the emergency, and if further treatment is indicated, initiate action to transfer the patient to a private physician or civilian facility as soon as possible. Further, subject to the provisions of § 728.3, the following personnel are authorized care as set forth.

(b) *Beneficiaries and extent of care.* (1) Provide all occupational health services to civilian employees paid from nonappropriated funds, including Navy exchange employees and service club employees, free of charge (see § 728.80(c)(2)). Provide treatment of occupational illnesses and injuries other than in emergencies per rules and regulations of the Office of Workers' Compensation Programs (see § 728.53).

(2) Civilians attending the Federal Bureau of Investigation (FBI) Academy, Marine Corps Development and Education Command, Quantico, VA, may be rendered care at the Naval Medical Clinic, Quantico, VA, for emergencies. Such persons who are in need of hospitalization for injuries or disease may be hospitalized and classed as civilian humanitarian nonindigents with the approval of the cognizant hospital's commanding officer. EXCEPTION: Certain individuals, such as employees of the Federal Bureau of Investigation who are injured in the line of duty, may be entitled to care at the expense of the Office of Workers' Compensation Programs (OWCP) (see § 728.53).

(3) The following civilians who are injured or become ill while participating in Navy or Marine Corps sponsored sports, recreational or training activities may be rendered care on a temporary (emergency) basis until such time as disposition can be effected to another source of care.

(i) Members of the Naval Sea Cadet Corps.

(ii) Junior ROTC/NDCC (National Defense Cadet Corps) cadets.

(iii) Civilian athletes training or competing as part of the U.S. Olympic effort.

(iv) Civilians competing in Navy or Marine Corps sponsored competitive meets.

(v) Members of Little League teams and Youth Conservation groups.

(vi) Boy Scouts and Girl Scouts of America.

(4) Other civilian personnel included below are not normally eligible for care in naval MTFs; however, under the conditions set forth, care may be rendered.

(i) *Potential beneficiaries.* (A) Civilian representatives of religious groups.

(B) Educational institutions representatives.

(C) Athletic clinic instructors.

(D) USO representatives.

(E) Celebrities and entertainers.

(F) Social agencies representatives.

(G) Others in a similar status to those in § 728.81(b)(4)(i) (A) through (F).

(H) News correspondents.

(I) Commercial airline pilots and employees.

(J) Volunteer workers. This category includes officially recognized welfare workers, other than Red Cross.

(ii) *Care authorized.* (A) Persons enumerated in paragraph (b)(4)(i) (A) through (G) of this section, who are contracted to provide direct services to the Armed Forces and who are acting under orders issued by the Department of Defense or one of the military departments to visit military commands overseas, and their accompanying dependents, may be provided medical care in naval MTFs outside the 48 contiguous United States and the District of Columbia provided local civilian facilities are not reasonably available or are inadequate. Limit inpatient care to acute medical and surgical conditions exclusive of nervous, mental, or contagious diseases, or those requiring domiciliary care. Routine dental care, other than dental prostheses and orthodontia, is authorized on a space available basis outside the United States, provided such care is not otherwise available in reasonably accessible and appropriate non-Federal facilities.

(B) Persons enumerated in paragraph (b)(4)(i) (H) and (I) of this section are authorized emergency medical and dental care in naval MTFs outside the 48 contiguous United States and the District of Columbia provided local civilian facilities are not reasonably available or are inadequate.

(C) Persons enumerated in paragraph (b)(4)(i)(J) of this section, both within and outside the 48 contiguous United States and the District of Columbia, may receive care in naval MTFs for injuries or diseases incurred in the performance of duty as beneficiaries of OWCP (see § 728.53). Additionally, if such volunteers are sponsored by an international organization (e.g., the United Nations) or by a voluntary nonprofit-relief agency registered with and approved by the Advisory Committee on Voluntary Aid (e.g., CARE), they may receive other necessary nonemergency medical care and occupational health services while serving outside the 48 contiguous United States and the District of Columbia.

(c) *Charges and collection.* Care is provided on a reimbursable basis. Complete and submit, per subpart J, a DD 7 (Report of Treatment Furnished Pay Patients, Hospitalization Furnished, part A) or DD 7A (Report of Treatment Furnished Pay Patients, Outpatient Treatment, part B) when outpatient or inpatient care is rendered.

### § 728.82 Individuals whose military records are being considered for correction.

Individuals who require medical evaluation in connection with consideration of their individual circumstances by the Navy, Army, and Air Force Board for Correction of Military Records are authorized evaluation, including hospitalization when necessary for the proper conduct thereof.

### § 728.83 Persons in military custody and nonmilitary Federal prisoners.

(a) *Potential beneficiaries.* (1) Military prisoners.

(2) Nonmilitary Federal prisoners.

(3) Enemy prisoners of war and other detained personnel.

(b) *Care authorized*—(1) *Military prisoners.* (i) Whose punitive discharges have been executed but whose sentences have not expired are authorized all necessary medical and dental care.

(ii) Whose punitive discharges have been executed and who require hospitalization beyond expiration of sentences are not eligible for care but may be hospitalized as civilian humanitarian nonindigents until final disposition can be made to some other appropriate facility.

(iii) On parole pending completion of appellate review or whose parole changes to an excess leave status following completion of sentence to confinement while on parole are members of the military service and as such are authorized care as outlined in subpart B.

(iv) On parole whose punitive discharge has been executed are not members of the military service and are therefore not entitled to care at Government expense. If the circumstances are exceptional, individuals herein who are not authorized care may request Secretarial designee status under the provisions of § 728.77.

(2) *Nonmilitary Federal prisoners.* Under the provisions of this section, nonmilitary Federal prisoners are authorized only emergency medical care. When such care is being rendered, the institution to which prisoners are sentenced must furnish necessary guards to effectively maintain custody of prisoners and assure the safety of other patients, staff members, and residents of the local area. Under no circumstances will military personnel be voluntarily used to guard or control such prisoners. Upon completion of emergency care, make arrangements for immediate transfer of the prisoners to a nonmilitary MTF or for return to the facility to which sentenced.

(3) *Enemy prisoners of war and other detained personnel.* Subject to the provisions of § 728.3, enemy prisoners of war and other detained personnel are entitled to and may be rendered all necessary medical and dental care.

(c) *Charges and collection.* Care provided individuals enumerated in § 728.83(b)(1) (ii), (iv), and (2) is on a reimbursable basis. Complete and submit, per subpart J, a DD 7 (Report of Treatment Furnished Pay Patients, Hospitalization Furnished, part A) or DD 7A (Report of Treatment Furnished Pay Patients, Outpatient Treatment, part B) when outpatient or inpatient care is rendered.

## Subpart H—Adjuncts to Medical Care

### § 728.91 General.

Adjuncts to medical care include but are not limited to prosthetic devices such as artificial limbs, artificial eyes, hearing aids, orthopedic footwear, spectacles, wheel chairs, hospital beds, and similar medical support items or aids which are required for the proper care and management of the condition being treated. Generally, expenses incurred for procurement of such items, either from civilian sources as supplemental care or from stocks maintained by the facility, are payable from operation and maintenance funds available for support of naval MTFs. However, certain adjuncts may be cost-shared under CHAMPUS for CHAMPUS-eligible individuals under circumstances enumerated in the cooperative care or services criteria of § 728.4(z).

### § 728.92 Policy.

(a) Provide adjuncts to medical care to eligible beneficiaries receiving inpatient or outpatient care when, in the opinion of the attending physician, such adjuncts will offer substantial assistance in overcoming the handicap or condition and thereby contribute to the well-being of the beneficiary.

(b) Unless necessary for humanitarian reasons, do not furnish orthopedic and prosthetic appliances on an elective basis to members of the naval service with short periods of service remaining when the defect requiring the appliance existed prior to entry into service and when such members will be separated from the service because of these defects.

(c) For active duty members, make the initial allowance of orthopedic footwear and orthopedic alterations to standard footwear the same quantity as provided in the initial clothing allowance.

(d) Base the number of orthopedic and prosthetic appliances issued or replaced for other authorized recipients upon the individual's requirements as determined by the attending physician to be consistent with the highest standards of modern medicine.

(e) Former members of the uniformed service should be advised that they may obtain durable medical equipment, medical care, and adjuncts from Veterans Administration facilities.

(f) Dependents are authorized certain adjuncts per §§ 728.31 (c) and (d) and in instances where items are not normally authorized at the expense of the Government, they may be provided at cost to the United States if available from Government stocks under the following conditions:

(1) Outside the United States.

(2) At specific stations within the United States which have been authorized by the Secretary of the Navy to sell these items.

### § 728.93 Chart of adjuncts.

The following chart and footnotes provide information relative to adjuncts which may be furnished the several categories of beneficiaries eligible for medical care at naval MTFs.

| Adjuncts | Active duty and retired members | Others authorized the same benefits as active duty or retired members [8] | Dependents authorized the same benefits | Other beneficiaries [8] |
|---|---|---|---|---|
| Ambulance service | Yes | Yes | Yes [1] | No |
| Artificial eyes | Yes | Yes | Yes | Maybe [3] |
| Artificial limbs | Yes | Yes | Yes | Maybe [3] |
| Contact or special lenses [11] | Yes [4] | Yes [4] | Maybe [2 4 6] | No |
| Crutches [7] | Yes | Yes | Yes | Yes |
| Dental prostheses | Yes | Yes | Maybe [9] | Maybe [9] |
| Elastic stockings | Yes | Yes | Yes | Yes |
| Hearing aids [10] | Yes [5] | Yes [5] | Maybe [2] | Maybe [3] |
| Hearing aid parts and batteries | Yes [10] | Yes [10] | Maybe [2 10] | No |
| Hospital beds [7] | Yes | Yes | Yes | Yes |
| Joint braces | Yes | Yes | Yes | Yes |
| Orthopedic footware | Yes | Yes | Maybe [2] | Maybe [3] |
| Prosthetic devices, other [7] | Yes | Yes | Maybe [2] | No |
| Respirators and inhalators [7] | Yes | Yes | Yes | Yes [1] |
| Resuscitators [7] | Yes | Yes | Yes | Yes [1] |
| Spectacles | Yes | Yes | Maybe [2 6] | No |
| Walking irons [7] | Yes | Yes | Yes | Yes |
| Wheel chairs [7] | Yes | Yes | Yes | Yes |

[1] When considered medically appropriate by the attending physician.
[2] See § 728.92(f).
[3] Outside the United States and at designated remote stations when considered medically appropriate by the attending physician.
[4] Contact or special lenses are not to be issued solely for cosmetic reasons. Further guidelines are contained in NAVMEDCOMINST 6810.1.
[5] In addition to the hearing aid, include in initial issue one spare receiver cord, approximately 1 month's supply of batteries, and a statement indicating make, model, type of receiver, serial number, code, part numbers, "B" battery voltage, and type of "A" and "B" batteries, as appropriate. Provide replacement of hearing aids upon the same basis as initial issue and, except in unusual circumstances, will not be replaced within 2 years of the initial furnishing or the last replacement of the appliance.
[6] Spectacles, contact lenses, or intraocular lenses may be provided dependents with eye conditions which require these items for complete medical or surgical management of a condition other than ordinary refractive error. For further information, consult NAVMEDCOMINST 6810.1.
[7] May be loaned on a custody basis at the discretion of the attending physician.
[8] See subpart of this part relating to specific beneficiary.
[9] When considered by the attending physician and dentist to be an adjunct to a medical or surgical condition other than dental and when in consonance with existing legislation and directives.
[10] For further guidelines, consult BUMEDINST 6320.41B.
[11] Includes intraocular lenses required for implantation upon removal of cataracts.

## Subpart I—Reservists—Continued Treatment, Return to Limited Duty, Separation, or Retirement for Physical Disability

### § 728.101 General.

(a) *Notice of eligibility (NOE).* While the NOE is basically a document that substantiates entitlement to a disability benefit equal to pay and allowances, it may be accepted when required to substantiate eligibility for benefits other than pay and allowances, *i.e.*, treatment in USMTFs under the provisions of title 10, United States Code.

(b) *Physical disability benefits.* The following, excerpted and paraphrased from SECNAVINST 1770.3, paragraph 10, is applicable when a reservist may be entitled to physical disability benefits.

(1) When a notice of eligibility (NOE) has been issued to a member hospitalized in a naval MTF and the attending physician is of the opinion that recovery is not anticipated or that the reservist is not expected to be fit for return to full duty within a reasonable period, a medical board will be convened and the case managed the same as that of a Regular member. Assure that a copy of the NOE accompanies

the medical board report forwarded to the Central Physical Evaluation Board. Disability benefits, equal to pay and allowances, will continue in such instances until final disposition.

(2) There is no limited duty status, per se, for inactive reservists. However, if the attending physician determines that a reservist is temporarily unfit for full duty, but will be fit for full duty following a period of convalescence or following duty with physical limitations, not to exceed 6 months, the physician may return the reservist to duty with a summary of the hospitalization or treatment. The summary will set forth the limitations posed by the member's disability and the period of such limitations. Followup hospitalization, treatment, and evaluation for the same condition may be provided at USMTFs during the period of restricted duty, if required. If, during the period of the restricted duty, it appears that the reservist will be *permanently* unfit for full duty, promptly authorize the reservist to report for evaluation, treatment if required, and appearance before a medical board at the nearest naval MTF capable of accomplishing same. Admission to the sicklist is authorized, when required. Should the medical board recommend appearance before a physical evaluation board, disability benefits equal to pay and allowances should continue until final disposition is effected.

### § 728.102 Care from other than Federal sources.

The provisions of this subpart do not authorize care for reservists at other than Federal facilities nor out of funds available for operation of USMTFs (supplemental care) after a period of active duty or a period of training duty ends, including travel to and from such training. Such care may be rendered under the provisions of part 732 of this chapter.

## Subpart J—Initiating Collection Action on Pay Patients

### § 728.111 General.

The Comptroller of the Navy has approved a system of transactions that generates reports to COMNAV MEDCOM on unfunded reimbursable transactions. The purpose of the final report is to provide data on services furnished by naval health care facilities for which central collection from other Government agencies and private parties is required.

### § 728.112 Responsibilities.

(a) *Patient administration departments.* The initiation of the collection process begins with patient administration departments. Collection action cannot be accomplished unless patient administration departments take the initial step to complete:

(1) *DD 7, Report of Treatment Furnished Pay Patients, Hospitalization Furnished (part A).* Prepare a separate substantiating DD 7, in triplicate, for each category of pay patient receiving inpatient care. At the end of each day that any pay patient is admitted, submit DD 7's to the collection agent.

(2) *DD 7A, Report of Treatment Furnished Pay Patients, Outpatient Treatment Furnished (part B).* Prepare a separate substantiating DD 7A, in triplicate, for each category of pay patient receiving outpatient care. At the end of each day that any pay patient is treated on an outpatient basis, submit DD 7A's to the collection agent.

(b) *Collection agents.* Upon receipt of a completed DD 7 or DD 7A, collection agents will take the action indicated in paragraph 24304 of the Resource Management Handbook, NAVMED P–5020, to effect central collection action.

### § 728.113 Categories of pay patients.

The categories of patients for whom collection action must be initiated are:

(a) *Coast Guard.* (1) Active Officers; (2) Retired Officers; (3) Active Enlisted; (4) Retired Enlisted; (5) Dependents; (6) Cadets.

(b) *Public Health Service.* (1) Active Officers; (2) Retired Officers; (3) Dependents of Officers.

(c) *National Oceanic and Atmospheric Administration (NOAA).* (1) Active Officers; (2) Retired Officers; (3) Dependents of Officers.

(d) *Foreign.* (1) NATO Officers (Except Canadians provided care under the comparable care agreement.); (2) NATO Enlisted (Except Canadians provided

care under the comparable care agreement.); (3) NATO Dependents; (4) Civilians Accompanying NATO Members; (5) Foreign Military Sales (FMS) Officers; (6) FMS Enlisted; (7) FMS Dependents; (8) FMS Civilians; (9) Military Grant Aid Officers; (10) Military Grant Aid Enlisted; (11) Military Grant Aid Dependents; (12) Military Grant Aid Civilians; (13) Military Officers From Other Than NATO Nations; (14) Military Enlisted From Other Than NATO Nations; (15) Dependents of Officers and Enlisted From Other Than NATO Nations; (16) Civilians Accompanying Military Members of Other Than NATO Nations; (17) Nationals and Their Dependents.

(e) *Secretarial designees not exempted from paying*.

(f) *Others*. (1) Merchant Marines; (2) Military Sealift Command (MSC) Personnel; (3) Public Health Service beneficiaries (Other than Commissioned Corps); (4) Veterans Administration beneficiaries; (5) Peace Corps beneficiaries; (6) Job Corps beneficiaries; (7) Volunteers In Service to America (VISTA) beneficiaries; (8) Office of Workers Compensation Program (OWCP) beneficiaries; (9) Bureau of Employees Compensation (BEC) beneficiaries; (10) Department of State and Other Federal Agencies beneficiaries (prepare a separate form for each Federal agency); (11) Civilian Humanitarian Nonindigents (CHNI); (12) Trust Territory beneficiaries; (13) Others not specified above who are not entitled to health benefits at the expense of the Government.

# PART 732—NONNAVAL MEDICAL AND DENTAL CARE

## Subpart A—General

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732.25 Accounting classifications for nonnaval medical and dental care expenses.
732.26 Standard document numbers.

AUTHORITY: 5 U.S.C. 301; 10 U.S.C. 1071–1088, 5031, 6148, 6201–6203, and 8140; and 32 CFR 700.1202.

SOURCE: 52 FR 32297, Aug. 27, 1987, unless otherwise noted.

## Subpart A—General

### § 732.1 Background.

When a U.S. Navy or Marine Corps member or a Canadian Navy or Marine Corps member receives authorized care from other than a Navy treatment facility, care is under the cognizance of the uniformed service medical treatment facility (USMTF) providing care, the USMTF referring the member to another treatment source, or under the provisions of this part. If such a member is not receiving care at or under the auspices of a Federal source, responsibility for health and welfare, and the adjudication of claims in connection with their care, remains within the Navy Medical Department. Part 728 of this chapter and NAVMEDCOMINST 6320.18 contain guidelines concerning care for other eligible beneficiaries, not authorized care by this part.

### § 732.2 Action.

Ensure that personnel under your cognizance are made aware of the contents of this part. Failure to comply with contents may result in delayed adjudication and payment or may result in denial of Navy financial responsibility for expenses of maternity, medical, or dental care obtained.

## Subpart B—Medical and Dental Care From Nonnaval Sources

### § 732.11 Definitions.

Unless otherwise qualified in this part the following terms when used throughout are defined as follows:

(a) *Active duty*. Full-time duty in the active military service of the United States. 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.

(b) *Active duty for training*. A specified tour of active duty for Reserves for training under orders that provides for automatic reversion to non-active duty status when the specified period of active duty is completed. It includes annual training, special tours, and the initial tour performed by enlistees without prior military service. The period of duty includes travel to and from training duty, not in excess of the allowable constructive travel time prescribed by SECNAVINST 1770.3 and paragraphs 10242 and 10243 of DOD Military Pay and Allowances Entitlements Manual.

(c) *Constructive return*. For purposes of medical and dental care, an unathorized absentee's return to military control may be accomplished through notification of appropriate military authorities as outlined below.

(1) For members in an unauthorized absentee (UA) status, constructive return to military control for the purpose of providing medical or dental care at Navy expense is effected when one of the following has occurred:

(i) A naval activity informs a civilian provider of medical or dental care that the Navy accepts responsibility for a naval member's care. The naval activity providing this information must also provide documentation of such notification to the appropriate adjudication authority in § 732.20.

(ii) A member has been apprehended by civil authorities at the specific request of naval authorities and naval authorities have been notified that the member can be released to military custody.

(iii) A naval member has been arrested, while in a UA status, by civil authorities for a civil offense and a naval authority has been notified that the member can be released to military control.

(2) When a naval member has been arrested by civil authorities for a civil offense while in a UA status and the offense does not allow release to military control, constructive return is not accomplished. The individual is responsible for medical and dental care received prior to arrest and the incarcerating jurisdiction is responsible for care required after arrest.

(d) *Designated Uniformed Services Treatment Facilities (Designated USTFs)*. Under Pub. L. 97–99, the following facilities are ''designated USTFs'' for the purpose of rendering medical and dental care to all categories of individuals entitled to care under this part.

(1) *Sisters of Charity of the Incarnate Word Health Care System*, 6400 Lawndale, Houston, TX 77058 (713) 928–2931 operates the following facilities:

(i) St. John Hospital, 2050 Space Park Drive, Nassau Bay, TX 77058, telephone (713) 333–5503. Inpatient and outpatient services.

(ii) St. Mary's Hospital Outpatient Clinic, 404 St Mary's Boulevard, Galveston, TX 77550, telephone (409) 763–5301. Outpatient services only.

(iii) St. Joseph Hospital Ambulatory Care Center, 1919 La Branch, Houston, TX 77002, telephone (713) 757–1000. Outpatient services only.

(iv) St Mary's Hospital Ambulatory Care Center, 3600 Gates Boulevard, Port Arthur, TX 77640 (409) 985–7431. Outpatient services only.

(2) *Inpatient and outpatient services*. (i) Wyman Park Health System, Inc., 3100 Wyman Park Drive, Baltimore, MD 21211, telephone (301) 338–3693.

(ii) Alston-Brighton Aid and Health Group, Inc., Brighton Marine Public Health Center, 77 Warren Street, Boston, MA 02135, telephone (617) 782–3400.

(iii) Bayley Seton Hospital, Bay Street and Vanderbilt Avenue, Staten Island, NY 10304, telephone (718) 390–5547 or 6007.

(iv) Pacific Medical Center, 1200 12th Avenue South, Seattle, WA 98144, telephone (206) 326–4100.

(3) *Outpatient services only*. (i) Coastal Health Service, 331 Veranda Street, Portland, ME 04103 (207) 774–5805.

(ii) Lutheran Medical Center, Downtown Health Care Services, 1313 Superior Avenue, Cleveland, OH 44113, telephone (216) 363–2065.

(e) *Duty status*. The situation of the claimant when maternity, medical, or dental care is received. Members, including reservists, on leave or liberty are considered in a duty status. Reservists, performing active duty for training or inactive duty training, are also considered in a duty status during their allowable constructive travel time to and from training.

(f) *Emergency care*. Medical treatment of severe life threatening or potentially disabling conditions which result from accident or illness of sudden onset and necessitates immediate intervention to prevent undue pain and suffering or loss of life, limb, or eyesight and dental treatment of painful or acute conditions.

(g) *Federal facilities*. Navy, Army, Air Force, Coast Guard, Veterans Administration, and USTFs (former U.S. Public Health Service facilities listed in § 732.11(d).

(h) *Inactive duty training*. Duty prescribed for Reserves by the Secretary of the Navy under Section 206 of Title 37, United States Code, or any other provision of law. Also includes special additional duties authorized for Reserves by an authority designated by the Secretary of the Navy and performed by Reserves on a voluntary basis in connection with the prescribed training or maintenance activities of units to which they are assigned.

(i) *Maternity emergency*. A condition commencing or exacerbating during pregnancy when delay caused by referral to a uniformed services medical treatment facility (USMTF) or designated USTF would jeopardize the welfare of the mother or unborn child.

(j) *Member*. United States Navy and Marine Corps personnel, Department of National Defence of Canada Navy and Marine Corps personnel, and Navy and Marine Corps personnel of other NATO Nations meeting the requirements for care under this part.

(k) *Non-federal care*. Maternity, medical, or dental care furnished by civilian sources (includes State, local, and foreign MTFs).

(l) *Nonnaval care*. Maternity, medical, or dental care provided by other than Navy MTFs. Includes care in other USMTFs, designated USTFs, VA facilities, as well as from civilian sources.

(m) *Office of Medical Affairs (OMA) or Office of Dental Affairs (ODA)*. Designated offices, under program management control of COMNAVMEDCOM and direct control of regional medical commands, responsible for administrative requirements delineated in this part. Responsibilities and functional tasks of OMAs and ODAs are outlined in NAVMEDCOMINST 6010.3.

(n) *Prior approval*. Permission granted for a specific episode of necessary but nonemergent maternity, medical, or dental care.

(o) *Reservist*. A member of the Naval or Marine Corps Reserve.

(p) *Supplemental care*—(1) *Operation and maintenance funds, Navy*. Supplemental care of all uniformed services members, at Navy expense, encompasses only inpatient or outpatient care augmenting the capability of a naval MTF treating a member. Such care is usually obtained from civilian sources through referral by the treating naval MTF. If a member, authorized care under this part, is admitted to or is being treated on an outpatient basis at any USMTF, all supplemental care is the financial responsibility of that facility regardless of whether the facility is organized or authorized to provide needed health care. The cost of such care is chargeable to operation and maintenance funds (OM&N) available for operation of the USMTF requesting the care regardless of service affiliation of the member (see part 728 of this chapter for such care under Navy Medical Department facilities).

(2) *Nonnaval medical and dental care program funds*. Adjudication authorities will pay claims, under this part, for care received as a result of a referral when:

(i) A United States Navy or Marine Corps member or a Canadian Navy or Marine Corps member requires care beyond the capability of the referring USMTF and care is obtained for such a member *not* admitted to or *not* being treated on an outpatient basis by a USMTF, and

(ii) The referring USMTF is not organized nor authorized to provide the needed health care.

(3) *Other uniformed services supplemental care programs*. In addition to services that augment other USMTF's capabilities, supplemental care programs of the other uniformed services include care and services comparable to those authorized by this part, e.g., emergency care and pre-approved non-emergency care.

(q) *Unauthorized absence*. Absence or departure without authority from a member's command or assigned place of duty.

(r) *Uniformed Services Medical Treatment Facilities (USMTF)*. Health care facilities of the Navy, Army, Air Force, Coast Guard, and the former U.S. Public Health Service facilities listed in paragraph (d) of this section designated as USTFs per DOD and Department of Health and Human Services directives.

**§ 732.12 Eligibility.**

(a) *Regular members*. To be eligible for non-Federal medical, dental, or emergency maternity care at Government expense, Regular active duty United States naval members and Canadian Navy and Marine Corps members must be in a duty status when care is provided.

(b) *Reservists*. (1) Reservists on active duty for training and inactive duty training, including leave and liberty therefrom, are considered to be in a duty status while participating in training. Accordingly, they are entitled to care for illnesses and injuries occurring while in that status.

(2) Reservists are entitled to care for injuries and illnesses occurring during direct travel enroute to and from active duty training (ACDUTRA) and to and from inactive duty training.

(c) *NATO naval members*. Naval members of the NATO Status of Forces Agreement (SOFA) nations of Belgium, Denmark, Federal Republic of Germany, France, Greece, Iceland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Turkey, and the United Kingdom, are authorized *outpatient care only* under the provisions of this part when stationed in or passing through the United States in connection with official duties. Public Law 99–591 *prohibits inpatient care* of these foreign military members in the United States at the expense of the United States Government. The other NATO SOFA Nation, Canada, entered into a comparable care agreement with the United States requiring the United States to provide inpatient and outpatient care under the provisions of this part to members of the Department of National Defence of Canada receiving care in the United States.

(d) *Absent without authority*. Naval members absent without authority during an entire episode of treatment are not eligible for non-Federal medical, dental, or emergency maternity care at Government expense. The only exception occurs when a member's illness or injury is determined to have been the direct cause of the unauthorized absentee status. In such an instance, eligibility will be:

(1) Determined to have existed from the day and hour of such injury or illness provided the member was not in an unauthorized absentee status prior to the onset of the illness or injury and initiation of treatment.

(2) Retained when the member is returned directly to military control.

(3) Terminated should the member return to an unauthorized absentee status immediately after completion of treatment. Departmental level (MEDCOM–333 for medical and MEDCOM–06 for dental) review is required before benefits may be extended.

(e) *Constructive return*. When constructive return, defined in § 732.11(c), is effected, entitlement will be determined to have existed from 0001 hours of the day of constructive return, not necessarily the day and hour care was initiated.

**§ 732.13 Sources of care.**

(a) *Initial application*. If a member requires maternity, medical, or dental care and naval facilities are unavailable, make initial application to other available Federal medical or dental facilities or USTFs. When members are stationed in or passing through a NATO SOFA nation and U.S. facilities are unavailable, ensure that members make initial application for emergency

and nonemergency care to military facilities of the host country, or if applicable, to civilian sources under the NATO SOFA nation's health care program. When hospitalized in Hawaii, Alaska, or in a foreign medical facility, members and responsible commands will comply with OPNAVINST 6320.6.

(b) *Secondary sources.* When either emergency or nonemergency care is required and there are no Federal or NATO SOFA facilities available, care may be obtained from non-Federal sources under this part.

**§ 732.14 Authorized care.**

(a) *Medical.* (1) Consultation and treatment provided by physicians or at medical facilities, and procedures not involving treatment when directed by COMNAVMEDCOM, are authorized. Such care includes, but is not limited to: treatment by physicians, hospital inpatient and outpatient care, surgery, nursing, medicine, laboratory and x-ray services, physical therapy, eye examinations, etc. See § 732.17 for prior approval of these services in nonemergency situations.

(2) When transplant (including bone-marrow) is the treatment of choice, COMNAVMEDCOM approval is required. If time permits, telephone (A) 294–1102, (C) (202) 653–1102 during regular hours or (A) 294–1327, (C) 653–1327 after regular duty hours, and followup with a message. Request approval via message in nonemergency situations.

(b) *Maternity episode.* If a member authorized care under this part qualifies for care under the provisions of § 732.17(c) and delivers in a civilian hospital, routine newborn care (*i.e.*, nursery, newborn examination, PKU test, etc.) is a part of the mother's admission expenses. Regardless of circumstances necessitating delivery in a civilian facility or how charges are separated on the bill, charges will be paid from funds available for care of the mother. If the infant becomes a patient in his or her own right—through an extension of the birthing hospital stay because of complications, transfer to another facility, or subsequent admission—the provisions of part 728 of this chapter and NAVMEDCOMINST 6320.18 are applicable, and the sponsor becomes responsible for a part of the medical expenses incurred.

(c) *Dental.* (1) With prior approval, the following may be provided:

(i) All types of treatment (including operative, restorative, and oral surgical) to relieve pain and abort infection.

(ii) Prosthetic treatment to restore extensive loss of masticatory function or the replacement of anterior teeth for esthetic reasons.

(iii) Repair of existing dental prostheses when neglect of the repair would result in unserviceability of the appliance.

(iv) Any type of treatment adjunctive to medical or surgical care.

(v) All x-rays, drugs, etc., required for treatment or care in paragraphs (c)(1) (i) through (iv) of this section.

(2) In emergencies (no prior approval), only measures appropriate to relieve pain or abort infection are authorized.

(d) *Eye refractions and spectacles.* Includes refractions of eyes by physicians and optometrists and furnishing and repairing spectacles.

(1) *Refractions.* A refraction may be obtained from a civilian source at Government expense only when Federal facilities are not available, no suitable prescription is in the member's Health Record, and the cognizant OMA or referring USMTF has given prior approval.

(2) *Spectacles.* When a member has no suitable spectacles and the lack thereof, combined with the delay in obtaining suitable ones from a Federal source would prevent performance of duty; repair, replacement, or procurement from a civilian source may be authorized upon initiation of an after-the-fact request per § 732.17. Otherwise, the prescription from the refractionist, with proper facial measurements, must be sent for fabrication to the appropriate dispensing activity set forth in NAVMED COMINST 6810.1. See § 732.15(g) concerning contact lenses.

**§ 732.15 Unauthorized care.**

The following are not authorized by this part:

(a) Chiropractic services.

(b) Vasectomies.

(c) Tubal ligations.

(d) Breast augmentations or reductions.

(e) Psychiatric care, beyond the initial evaluation.

(f) Court ordered care.

(g) Contact lenses.

(h) Other elective procedures.

### § 732.16 Emergency care requirements.

Only in a bona fide emergency will medical, maternity, or dental services be obtained under this part by or on behalf of eligible personnel without prior authority as outlined below.

(a) *Medical or dental care.* A situation where the need or apparent need for medical or dental attention does not permit obtaining approval in advance.

(b) *Maternity care.* When a condition commences or exacerbates during pregnancy in a manner that a delay, caused by referral to a USMTF or USTF, would jeopardize the welfare of the mother or unborn child, the following constitutes indications for admission to or treatment at a non-Federal facility:

(1) Medical or surgical conditions which would constitute an emergency in the nonpregnant state.

(2) Spontaneous abortion, with first trimester hemorrhage.

(3) Premature or term labor with delivery.

(4) Severe pre-eclampsia.

(5) Hemorrhage, second and third trimester.

(6) Ectopic pregnancy with cardiovascular instability.

(7) Premature rupture of membrames with prolapse of the umbilical cord.

(8) Obstetric sepsis.

(9) Any other obstetrical condition that, by definition, constitutes an emergency circumstance.

### § 732.17 Nonemergency care requirements.

Members are cautioned not to obtain nonemergency care from civilian sources without prior approval from the cognizant adjudication authority in § 732.20. Obtaining nonemergency care, other than as specified herein, without documented prior approval may result in denial by the Government of responsibility for claims arising from such care.

(a) *Individual prior approval.* (1) Submit requests for prior approval of nonemergency care (medical, dental, or maternity) from non-Federal sources to the adjudication authority (§ 732.20) serving the geographic area where care is to be obtained. When the requirements of § 732.14(d)(2) are met and spectacles have been obtained, request after-the-fact approval per this paragraph.

(2) Submit requests on a NAVMED 6320/10. Statement of Civilian Medical/Dental Care, with blocks 1 through 7 and 19 through 25 completed. Assistance in completing the NAVMED 6320/10 can be obtained from the health benefits advisor (HBA) at the nearest USMTF.

(3) Upon receipt, the adjudication authority will review the request and, if necessary, forward it to the appropriate chief of service with an explanation of non-Federal care regulations pertaining to the request. The chief of service will respond to the request within 24 hours. The adjudication authority will then complete blocks 26 and 27, and return the original of the approved/disapproved NAVMED 6320/10 to the member.

(b) *Blanket prior approval.* (1) Recruiting offices and other activities far removed from USMTFs, uniformed services dental treatment facilities (USDTFs), designated USTFs, and VA facilities may request blanket approval for civilian medical and dental care of assigned active duty personnel. Letter requests should be submitted to the adjudication authority (§ 732.20) assigned responsibility for the geographic area of the requestor.

(2) With full realization that such blanket approval is an authorization to obligate the Government without individual prior approval, adjudication authorities will ensure that:

(i) Each blanket approval letter specifies a maximum dollar amount allowable in each instance of care.

(ii) The location of the activity receiving blanket approval authority is clearly delineated.

(iii) Travel distance and time required to reach the nearest USMTF, USDTF, designated USTF, or VA facility have been considered.

(iv) Certain conditions are specifically excluded, e.g., psychiatric care and elective surgical procedures. These conditions will continue to require individual prior approval.

(v) COMNAVMEDCOM (MEDCOM-333) is made an information addressee on each letter of authorization.

(c) *Maternity care.* (1) Pregnant active duty members residing outside Military Health Services System (MHSS) inpatent catchment areas of uniformed services facilities (including USTFs), designated in Volumes I, II, and III of MHSS Catchment Area Directories, are permitted to choose whether to deliver in a closer civilian hospital or travel to a USMTF or USTF for delivery. If the Government is to assume financial responsibility for non-Federal maternity care of any member regardless of where she resides, the member must obtain individual prior approval as outlined in paragraph (a) of this section. Adjudication authorities should not approve requests from members residing within an inpatient MHSS catchment area unless:

(i) Capability does not (did not) exist at the USMTF or other Federal MTF serving her catchment area.

(ii) An emergency situation necessitated delivery or other treatment in a non-Federal facility (§ 732.16(b)).

(2) Normal delivery at or near the expected delivery date should not be considered an emergency for members residing within an MHSS inpatient catchment area where delivery was expected to occur and, unless provided for in this part, will not be reason for delivery in a civilian facility at Government expense.

(3) When granted leave that spans the period of an imminent delivery, the pregnant member should request a copy of her complete prenatal care records from the prenatal care physician. The physician should note in the record whether the member is clear to travel. If receiving prenatel care from a USMTF, the HBA will assist the member in obtaining a statement bearing the name of the MTF (may be an OMA) with administrative responsibility for the geographic area of her leave address, including the telephone number of the head of the patient administration department or HBA, if available. If a member is receiving prenatal care from other than a USMTF, she should avail herself of the services of the nearest HBA to effect the aforestated services. This statement should be attached to the approved leave request. In normal deliveries, requests for after-the-fact approval should be denied when members have not attempted to adhere to the provisions of this part.

(4) Upon arrival at the designated leave address, members should contact the MTF indicated on the statement attached to their leave request. The MTF will make a determination whether the member's leave address falls within the inpatient catchment area of a USMTF or USTF with the capability of providing needed care. If no such USMTF or USTF exists, the member will be given the opportunity to choose to deliver in a civilian hospital closer to her leave address or travel to the most accessible USMTF or USTF with capability for maternity care.

(5) Upon determination that civilian sources will be used for maternity care, the MTF listed on the attachment to the leave papers will inform the member that she (or someone acting in her behalf) must notify that MTF of the member's admission for delivery or other inpatient care so that medical cognizance can be initiated.

(6) Automatically grant prior or retroactive approval, as the situation warrants, to members requiring maternity care while in a travel status in the execution of permanent change of station (PCS) orders.

(d) *Nonemergency care without prior approval.* (1) If it becomes known that a member intends to seek medical or dental care (inpatient or outpatient) from a non-Federal source and prior approval has not been granted for the use of the Nonnaval Medical and Dental Care Program, the member must be counseled by, or in the presence of, a Medical Department officer. Request that the member sign a statement on an SF 600, Chronological Record of Medical Care, or an SF 603 or 603A, Health Record, Dental as appropriate, for inclusion in the member's Health Record. The statement must specify that counseling has been accomplished, and that the member understands the

significance of receiving unauthorized civilian care. This must be accomplished when either personal funds or third party payor (insurance) funds are intended to be used to defray the cost of care. Counseling will include:

(i) Availability of care from a Federal source.

(ii) The requirement for prior approval if the Government may be expected to defray any of the cost of such care.

(iii) Information regarding possible compromise of disability benefits should a therapeutic misadventure occur.

(iv) Notification that should hospitalization become necessary, or other time is lost from the member's place of duty, such lost time may be chargeable as ''ordinary leave.''

(v) Notification that the Government cannot be responsible for out-of-pocket expenses which may be required by the insurance carrier or when the member does not have insurance which covers the cost of contemplated care.

(vi) Direction to report to a uniformed services medical officer (preferably Navy) upon completion of treatment for determination of member's fitness for continued service.

(2) If it becomes known that a member has already received non-Federal medical care without prior authorization, refer the member to a uniformed services medical officer (preferably Navy) to determine fitness for continued service. At this time, counseling measures delineated in paragraph (d)(1)(iii), (iv), and (v) of this section must be taken.

### § 732.18 Notification of illness or injury.

(a) *Member's responsibility*. (1) If able, members must notify or cause their parent command, the nearest naval activity, or per OPNAVINST 6320.6, the nearest U.S. Embassy or consulate when hospitalized in a foreign medical facility to be notified as soon as possible of the circumstances requiring medical or dental attention in a non-Federal facility. The member will also assure (request the facility to make notification if unable to do so personally) that the following information is passed to the adjudication authority serving the area of the source of care (§ 732.20). This notification is in addition to the requirements of article 4210100 of the Military Personnel Command Manual (MILPERSMAN) or Marine Corps Order 6320.3B, as appropriate. The adjudication authority will then arrange for transfer of the member and, if appropriate, newborn infant(s), to a Federal facility or for such other action as is appropriate.

(i) Name, grade or rate, and social security number of patient.

(ii) Name of non-Federal medical or dental facility rendering treatment.

(iii) Date(s) of such treatment.

(iv) Nature and extent of treatment or care already furnished.

(v) Need or apparent need for further treatment (for maternity patients, need or apparent need for further care of infant(s) also).

(vi) Earliest date on which transfer to a Federal facility can be effected.

(vii) Telephone number of attending physician and patient.

(2) Should movement be delayed due to actions of the member or the member's family, payment may be denied for all care received after provision of written notification by the adjudication authority.

(3) The denial is § 732.18(a)(2) will be for care received after the member's condition has stabilized and after the cognizant adjudication authority has made a request to the attending physician and hospital administration for the member's release from the civilian facility. This notification must specify:

(i) Date and time the Navy will terminate its responsibility for payment.

(ii) That care rendered subsequent to receipt of the written notification is at the expense of the member.

(b) *Adjudication authority*. As soon as it is ascertained that a member is being treated in a nonnaval facility, adjudication authorities must make the notifications required in MILPERSMAN, article 4210100.11. See part 728 of this chapter on message drafting and information addressees.

(1) Article 4210100.11 of the MILPERSMAN requires submission of a personnel casualty report, by priority message, to the primary and secondary next of kin (PNOK/SNOK) of Navy members seriously or very seriously ill

or injured, and on those terminally ill (diagnosed and confirmed). While submission of the personnel casualty report to the PNOK and SNOK is a responsibility of the member's command, adjudication authorities must advise the member's command when such a member is being treated or diagnosed by non-Federal sources. The message will also request forwarding of the member's service and medical records to the personnel support detachment (PSD) supporting the activity in which the OMA is located. Additionally, the notification should contain a request for appropriate orders, either temporary additional duty (TEMADD) or temporary duty (TEMPDU).

(i) Request TEMADD orders if care is expected to terminate within the time constraints imposed for these orders.

(ii) Request TEMDU Under Treatment orders for members hospitalized in a NMTF within the adjudication authority's area of responsibility.

(2) Make prompt message notification to the member's commanding officer when apprised of any medical condition, including pregnancy, which will now or in the foreseeable future result in loss of a member's full duty services in excess of 72 hours. Mark the message ''Commanding Officer's Eyes Only.''

**§ 732.19 Claims.**

(a) *Member's responsibility*. Members receiving care are responsible for preparation and submission of claims to the cognizant adjudication authority identified in § 732.20. A complete claim includes:

(1) *NAVMED 6320/10, Statement of Civilian Medical/Dental Care*. In addition to its use as an authorization document, the original and three copies of a NAVMED 6320/10 are required to adjudicate claims in each instance of sickness, injury, or maternity care when treatment is received from a non-Federal source under the provisions of this part. The form should be prepared by a naval medical or dental officer, when practicable, by the senior officer present where a naval medical or dental officer is not on duty, or by the member receiving care when on detached duty where a senior officer is not present.

(i) For nonemergency care with prior approval, submit the NAVMED 6320/10 containing the prior approval, after completing blocks 8 through 18.

(ii) For emergency care (or nonemergency care without prior approval), submit a NAVMED 6320/10 after completing blocks 1 through 18. Assure that the diagnosis is listed in block 10. If prior approval was not obtained, state in block 11 circumstances necessitating use of non-Federal facilities.

(iii) Signature by the member in block 17 implies agreement for release of information to the responsible adjudication authority receiving the claim for processing. Signature by the certifying officer in block 18 will be considered certification that documentation has been entered in the member's Health Record as directed in article 16–24 of MANMED.

(2) *Itemized bills*. The original and three copies of itemized bills to show:

(i) Dates on or between which services were rendered or supplies furnished.

(ii) Nature of and charges for each item.

(iii) Diagnosis.

(iv) Acknowledgment of receipt of the services or supplies on the face of the bill or by separate certificate. The acknowledgment must include the statement. ''Services were received and were satisfactory.''

(3) *Claims for reimbursement*. To effect reimbursement, also submit the original and three copies of paid receipts and an SF 1164. Claim for Reimbursement for Expenditures on Official Business, completed per paragraphs 046377–2 a and b of the Naval Comptroller Manual (NAVCOMPT MAN).

(4) *Notice of eligibility (NOE) and line of duty (LOD) determination*. When a reservist claims benefits for care received totally after the completion of either an active duty or active duty for training period, the claim should also include:

(i) An NOE issued per SECNAVINST 1770.3.

(ii) An LOD determination from the member's commanding officer.

(b) *Adjudicating authority's responsibility*. Reviewing and processing properly completed claims and forwarding

approved claims to the appropriate disbursing office should be completed within 30 days of receipt. Advice may be requested from COMNAVMEDCOM (MEDCOM–333 (A/V 294–1127)) for medical or MEDCOM–06 (A/V 294–1250)) for dental on unusual or questionable instances of care. Advise claimants of any delay experienced in processing claims.

(1) *Review*. The receiving adjudication authority will carefully review each claim submitted for payment or reimbursement to verify whether:

(i) Claimant was entitled to benefits (*i.e.*, was on active duty, active duty for training, inactive duty training, was not an unauthorized absentee, etc.). As required by part 728 of this chapter, a Defense Enrollment Eligibility Reporting System (DEERS) eligibility check must be performed on claims to all claimants required to be enrolled in DEERS.

(ii) Care rendered was due to a bona fide emergency. (NOTE: When questions arise as to the emergency nature of care, forward the claim and all supporting documentation to the appropriate clinical specialist at the nearest naval hospital for review.)

(iii) Prior approval was granted if a bona fide emergency did not exist. (NOTE: If prior approval was not obtained and the condition treated is determined to have been nonemergent, the claim may be denied.) Consideration should always be given to cases that would have received prior approval but, due to lack of knowledge of the program, the member did not submit a request.

(iv) Care rendered was authorized under the provisions of this part.

(v) Care rendered was appropriate for the specific condition treated. (NOTE: When questions arise regarding appropriateness of care, forward all documentation to a clinical specialist at the nearest naval hospital for review. If care is determined to have been inappropriate, the claim may be denied to the extent the member was negligent.)

(vi) Claimed benefits did not result from a referral by a USMTF. If the member was an inpatient or an outpatient in a USMTF immediately prior to being referred to a civilian source of care, the civilian care is supplemental and may be the responsibility of the referring USMTF. See § 732.11(p) for the definition of supplemental care.

(2) *Dispproval*. If a determination is made to disapprove a claim, provide the member (and provider of care, when applicable) a prompt and courteous letter stating the reason for the disapproval and the appropriate avenues of appeal as outlined in § 732.24.

(3) *Processing*. Subpart C contains the chargeable accounting classifications and Standard Document Numbers (SDN) to be cited on the NAVCOMPT 2277, Voucher for Disbursement and/or Collection, on an SF 1164 submitted per paragraph (a)(3) of this section, and on supporting documents of approved claims before submission to disbursing offices.

(i) For payment to providers of care, a NAV COMPT 2277 will be prepared and certified approved for payment by the adjudicating authority. This form must accompany the NAVMED 6320/10 and supporting documentation per paragraph 046393–1 of the NAVCOMPTMAN.

(ii) Where reimbursement is requested, the SF 1164 submitted per § 732.19(a)(3) will be completed, per paragraph 046377 of the NAVCOMPTMAN, and certified approved for payment by the adjudicating authority. This form must accompany the NAVMED 6320/10 and supporting documentation.

(c) *Amount payable*. Amounts payable are those considered reasonable after taking into consideration all facts. Normally, payment should be approved at rates generally prevailing within the geographic area where services or supplies were furnished. Although rates specially established by the Veterans Administration, CHAMPUS, or those used in Medicare are not controlling, they should be considered along with other facts.

(1) *Excessive charges*. If any charge is excessive, the adjudication authority will advise the provider of care of the conclusion reached and afford the provider an opportunity to voluntarily reduce the amount of the claim. If this does not result in a proper reduction and the claim is that of a physician or dentist, refer the difference in opinions

to the grievance committee of the provider's professional group for an opinion of the reasonableness of the charge. If satisfactory settlement of any claim cannot thus be made, forward all documentation to COMNAVMEDCOM (MEDCOM–333) for decision. Charges determined to be above the allowed amount or charges for unauthorized services are the responsibility of the service member.

(2) *Third party payment*. Do not withhold payment while seeking funds from health benefit plans or from insurance policies for which premiums are paid privately by service members (see § 732.22 for possible recovery of payments action).

(3) *No-fault insurance*. In States with no-fault automobile insurance requirements, adjudication authorities will notify the insurance carrier identified in item 16 of the NAVMED 6320/10 that Federal payment of the benefits in this part is secondary to any no-fault insurance coverage available to the potentially covered member.

(d) *Duplicate payments*. Adjudication authorities and disbursing activities should take precautions against duplicate payments per paragraph 046073 of the NAVCOMPTMAN.

**§ 732.20 Adjudication authorities.**

(a) *General*. Controlling activities for medical care in the United States are designated as ''offices of medical affairs'' (OMA) and for dental care, ''offices of dental affairs'' (ODA). NAVMEDCOMINST 6010.3 delineates responsibilities and functional tasks of OMAs and ODAs, including monthly reporting of receipt of claims and claims payment. Commanders of geographic naval medical commands must communicate with all activities in their regions to ensure that messages and medical cognizance reports are properly furnished per higher authority directives.

(b) *Within the United States (less Hawaii)*. For the 48 contiguous United States, the District of Columbia, and Alaska, the following six regions are responsible for care rendered or to be rendered within their areas of responsibility.

(1) *Northeast Region*. The States of Connecticut, Delaware, Illinois, Indiana, Iowa, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Vermont, and Wisconsin are served by 1 ODA and 1 OMA:

(i) Responsibility for dental matters for States in the Northeast Region is vested in: Commander, Naval Medical Command, Northeast Region, Office of Dental Affairs, Great Lakes, IL 60088, Tele: (A/V) 792–3940 or (C) (312) 688–3940.

(ii) Responsibility for medical matters for States in the Northeast Region is vested in: Commander, Naval Medical Command, Northeast Region, Office of Medical Affairs, Great Lakes, IL 60088, Tele: (A/V) 792–3950 or (C) (312) 688–3950.

(2) *National Capital Region*. For the States of Maryland and West Virginia; the Virginia counties of Arlington, Fairfax, Loudoun, and Prince William; the Virginia cities of Alexandria, Falls Church, and Fairfax; and the District of Columbia, responsibility for medical and dental matters is vested in: Commander, Naval Medical Command, National Capital Region, Office of Medical Affairs, Bethesda, MD 20814, Tele: (A/V) 295–5322 or (C) (301) 295–5322.

(3) *Mid-Atlantic Region*. For the States of North Carolina, South Carolina, and all areas of Virginia south and west of Prince William and Loudoun counties, responsibility for medical and dental matters is vested in: Commander, Naval Medical Command, Mid-Atlantic Region, 6500 Hampton Boulevard, Norfolk, VA 23502, Attn: Office of Medical/Dental Affairs, Tele: (A/V) 565–1074/1075 or (C) (804) 445–1074 or 1075.

(4) *Southeast Region*. For the States of Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, Oklahoma, Tennessee, and Texas, medical and dental responsibilities are vested in: Commanding Officer, Naval Medical Clinic, Code O1A, New Orleans, LA 70146, Tele: (A/V) 485–2406/7/8 or (C) (504) 361–2406 2407 or 2408.

(5) *Southwest Region*. For the States of Arizona and New Mexico; the counties of Kern, San Bernadino, San Luis Obispo, Santa Barbara, and all other California counties south thereof; the community of Bridgeport, California (Marine Corps cold-weather training

site); and Nevada, except for NAS Fallon and its immediate area; medical and dental responsibilities are vested in: Commander, Naval Medical Command, Southwest Region, Office of Medical Affairs, San Diego, CA 92134–7000, Tele: (A/V) 987–2611 or (C) 233–2611.

(6) *Northwest Region*. The States of Alaska, Colorado, Idaho, Kansas, Montana, Nebraska, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming; the counties of Inyo, Kings, Tulare, and all other counties of California north thereof; and NAS Fallon, Nevada and its immediate area are served by 2 OMAs and 1 ODA:

(i) Responsibility for dental matters for the area of responsibility of the Northwest Region is vested in: Commander, Naval Medical Command, Northwest Region, Office of Dental Affairs, Oakland, CA 94267–5025, Tele: (A/V) 855–6200 or (C) (415) 633–6200.

(ii) Responsibility for medical matters for the States of Colorado, Kansas, and Utah; the California counties of Inyo, Kings, Tulare, and all other counties of California north thereof; and NAS Fallon, Nevada and its immediate area is vested in: Commander, Naval Medical Command, Northwest Region, Oakland, CA 94627–5025, Attn: Office of Medical Affairs, Tele: (A/V) 855–5705 or (C) (415) 633–5705.

(iii) Responsibility for medical matters for the States of Alaska, Idaho, Montana, Nebraska, North Dakota, Oregon, South Dakota, Washington, and Wyoming is vested in: Commanding Officer, Naval Medical Clinic, Naval Station, Seattle, WA 98115, Attn: Office of Medical Affairs, Tele: (A/V) 941–3823 or (C) (206) 526–3823.

(c) *Outside the United States (plus Hawaii)*. For all areas outside the United States plus Hawaii, the following activities are vested with responsibility for approval or disapproval of requests and claims for maternity, medical, and dental care:

(1) Executive Director, OCHAMPUSEUR, U.S. Army Medical Command, APO New York 09102, for care rendered within the U.S. European Command, Africa, the Malagasy Republic, and the Middle East.

(2) Commanding Officer, U.S. Naval Hospital, FPO San Francisco 96652–1600 (U.S. Naval Hospital, Subic Bay, Luzon, Republic of the Philippines), for care rendered in Afghanistan, Bangladesh, Hong Kong, India, Nepal Pakistan, the Philippines, Southeast Asia, Sri Lanka and Taiwan.

(3) Commanding Officer, U.S. Naval Hospital, FPO Seattle 98765–1600 (U.S. Naval Hospital, Yokosuka, Japan), for care rendered in Japan, Korea, and Okinawa.

(4) Commanding Officer, U.S. Naval Hospital, FPO San Francisco 96630–1600 (U.S. Naval Hospital, Guam, Mariana Islands), for care rendered in New Zealand and Guam.

(5) Commanding Officer, U.S. Naval Communications Station, FPO San Francisco 96680–1800 (U.S. Naval Communications Station, Harold E. Holt, Exmouth, Western Australia), for care rendered in Australia.

(6) Commanding Officer, U.S. Naval Air Station, FPO New York 09560 (U.S. Naval Air Station, Bermuda), for care rendered in Bermuda.

(7) Commanding Officer, U.S. Naval Hospital, FPO Miami 34051 (U.S. Naval Hospital, Roosevelt Roads, Puerto Rico), for maternity and medical care, and Commanding Officer, U.S. Naval Dental Clinic, FPO Miami 34051 (U.S. Naval Dental Clinic, Roosevelt Roads, PR), for dental care rendered in Puerto Rico, the Virgin Islands, and other Caribbean Islands.

(8) Commanding Officer, Naval Medical Clinic, Box 121, Pearl Harbor, HI 96860, for maternity and medical care, and Commanding Officer, Naval Dental Clinic, Box 111, Pearl Harbor, HI 96860, for dental care rendered in the State of Hawaii, Midway Island, and the Central Pacific basin.

(9) The OMA for either the Southeast Region or the Southwest Region for care rendered in Mexico to members stationed within the respective areas of responsibility of these OMAs. Forward claims for care rendered in Mexico to all other personnel to Commander, Naval Medical Command, Washington, DC 20372–5120 (MEDCOM–333).

(10) Commander, Naval Medical Command, Washington, DC 20372–5120 (MEDCOM–333) for inpatient and outpatient emergency and nonemergency care of active duty Navy and Marine Corps members in Canada and under

the circumstances outlined in paragraph (d) of this section.

(11) Outside the 50 United States, commanding officers of operational units may either approve claims and direct payment by the disbursing officer serving the command or forward claims to the appropriate naval medical command in paragraphs (b)(1) through (c)(9) of this section. This is a local policy decision to enhance the maintenance of good public relations.

(12) The appropriate command in paragraphs (b)(1) through (c)(9) of this section for care rendered aboard commercial vessels en route to a location within the geographic areas listed.

(13) The commanding officer authorizing care in geographical areas not specifically delineated elsewhere in this section.

(d) *The Commander, Naval Medical Command (MEDCOM–333), Navy Department, Washington, DC 20372–5120.* Under the following circumstances, responsibility is vested in COMNAVMEDCOM for adjudication of claims:

(1) For reservists who receive treatment after completion of their active duty or inactive duty training as prescribed in § 732.12(b).

(2) For care rendered in Mexico to personnel stationed outside the areas of responsibility of the Southeast and Southwest Regions.

(3) For care rendered to members stationed in or passing through countries in Central and South America.

(4) For outpatient care rendered NATO active duty members.

(5) When Departmental level review is required prior to approval, adjudication, or payment. These claims:

(i) Will be considered on appeal.

(ii) Must be forwarded by the member through the adjudication authority chain of command (In instances of unusual or controversial denial of claims, the adjudication authority may forward claims to COMNAVMEDCOM on appeal, via the chain of command, with notification to the member.).

(6) For all inpatient and outpatient care of active duty Navy and Marine Corps members stationed in the United States who receive care in Canada.

### § 732.21 Medical board.

When adjudication authorities uncover conditions which may be chronic or otherwise potentially disabling, they should make a determination (with help from appropriate clinical specialists) as to the need for a medical board. Chapter 18 of MANMED and Medical Disposition and Physical Standards Notes, available from COMNAVMEDCOM (MEDCOM–25), provide guidance.

(a) Chronic conditions requiring a medical board include (but are not limited to):

(1) Arthritis,

(2) Asthma,

(3) Diabetes,

(4) Gout,

(5) Heart disease,

(6) Hypertension,

(7) Peptic ulcer disease,

(8) Psychiatric conditions, and

(9) Allergic conditions requiring desensitization.

(b) Other potentially disabling or chronic conditions may be referred to a medical board by the adjudication authority with the concurrence of an appropriate naval clinical specialist and the commander of the regional medical command.

### § 732.22 Recovery of medical care payments.

Adjudication authorities must submit evidence of payment to the action JAG designee per chapter 24 of the Manual of the Judge Advocate General (JAGMAN), in each instance of payment where a third party may be legally liable for causing the injury or disease treated, or when a Government claim is possible under workers compensation, no-fault insurance, or under medical payments insurance (all automobile accident cases).

(a) To assist in identifying possible third party liability cases, item 16 of each NAVMED 6320/10 must be completed whenever benefits are received in connection with a vehicle accident. Adjudication authorities should return for completion, as applicable, any claim received without item 16 completed.

(b) The front of a NAVJAG Form 5890/12 (Hospital and Medical Care, 3rd

Party Liability Case) must be completed and submitted by adjudication authorities with evidence of payment. Block 4 of this form requires an appended statement of the patient or an accident report, if available. To ensure that Privacy Act procedures are accomplished and documented, the person securing such a statement from a recipient of care must show the recipient the Privacy Act statement printed at the bottom of the form prior to securing such a statement. The member should be asked to sign his or her name beneath the statement.

(c) For care rendered in States with no-fault insurance laws, comply with procedures outlined in § 732.19(c)(3).

### § 732.23 Collection for subsistence.

The Navy Pay and Personnel Procedures Manual provides guidance regarding pay account checkage procedures to liquidate subsistence charges incurred by members entitled to care under the provisions of this part. Such members must also be entitled to basic allowance for subsistence (BAS) while hospitalized at Government expense. The responsible activity (the adjudication authority or the naval MTF to which such a member is transferred) should follow procedures outlined in the Navy Pay and Personnel Procedures Manual when an eligible officer or enlisted member of the naval service is subsisted at Department of the Navy expense while hospitalized in a nonnaval treatment facility. Subpart C contains the creditable accounting classification for inpatient subsistence collections.

### § 732.24 Appeal procedures.

When a claim for care or a request for prior approval for nonemergency care is initially denied by an adjudication authority, the member may appeal the denial as outlined below. Any level in the appeal process may over-rule the previous decision and order payment of the claim in whole or in part or grant the request for prior approval of care.

(a) Level I—Reconsideration by the adjudication authority making the initial denial. The member should submit any additional information that may mitigate the initial denial.

(b) Level II—Consideration by the commander of the regional medical command having cognizance over the adjudication authority which upheld the initial denial on reconsideration.

(c) Level III—Consideration by COMNAVMEDCOM (MEDCOM–333).

## Subpart C—Accounting Classifications for Nonnaval Medical and Dental Care Expenses and Standard Document Numbers

### § 732.25 Accounting classifications for nonnaval medical and dental care expenses.

| Approp. | Sub-Head | OBJ.** Class | BCN | SA | AAA | TT | PAA | Cost Code | Purpose |
|---|---|---|---|---|---|---|---|---|---|
| 17*1804 | 188M | 000 | 00018 | M | 000179 | 2D | MDQ000 | 990010000MDQ | Outpatient Care Service Expenses. [1 2] |
| 17*1804 | 188M | 000 | 00018 | M | 000179 | 2D | MDT000 | 990010000MDT | Outpatient Care Supply Expenses. [1 3] |
| 17*1804 | 188M | 000 | 00018 | M | 000179 | 2D | MDE000 | 990010000MDE | Ambulance Expenses. [1] |
| 17*1804 | 188M | 000 | 00018 | M | 000179 | 2D | MDQI00 | 990020000MDQ | Inpatient Care Service Expense. [1 2] |
| 17*1804 | 188M | 000 | 00018 | M | 000179 | 2D | MDTI00 | 990020000MDT | Inpatient Care Supply Expenses. [1 3] |

| Approp. | Sub-Head | OBJ.** Class | BCN | SA | AAA | TT | PAA | Cost Code | Purpose |
|---|---|---|---|---|---|---|---|---|---|
| 17*1804 | 188M | 006 | 00018 | M | 000179 | 3C | MDZI00 | 990020000MDZ | Inpatient Subsistence Collections.[1] |

NOTES:
*For the third digit of the appropriation, enter the last digit of the fiscal year current at the time claim is approved for payment.
**Refer to NAVCOMPT Manual par. 027003 for appropriate Expenditure Category Codes when disbursement or collection involves a foreign or U.S. Contractor abroad.
[1] Not applicable when care is procured from non-DOD sources for a patient receiving either inpatient or outpatient care at a naval medical facility. In such instances, the expenses incurred are payable from operations and maintenance funds available for support of the naval medical facility.
[2] Service expenses include: hospital, emergency room clinic, office fees; physician and dentist professional fees; laboratory, radiology, operating room, anesthesia, physical therapy, and other services provided.
[3] Supply expenses include: medications and pharmacy charges; IV solutions; whole blood and blood products; bandages; crutches; prosthetic devices; needles and syringes; and other supplies provided.

### § 732.26 Standard document numbers.

Adjudication authorities will assign to each claim approved for payment, a unique 15 position alpha/numeric standard document number (SDN). Prominently display this number on the NAVMED 6320/10, the NAVCOMPT 2277 (Voucher for Disbursement and/or Collection), NAVCOMPT 1164 (Claim for Reimbursement for Expenditures on Official Business) and on all other documentation accompanying claims. Compose SNDs per the following example: N0016887MD00001 or N0016887RV00001.

| | 1 | 2 thru 6 | 7 & 8 | 9 & 10 | 11 thru 15 |
|---|---|---|---|---|---|
| Position Entry | N | 00168 | 87 | MD or RV | 00001 |

| Position | Data entry |
|---|---|
| 1 | "N" identifies Navy. |
| 2 thru 6 | Unit Identification Code of document issuing activity. |
| 7 and 8 | Last two digits of the fiscal year in which the claim is approved for payment. |
| 9 and 10, | For NAVCOMPT 2277s, "MD" identifies the document as Miscellaneous Financial Document. |
| or, | |
| 9 and 10 | For SF 1164s, "RV" identifies the document as a Reimbursement Voucher. |
| 11 thru 15 | Consecutively assigned five digit serial number beginning with "00001" each fiscal year. Each subsequent claim will then be serially numbered "00002", "00003", etc. |

## PART 733—ASSISTANCE TO AND SUPPORT OF DEPENDENTS; PATERNITY COMPLAINTS

Sec.
733.1 Rates of basic allowance for housing (BAH).
733.2 Delegations.
733.3 Information and policy on support of dependents.
733.4 Complaints of nonsupport and insufficient support of dependents.
733.5 Determination of paternity and support of illegitimate children.

AUTHORITY: 5 U.S.C. 301; 10 U.S.C. 5013; 37 U.S.C. 101, 401, 403; 50 U.S.C. App. 2210; E.O. 11157, 29 FR 7973, 3 CFR 1964 Supp. p. 139, as amended.

SOURCE: 44 FR 42190, July 19, 1979, unless otherwise noted.

### § 733.1 Rates of basic allowance for housing (BAH).

(a) Except as otherwise provided by law, a member of the naval service entitled to basic pay is entitled to a BAH at the monthly rates according to the

pay grade to which he or she is assigned, in accordance with 37 U.S.C. 403.

(b) The term ''dependent'' with respect to a member of the naval service, as used in this part, means:

(1) His or her spouse;

(2) His or her unmarried child (including any of the following categories of children if such child is in fact dependent on the member: A stepchild; an adopted child; or an illegitimate child whose alleged member-parent has been judicially decreed to be the parent of the child or judicially ordered to contribute to the child's support, or whose parentage has been admitted in writing by the member) who either:

(i) Is under 21 years of age; or

(ii) Is incapable of self-support because of a mental or physical incapacity, and in fact dependent on the member for over one-half of his or her support; and

(3) His or her parent (including a stepparent or parent by adoption, and any person, including a former stepparent, who has stood in loco parentis to the member at any time for a continuous period of at least 5 years before he or she became 21 years of age) who is in fact dependent on the member for over one-half of his or her support; however, the dependency of such a parent is determined on the basis of an affidavit submitted by the parent and any other evidence required under regulations prescribed by the Secretary of the Navy, and he or she is not considered a dependent of the member claiming the dependency unless:

(i) The member has provided over one-half of his or her support for the period prescribed by the Secretary; or

(ii) Due to changed circumstances arising after the member enters on active duty, the parent becomes in fact dependent on the member for over one-half of is or her support.

The relationship between a stepparent and his or her stepchild is terminated by the stepparent's divorce from the parent by blood.

[44 FR 42190, July 19, 1979, as amended at 65 FR 62617, Oct. 19, 2000]

### § 733.2 Delegations.

The Director, Navy Family Allowance Activity, Anthony J. Celebrezze Federal Building, Cleveland, OH 44199, with respect to personnel of the Navy, and the Head, Personal Affairs Branch, Manpower Department, Headquarters United States Marine Corps, Washington, DC 20380, with respect to personnel of the Marine Corps, have been granted the authority by the Secretary of the Navy to make determinations including determinations of dependency and relationship when required by legislation or policy for eligibility for BAH, transportation and medical care in behalf of dependents of Navy and Marine personnel and to administer matters involving adequacy of support for dependents and waivers of support of a spouse, and on the basis of new evidence or for other good cause to reconsider or modify any such determination.

[44 FR 42190, July 19, 1979, as amended at 65 FR 62617, Oct. 19, 2000]

### § 733.3 Information and policy on support of dependents.

(a) *Policy*—(1) *General.* The naval service will not be a haven or refuge for personnel who disregard or evade their obligations to their families. All members of the naval service are expected to conduct their personal affairs satisfactorily. This includes the requirement that they provide adequate and continuous support for their lawful dependents and comply with the terms of separation agreements and court orders. Failure to do so which tends to bring discredit on the naval service is a proper subject of command consideration for initiation of court-martial proceedings or other administrative or disciplinary action.

(2) *Adequacy of support.* Every member has an inherent natural and moral obligation to support his or her spouse and family. What is adequate and reasonably sufficient support is a highly complex and individual matter dependent on numerous factors, and may be resolved permanently only in the civil courts. Salient factors that should be considered are the pay of the member, any other private income or resources of the member and the dependents, the cost of necessities and every day living expenses and financial obligations of the dependents, and the expenses and

other financial obligations of the member in relation to his or her income. The Department of the Navy does not and cannot act as a court in these matters. It is desired that the amount of support to be provided for dependents either be established by mutual understanding between the parties concerned or adjudicated in the civil courts. The support scales set forth in paragraphs (b) and (c) of this section are not intended as a fixed rule. They are intended as guidelines and the actual support may be increased or decreased as the facts and circumstances warrant until the amount of support to be furnished is settled by agreement of the parties or adjudicated by the civil courts. Because of the inherent arbitrary and temporary nature of the support scales set forth below, it is not intended that they be used as bases for any judicial proceedings, for to do so would lend excessive credence to administrative tools which have been designed for use only within the Navy and the Marine Corps.

(3) *Support of a lawful wife*. The laws of jurisdictions in the United States impose a legal obligation upon a husband to support his wife. Exemptions from support of a lawful wife may be in the form of an order of a civil court of competent jurisdiction, relinquishment by the wife or mutual agreement of the parties, or a waiver of the naval support requirement granted by the Director, Navy Family Allowance Activity or the Commandant of the Marine Corps, as appropriate.

(4) *Payments of alimony*. Dependents for whom basic allowance for quarters or other allowances are payable are defined by law. For purposes of qualifying for basic allowance for quarters, medical care or other benefits, a former spouse is not a dependent even though alimony has been decreed. Members are expected to comply with the terms of court orders or divorce decrees which adjudge payments of alimony even though basic allowance for quarters is not payable.

(5) *Support of children*. The duty of a member to support his or her minor children is not affected by desertion or other misconduct on the part of the spouse. The obligation to support a child or children is not affected by dissolution of the marriage through divorce, unless the judicial decree or order specifically negates the obligations of the member to support a child or children of the marriage. The fact that a divorce decree is silent relative to support of minor children or does not mention a child or children will not be considered as relieving the service member of the inherent obligation to provide support for the child or children of the marriage. In many cases, the courts may not be cognizant of the existence of a child or children, or may not have jurisdiction over the child or children. A commanding officer has discretion to withhold action for alleged failure to support a child under the following conditions:

(i) Where the member cannot ascertain the whereabouts and welfare of the child concerned.

(ii) Where it is apparent that the person requesting support for a child does not have physical custody of the child.

(iii) Where the member has been granted custody of the child by court order but does not have physical control of the child and the member is ready, willing, and able to care for and support the child if physical control is obtained.

(6) *Adopted children*. The natural parents of an adopted child are relieved of the obligation to support the child as such duty is imposed on the adoptive parents. A Navy or Marine Corps member who contemplates the adoption of a child should be aware of the legal obligation to provide continuous support for such child during minority.

(7) *Entitlement to basic allowance for quarters*. Entitlement of members to basic allowance for quarters on behalf of dependents is provided by statute. No member should be denied the right to submit a claim or application for basic allowance for quarters, nor should any command refuse or fail to forward any such claim or application. In cases involving parents, the member should furnish an estimate of the dependency situation to the best of his or her knowledge. Commanding officers should not contact parents for dependency information to include in the member's application. This delays the

application and serves no useful purpose, as such cases are thoroughly investigated by the Navy Family Allowance Activity or Headquarters Marine Corps, which obtains necessary dependency affidavits directly from the parents. Any person, including a service member or dependent who obtains an allowance by fraudulent means is subject to criminal prosecution.

(8) *Application of the rule based on Robey v. United States 71 Ct. Cl. 561.* Determinations that no dependency exists may be made in disputed cases—if a member does not contribute to the support of spouse and child at least to the extent of:

(i) The full amount of his/her basic allowance for quarters, or

(ii) An amount specified in a court order or legal separation agreement, or

(iii) An amount agreed to by the parties as acceptable, adequate support, whichever is lesser. Pertinent decisions of the Court of Claims or Comptroller General will be followed in determinations of dependency.

(b) *Navy members.* (1) The amount of support to be provided in the absence of a mutual agreement or court order is as follows:

For spouse only—⅓ gross pay
For spouse and one minor child—½ gross pay
For spouse and two or more children—⅜ gross pay
For one minor child—⅙ gross pay
For two minor children—¼ gross pay
For three or more children—⅓ gross pay

(2) For purposes of this support guide, gross pay will include basic pay and BAH, but does not include hazardous duty pay, sea or foreign duty pay, incentive pay, or basic allowance for subsistence.

(c) *Marine Corps members.* (See MCO 5800.16A, Marine Corps Manual for Legal Administration (LEGADMINMAN))

(1) In the absence of a court order or a written agreement between the parties as to an amount of support to be furnished by the Marine, the following shall apply to establish interim support requirements. Note that gross pay is defined as basic pay and BAH, but does not include hazardous duty pay, incentive pay, or basic allowance for subsistence.

(2) *Single family.* (i) For a single family living in Government housing (civilian spouse): interim support shall be $200.00 per supported person, up to a maximum of ⅓ gross pay, per month.

(ii) For a single family not living in Government housing (civilian spouse): interim support shall be either $200.00 per supported family member, or BAH at the ''with dependents'' rate, whichever is greater, up to a maximum of ⅓ gross pay, per month.

(3) *Multiple families (not including a spouse in the armed forces).* Interim support for each family member shall be either $200.00 per supported family member, or the pro rata share of BAH at the ''with dependents'' rate, whichever is greater, up to a maximum of ⅓ gross pay, per month.

(4) *Both spouses in the armed forces.* (i) No children of the marriage: no support obligation, regardless of any disparities in pay grade.

(ii) All the children of the marriage in the custody of one spouse: interim support shall be either $200.00 per supported child, or BAH at the ''with dependents'' rate, whichever is greater, up to a maximum of ⅓ gross pay, per month.

(iii) If custody of children of the marriage is divided between the two parents: interim support shall be either $200.00 per supported family member, or the pro rata share of BAH at the ''with dependents'' rate, whichever is greater, up to a maximum of ⅓ gross pay, per month.

(5) Support amounts required pursuant to this section will be paid until a court order or written agreement is obtained.

(6) Form and timing of financial support payments

(i) Unless otherwise required by court order or by written financial support agreement, a financial support payment will be made in one of the following ways:

(A) Check.

(B) Money order.

(C) Electronic transfer.

(D) Voluntary allotment.

(E) Cash.

(F) Involuntary allotment.

(G) Garnishment.

(ii) As an exception to paragraph 15002.6a of the LEGADMINMAN, a commanding officer may direct compliance with the financial support requirements of this section by making in-kind financial support. For example, paying non-Government housing expenses on behalf of family members, automobile loans, or charge accounts.

(7) *Alimony and child support.* (i) Dependents for whom BAH or other allowances are payable are defined by law. For purposes of qualifying for BAH, medical care, or other benefits, a former spouse is not a dependent even though alimony has been decreed. Marines are expected to comply with the terms of court orders which adjudge alimony payments (even though BAH is not payable) until the responsibility for compliance is terminated by a court of competent jurisdiction; a written agreement between the persons concerned; relinquishment by the former spouse in writing; or the waiver of the support requirement is granted by the general court-martial (GCM) authority in writing.

(ii) If the decree is silent as to alimony payments, it is presumed that the court did not intend such payments.

(iii) When a valid court order exists and the Marine concerned is financially unable to comply, the Marine will be advised that noncompliance with the terms of that order renders the Marine liable to further civil court action.

(iv) The duty of Marines to support their minor children is not terminated by desertion or other misconduct on the part of the Marine's spouse. Similarly, the obligation to support a child or children is not eliminated or reduced by the dissolution of the marriage through divorce, unless a judicial decree or order specifically negates the obligation of child support. The fact that a divorce decree is silent relative to support of minor children, or does not mention a child or children, will not be interpreted by command authorities as relieving the Marine of the inherent obligation to provide support for the child or children of the marriage.

(v) A commanding officer may consider releasing a Marine under his/her command from the specific requirements of this regulation in the situations described below. A commanding officer may reconsider any prior decision made by himself/herself or by a prior commanding officer:

(A) When the Marine cannot determine the whereabouts and welfare of the child concerned;

(B) When it is apparent that the person requesting support for the child does not have physical custody of the child;

(C) When the Marine has been the victim of a substantiated instance of physical abuse (this section applies only to a requirement to support a spouse, not dependent children. Commanding officers are strongly encouraged to consult the installation family counseling center concerning such issues. In addition, commanders should exercise extreme caution in denying dependent support in cases where the servicemember is also a perpetrator of spousal abuse.); or

(D) The dependent is in jail.

(vi) All command directed support waivers shall be in writing and a copy shall be provided to the disenfranchised family member by the command. The command shall also retain a copy. Alleged verbal support waivers shall be given no force or effect.

(vii) The natural parents of an adopted child are relieved of the obligation to support the child as such duty is imposed on the adoptive parent. A Marine who contemplates the adoption of a child should be aware of the legal obligation to provide continuous support, once adopted, for such child during its minority.

[44 FR 42190, July 19, 1979, as amended at 65 FR 62617, Oct. 19, 2000]

### § 733.4 Complaints of nonsupport and insufficient support of dependents.

(a) Upon receipt of a complaint alleging that a member is not adequately supporting his or her lawful dependents (spouse or children), the member will be interviewed and informed of the policy of the Department of the Navy concerning support of dependents. In the absence of a determination by a civil court or a mutual agreement of the parties, the applicable guide in § 733.3

will apply. The member will be informed that his/her Navy or Marine Corps career may be in jeopardy if he/she does not take satisfactory action. The member may become ineligible to reenlist or extend enlistment (in the case of enlisted members), and may be subject to administrative or disciplinary action that may result in separation from the Navy or Marine Corps.

(1) *Waiver of support of spouse.* If the member feels that he or she has legitimate grounds for a waiver of support for the spouse, the Director, Navy Family Allowance Activity or in the case of a member of the U.S. Marine Corps, the general court-martial convening authority, may grant such a waiver for support of a spouse (but not children) on the basis of evidence of desertion without cause or infidelity on the part of the spouse. The evidence may consist of—

(i) *U.S. Navy members.* An affidavit of the service member, relative, disinterested person, public official, or law enforcement officer, and written admissions by the spouse contained in letters written by that spouse to the service member or other persons. However, affidavits of the service member and relatives should be supported by other corroborative evidence. All affidavits must be based upon the personal knowledge of the facts set forth; statements of hearsay, opinion, and conclusion are not acceptable as evidence.

(ii) *U.S. Marine Corps members.* The Marine's commander may consider all pertinent facts and circumstances. The general court-martial convening authority my consider any reliable evidence including, but not necessarily limited to, the following: affidavits of the Marine, relatives, or other witnesses; admissions of the spouse, including verbal and written statements or letters written by the spouse to the Marine or other persons; pertinent photographs or court orders; and admissions by the person with whom the spouse allegedly had sexual liaisons. Witness statements should ordinarily state facts that were personally observed. Statements that merely state a conclusion without providing the personal observations on which the conclusion is based are generally unpersuasive.

(iii) The request for waiver of support of a spouse should be submitted to the Director, Navy Family Allowance Activity or in the case of a member of the U.S. Marine Corps, the general court-martial convening authority, with a complete statement of the facts and substantiating evidence, and comments or recommendations of the commanding officer.

(2) *Action.* After a written complaint that a member has failed or refused to furnish support for his or her spouse or children has been received, and the member has been counseled with regard to his/her rights and obligations in the support matter, continued failure or refusal, without justification, to furnish support for dependents in accordance with the provisions of a valid court order, written agreement, or, in the absence of a court order or agreement, the appropriate support guide set forth above, will be a basis for consideration of disciplinary or administrative action which may result in the member's separation from active service.

(b) [Reserved]

[44 FR 42190, July 19, 1979, as amended at 65 FR 62618, Oct. 19, 2000]

### § 733.5 Determination of paternity and support of illegitimate children.

(a) *Illegitimate children.* If the service member desires marriage, leave for this purpose is recommended whenever consistent with the needs or exigencies of the service. When the blood parents of an illegitimate child marry, the child is considered to be legitimized by the marriage unless a court finds the child to be illegitimate.

(b) *Judicial order or decree of paternity or support.* Normally any order or decree which specifies the obligation to render support of illegitimate children will include within it a determination of paternity of such children; however, some jurisdictions provide for determinations of the legal obligation to support illegitimate children without a determination of paternity. Either type of order or decree falls within the scope of this paragraph. If a judicial order or decree of paternity or support is rendered by a United States or foreign court of competent jurisdiction

against a member of the Navy or Marine Corps on active duty, the member concerned will be informed of his moral and legal obligations as well as his legal rights in the matter. The member will be advised that he is expected to render financial assistance to the child regardless of any doubts of paternity that the member may have. If the court order or decree specifies an amount of support to be provided the member will be expected to comply with the terms of such decree or order. If no amount is specified, support should be rendered in accordance with such reasonable agreement as may be made with the mother or legal guardian of the child or, in the absence of such agreement, in accordance with the applicable guide set forth above. If the member refuses to comply with the terms of the court order, administrative action will be taken as indicated in § 733.4.

(1) *Court of competent jurisdiction.* A court of competent jurisdiction is generally a court that has jurisdiction over the subject matter and the parties involved. As a general rule, the competency of the court to render the judicial order or decree may be tested by the enforceability of the order or decree. Normally, although not always, personal service of the court's process on the member is considered essential. With respect to a foreign judicial order or decree, the general rule is that where the defendant was a citizen or subject of the foreign country in which the order or decree was issued, the court may have acquired jurisdiction over the member by any mode of service or notice recognized as sufficient by the laws of that country. It should be noted, however, that an order or decree against a citizen or permanent resident of another country, without personal service or personal notice of the action to him or her, is null and void unless the member voluntarily submitted to the jurisdiction by appearing and contesting the action. In the event there is doubt as to the competency of the court to enter the order or decree, the question shall be referred to the Judge Advocate General.

(2) [Reserved]

(c) *Nonjudicial determination.* In the absence of an adjudication of paternity or of a court-ordered obligation to furnish support, the member shall be privately consulted and asked, where appropriate, whether he or she admits either paternity of, or the legal obligation to support, the child or expected child. If the answer is affirmative, the member shall be informed that he or she is expected to furnish support as set forth in paragraph (b) of this section. Where paternity or the legal obligation to support is admitted by a male member, such member should be informed of his moral obligation to assist in the payment of prenatal expenses.

(d) *Members not on active duty.* Allegations of paternity against members of the naval service who are not on active duty will be forwarded to the individual concerned in such a manner as to insure that the charges are delivered to the addressee only. The correspondence should be forwarded via the commandant of the naval district in which the member resides.

(e) *Former members.* (1) If a certified copy of a judicial order or decree of paternity or support duly rendered by a United States or foreign court of competent jurisdiction against a former member of the Navy or Marine Corps is submitted, his or her last-known address will be furnished to the complainant with return of the correspondence and court order. The complainant will be informed of the date of discharge and advised that the individual concerned is no longer a member of the Navy or Marine Corps in any capacity.

(2) Where there has been no court adjudication, the correspondence will be returned to the complainant with an appropriate letter stating that the individual is no longer a member of the Navy or the Marine Corps in any capacity and giving the date of his or her discharge or final separation except that the last-known address of the former member shall be furnished to the claimant if the complaint against the former member is supported by a document which establishes that the former member has made an 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.

In cases where the complaint, along 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 in order to protect the physical health of either the prospective mother or the unborn child, the last-known address of the former member shall likewise be furnished to the claimant.

[44 FR 42190, July 19, 1979, as amended at 65 FR 62618, Oct. 19, 2000]

# PART 734—GARNISHMENT OF PAY OF NAVAL MILITARY AND CIVILIAN PERSONNEL FOR COLLECTION OF CHILD SUPPORT AND ALIMONY

Sec.
734.1 Purpose.
734.2 Scope.
734.3 Service of process.
734.4 Responsibilities.
734.5 Administrative procedures.

AUTHORITY: 42 U.S.C. 659 (Social Security Act, sec. 459 added by Pub. L. 93–647, part B, sec. 101(a), 88 Stat. 2357, as amended by the Tax Reform and Simplification Act of 1977, Pub. L. 95–30, title V, sec. 502, 91 Stat. 157).

SOURCE: 44 FR 42193, July 19, 1979, unless otherwise noted.

## § 734.1 Purpose.

This part prescribes responsibilities and procedures applicable in the Department of the Navy when processing and honoring legal process brought for the enforcement of legal obligations to provide child support or make alimony payments under 42 U.S.C. 659 (Social Security Act, section 459 added by Pub. L. 93–647, part B, sec. 101(a), 88 Stat. 2357, as amended by the Tax Reform and Simplification Act of 1977, Pub. L. 95–30, title V, sec. 502, 91 Stat. 157).

## § 734.2 Scope.

The provisions of this part shall apply to legal process affecting any Federal pay administered by the Department of the Navy and due and payable to all categories of naval military or civilian personnel including personnel of Navy or Marine Corps nonappropriated-fund activities. This part is not applicable to legal process affecting entitlements administered by other agencies, such as civilian employees' retirement benefits administered by the Office of Personnel Management or compensation administered by the Veterans Administration.

[44 FR 42193, July 19, 1979, as amended at 47 FR 28371, June 30, 1982]

## § 734.3 Service of process.

(a) It is the policy of the Department of the Navy to respond promptly to legal process addressed to naval officials. Service of legal process affecting the pay of Department of the Navy personnel shall be made on the following designated officials in the manner and in the circumstances specified below:

(1) *Navy members.* Process affecting the military pay of active duty, Reserve, Fleet Reserve, or retired Navy members, wherever serving or residing, may be served personnally or by registered or certified mail, return receipt requested, on the Director, Navy Family Allowance Activity, Anthony J. Celebrezze Federal Building, Room 967, Cleveland, Ohio 44199.

(2) *Marine Corps members.* 42 U.S.C. 659 provides that pay of a servicemember, active duty or retired, shall be subject to legal process brought for the enforcement against such member of legal obligations to provide child support or alimony payments. ''Legal process'' means any writ, order, summons, or other similar process in the nature of garnishment. Upon receipt of such legal process, it will be forwarded directly to: Defense Finance and Accounting Service, Cleveland Center, Garnishment Operations Directorate (DFAS-CL/L), P.O. Box 998002, Cleveland, Ohio 44199–8002. The letter of transmittal will state the date of service and method by which service was made. Detailed instructions for disbursing officers and commanding officers are contained in DFAS-KC 7220.31–R, chapter 7.

(3) *Civilian Employees.* Process affecting the pay of active civilian employees of the Department of the Navy:

(i) If currently employed at Navy or Marine Corps activities (including nonappropriated-fund instrumentalities) or installations situated within the territorial jurisdiction of the issuing

court, such process may be served personally, or by registered or certified mail, return receipt requested, on the commanding officer or head of such activity or installation, or principal assistant specifically designated in writing by such official.

(ii) In other cases involving civilian employees, such process may be served personally or by registered or certified mail, return receipt requested, in the manner indicated below:

(A) If pertaining to civil service personnel of the Navy or Marine Corps, such process may be served on the Director of Civilian Personnel Law, Office of the General Counsel, Navy Department, Washington, DC 20390.

(B) If pertaining to non-civil service civilian personnel of Navy Exchanges or related nonappropriated-fund instrumentalities administered by the Navy Resale System Office, such process may be served on the Commanding Officer, Navy Resale System Office, Attention: Industrial Relations Officer, 29th Street and Third Avenue, Brooklyn, New York 11232.

(C) If pertaining to non-civil service civilian personnel of Navy clubs, messes, or recreational facilities (nonappropriated funds), such process may be served on the Chief of Naval Personnel, Director, Recreational Services Division (Pers/NMPC–72), Washington, DC 20370.

(D) If pertaining to non-civil service civilian personnel of other nonappropriated-fund instrumentalities which fall outside the purview of the Chief of Naval Personnel or the Commanding Officer, Navy Resale Systems Office, such as locally established morale, welfare, and other social and hobby clubs, such process may be served on the commanding officer of the activity concerned.

(E) If pertaining to non-civil service civilian personnel of any Marine Corps nonappropriated-fund instrumentalities, such process may be served on the commanding officer of the activity concerned.

(b) The Department of the Navy officials designated above are authorized to accept service of process within the purview of 42 U.S.C. 659 (Social Security Act, sec. 459 added by Pub. L. 93–647, part B, sec. 101(a), 88 Stat. 2357, as amended by the Tax Reform and Simplification Act of 1977, Pub. L. 95–30, title V, sec. 502, 91 Stat. 157). Where service of process is offered to an official not authorized to accept it under paragraph (a) of this section, the person offering such service shall be referred to the appropriate official designated in paragraph (a) of this section.

[44 FR 42193, July 19, 1979, as amended at 65 FR 62619, Oct. 19, 2000]

### § 734.4 Responsibilities.

(a) *Designated officials*. Within their respective areas of cognizance as set forth in § 734.3, the designated officials are responsible for the following functions with regard to legal process:

(1) Sending such notifications and directions to the member concerned and his or her commanding officer as may be required.

(2) Obtaining or providing an appropriate review by qualified legal counsel.

(3) Taking or directing actions, temporary and final, as are necessary to comply with 42 U.S.C. 659, as amended (*see* § 734.3(b)), the MCO 5800.16A, Marine Corps Manual for Legal Administration (LEGADMINMAN), Navy Comptroller Manual, and the court's order in the case, and

(4) Apprising the cognizant United States Attorney of the Department of the Navy's disposition, as required, and, in coordination with the Judge Advocate General, effecting liaison with the Department of Justice or United States Attorneys in instances of noncompliance with process or other circumstances requiring such action.

(b) *Command responsibility*. (1) The Commanding officer of the member or employee concerned shall, upon receipt of notification from the appropriate designated official, ensure that the member or employee has received written notification of the pendency of the action and that the member or employee is afforded counseling concerning his or her obligations in the matter, and legal assistance if applicable, in dealing with the legal action to affect his or her Federal pay. The commanding officer shall comply with the directions of the designated official in responding to the legal process.

(2) For the purposes of this part, the Director, Navy Family Allowance Activity, Cleveland, Ohio, will function as the commanding officer with regard to retired Navy military personnel and members of the Fleet Reserve.

(c) *Legal services*. The Judge Advocate General is responsible for the following functions pertaining to legal process within the purview of this part:

(1) Providing overall technical direction and guidance, as required, for all Department of the Navy military and civilian attorneys engaged in reviewing such process or advising on its disposition.

(2) Ensuring, as Director, Naval Legal Sevice, the availability of attorneys in Naval Legal Service Offices who are qualified to advise and assist the designated officials concerning the disposition of legal process, and

(3) Where required, ensuring effective liaison with the Department of Justice or United States Attorneys.

[44 FR 42193, July 19, 1979, as amended at 65 FR 62619, Oct. 19, 2000]

### § 734.5 Administrative procedures.

The designated officials specified in § 734.3, shall, in consultation with the Judge Advocate General and Commander, Navy Accounting and Finance Center or the Commandant of the Marine Corps (FD), as appropriate, establish procedures for effectively executing their assigned responsibilities. Implementing procedures shall conform with 42 U.S.C., 659, as amended, the MCO 5800.16A, Marine Corps Manual for Legal Administration (LEGADMINMAN), the Navy Comptroller Manual, and the Federal Personnel Manual.

[44 FR 42193, July 19, 1979, as amended at 65 FR 62619, Oct. 19, 2000]

## PART 735—REPORTING BIRTHS AND DEATHS IN COOPERATION WITH OTHER AGENCIES

Sec.

735.1 Purpose.
735.2 Background.
735.3 Action.

AUTHORITY: 70A Stat. 278; 80 Stat. 379, 383; 5 U.S.C. 301, 552; and 10 U.S.C. 5031.

SOURCE: 51 FR 15321, Apr. 23, 1986, unless otherwise noted.

### § 735.1 Purpose.

To promulgate latest guidance on reporting births and deaths, including births to which part 138 of this title is applicable.

### § 735.2 Background.

For Armed Forces members and their dependents on duty overseas, registration of vital statistics with an appropriate foreign government may be a distinct advantage should documentary evidence, acceptable in all courts, be required at any future time. Department of Defense (DOD) policy is that military services will require their members to make official record of births, deaths, marriages, etc., with local civil authorities in whose jurisdiction such events occur.

### § 735.3 Action.

When a medical officer has knowledge of a birth or death occurring under the following conditions, he or she shall refer the matter to the commanding officer for assurance of compliance with DOD policy.

(a) *Births*. (1) In accordance with local health laws and regulations, the commanding officer of a naval hospital in the United States (U.S.) shall report to proper civil authorities all births, including stillbirths, occurring at the hospital. Medical officers on ships and aircraft operating within U.S. political boundaries, or at stations other than naval hospitals in the U.S., shall report all births occurring within their professional cognizance. It shall be the duty of the medical officer to determine the requirements of local civil authorities for these reports.

(2) When births occur on aircraft or ships operating beyond U.S. political boundaries, the medical officer responsible for delivery shall make a report to the commanding officer, master of the ship, or to the officer in command of any aircraft, in every case to be recorded in the ship or aircraft log. A report shall also be made to local civil authorities in the first port of entry if required by law and regulation of such authorities when births occur on a

course inbound to the U.S. Additionally, the medical officer shall:

(i) Furnish the parents with appropriate certificates and shall, if the report is not accepted by the local registrar of vital statistics or other civil authority, or in any case in which local authority has indicated in writing that such a report will not be accepted,

(ii) Advise the parents to seek the advice of the nearest office of the U.S. Immigration and Naturalization Service (USINS), at the earliest practicable time. USINS offices are located in ports of entry and in major cities of the United States.

(iii) For births occurring on courses out-bound and beyond the continental limits of the U.S., report to the U.S. consular representative at the next appropriate foreign port. When the aircraft or ship does not enter a foreign port, procedures described in § 735.3(a)(2)(ii) shall be followed.

(3) Attention is invited to the fact that reports of birth may be forwarded to the Bureau of Health Statistics, Department of Health, Honolulu, Hawaii for any births occurring on courses destined for islands in the Pacific Ocean over which the United States has jurisdiction as well as for those births which are otherwise accepted by civil authorities for Hawaii.

(4) Part 138 of this title prescribes policy, responsibilities, and procedures on birth registration of infants born to U.S. citizens, in military medical facilities outside the United States and its possessions.

(b) *Deaths.* When a death occurs at a naval activity in any State, Territory, or insular possession of the United States, the commanding officer or designated representative shall report the death promptly to proper civil authorities in accordance with Naval Medical Command directives. If requested by these civil authorities, the civil death certificate may be prepared and signed by the cognizant naval medical officer. Local agreements concerning reporting and preparation of death certificates should be made between the naval facility and local civil authorities.

# SUBCHAPTER D—PROCUREMENT, PROPERTY, PATENTS, AND CONTRACTS

CROSS REFERENCE: For joint procurement regulations of the Armed Forces, see chapter I of this title.

## PART 736—DISPOSITION OF PROPERTY


Sec.
736.1 General.
736.2 Dispositions under contracts.
736.3 Sale of personal property.
736.4 Disposition of real property.
736.5 Disposition of real and personal property under special statutory authority.
736.6 Certification prior to disposition.
736.7 Approval by the Attorney General.


AUTHORITY: Secs. 5031, 6011, 70A Stat. 278, as amended; 10 U.S.C. 5031, 6011. Interpret or apply R.S. 3618, 3678, 3709, 38 Stat. 1084, 44 Stat. 605, 49 Stat. 885, 53 Stat. 811, 54 Stat. 396, 57 Stat. 380, 59 Stat. 260, sec. 27, 60 Stat. 856, sec. 5, 60 Stat. 998, sec. 4, 62 Stat. 286, secs. 7(c), 8(a-b), 62 Stat. 452, 63 Stat. 377, 64 Stat. 1109, 65 Stat. 645, 68 Stat. 832, sec. 501(c)(3), 68A Stat. 163, secs. 2481, 2541, 2542, 2571–2574, 2662, 2667, 6155, 6156, 6901, 7227, 7228, 7230, 7304–7308, 7541–7547, 7601–7604, 70A Stat. 141, sec. 5003, 72 Stat. 1252, 72 Stat. 1793, sec. 616, 73 Stat. 381, as amended; 31 U.S.C. 487, 628, 41 U.S.C. 5, 31 U.S.C. 686, 686a, 40 U.S.C. 304a, 50 U.S.C. 98–98h, 22 U.S.C. 521, 44 U.S. C. 366–380, 42 U.S.C. 1572, 24 U.S.C. 37, 20 U.S.C. 77d, 15 U.S.C. 328, 49 U.S.C. 1156(c), 1157(a-b), 40 U.S.C. 471 *et seq.*, 42 U.S.C. 1855–1855g, 22 U.S.C. 1611–1613c, 1750 *et seq.*, 26 U.S.C. 501(c)(3), 10 U.S.C. 2481, 2541, 2542, 2571–2574, 2662, 2667, 6155, 6156, 6901, 7227, 7228, 7230, 7304–7308, 7541–7547, 7601–7604, 38 U.S.C. 5003, 42 U.S.C. 1891–1893, 40 U.S.C. 483a, E.O. 10885, 25 FR 8471, 40 U.S.C. 471; 40 U.S.C. 486; 10 U.S.C. 2576; 33 U.S.C. 1401; Pub. L. No. 96–41 (50 U.S.C. 98); Pub. L. No. 93–288 (42 U.S.C. 5121).

SOURCE: 25 FR 4674, May 27, 1960, unless otherwise noted.

### § 736.1 General.

Real and personal property under the jurisdiction of the Department of the Navy, exclusive of battleships, aircraft carriers, cruisers, destroyers, and submarines (referred to as warships in this part) and certain public domain lands and mineral interests, may be disposed of under the authority contained in the Federal Property and Administrative Services Act of 1949 (63 Stat. 377), as amended (40 U.S.C. 471), in this part referred to as the Federal Property Act. The Federal Property Act places the responsibility for the disposition of excess and surplus property located in the United States, Puerto Rico, the Virgin Islands, American Samoa, Guam, and the Trust Territory of the Pacific Islands with the Administrator of General Services, and for disposition of such property located in foreign areas, with the head of each executive agency. The Act of August 10, 1956 (70A Stat. 451; 10 U.S.C. 7304, 7305, 7307) and Executive Order 11765 of January 21, 1974, (39 FR 2577) provide authority for the disposal of warships as well as other vessels stricken from the Naval Vessel Register. The United States Maritime Commission, however, is authorized to dispose of surplus vessels, other than warships, or 1,500 gross tons or more which the Commission determines to be merchant vessels or capable of conversion to merchant use (40 U.S.C. 484(i)). Accordingly, in disposing of its property, the Department of the Navy is subject to applicable regulations of the Administrator of General Services and the Secretary of Defense, and, in regard to potential merchant vessels other than warships, to determinations of the United States Maritime Commission. In general, property of the Department of the Navy, which becomes excess to its needs, may not be disposed of to the general public until it has been determined to be surplus after screening such property with the other military departments of the Department of Defense and all other agencies of the Government, and after it has been offered for donation to educational institutions, and law enforcement and marine research activities.

(a) Within the limitations indicated in the introductory paragraph of this section, the Department of the Navy is authorized to sell its surplus personal property under the authority of the Federal Property Act and the Act of August 10, 1956 (70A Stat. 451; 10 U.S.C. 7305), and to report its real property,

when excess to the needs of the Department of Defense, to the General Services Administration for ultimate disposition by that agency or the Department of the Navy. The Department of the Navy is also authorized to transfer real and personal property to other departments or agencies of the Government, and to sell, transfer and otherwise dispose of certain vessels and other personal property under special statutory authority. Ships other than warships are sold pursuant to the Federal Property Act (40 U.S.C. 484(i)) by the U.S. Maritime Commission if over 1500 gross tons and determined by the Maritime Commission to be merchant vessels or capable of conversion to merchant use. In certain cases, Navy vessels and other property may be transferred or otherwise made available to other agencies without reimbursement (sec. 616, 73 Stat. 381; 40 U.S.C. 483a).

(b) This part sets forth the general procedures and authority with respect to the disposition of property under the control of the Department of the Navy except disposition of property to foreign governments under the authority of such statutes as the Aid to American Republics Act (54 Stat. 396; 22 U.S.C. 521) and the Mutual Defense Assistance Control Act of 1951 (65 Stat. 644; 22 U.S.C. 1611–1613c).

(c) The Department of Defense Material Disposition Manual and directives issued by the Department of the Navy cover the disposition of all property of the Department including disposition under the Federal Property Act. The Defense Material Disposition Manual is available on the internet at *www.drms.dla.mil*. Section XXIV of Navy Procurement Directives contains similar information applicable to the disposition of contractor inventory. These publications are available for inspection at the offices of the Commandants of the several Naval Districts; and at various Navy and Marine Corps installations.

[25 FR 4674, May 27, 1960, as amended at 39 FR 18442, May 28, 1974; 41 FR 26008, June 24, 1976; 65 FR 53590, Sept. 5, 2000]

### § 736.2 Dispositions under contracts.

(a) Contractor inventory (that is, personal property acquired by a contractor under terms vesting title in the Government but in excess of the amount required for performance of a contract) may be sold to the contractor or otherwise disposed of in accordance with the terms and conditions set forth in the contract and applicable Navy instructions. See also parts 8 and 13 and §§ 30.2 and 30.3 of this title.

(b) Industrial and plant equipment provided by the Government to a contractor for the performance of a contract may, subject to applicable statutory authority and Navy instructions be disposed of in accordance with the applicable contract terms and conditions.

(c) Transfer to nonprofit education or research institutions of title to equipment purchased with funds available for grants or contracts for the conduct of basic or applied research is authorized by the act of September 6, 1958 (sec. 2, 72 Stat. 1793; 42 U.S.C. 1892) and implementing regulations (§§ 13.800 to 13.803 of this title).

### § 736.3 Sale of personal property.

(a) The sale of personal property determined to be surplus or foreign excess or for exchange purposes is authorized by the Federal Property Act and regulations of the Administrator of General Services (see § 736.1(a)). Certain vessels stricken from the Naval Vessel Register may be sold under the act of August 19, 1956, (70A Stat. 451, 10 U.S.C. 7305).

(b) Sales are by sealed bid, auction, spot bid or, under limited conditions prescribed by law, negotiated method. A deposit, generally 20 percent of the amount bid, is normally required of each bidder. Awards are usually made to the highest acceptable bidder. Normally property may not be removed from Government control until full payment is made. Arrangements must be made by the successful bidder to remove the property within the time limit prescribed in the invitation to bid or sales contract. The Government reserves the right to withdraw any property from sale when in the best interest of the Government.

(1) The Department of Defense has a contact point for any person interested in purchasing surplus Department of Defense personal property within the

United States. The contact point is the Defense Surplus Bidders Control Office, Defense Reutilization and Marketing Office, Federal Center Building, Battle Creek, Michigan. This office maintains a single bidders list for all military departments. The list is arranged to show each person's buying interests, both geographically and with respect to categories of property. The categories of property (together with an application blank) are listed in a pamphlet ''How to Buy Surplus Personal Property From The Department of Defense,'' prepared by the Defense Reutilization and Marketing Office, Defense Logistics Agency, Battle Creek, Michigan.

(2) Retail sales at fixed prices based on the current market value are conducted by certain Defense property disposal offices.

[39 FR 18442, May 28, 1974, as amended at 65 FR 53590, Sept. 5, 2000]

### § 736.4 Disposition of real property.

(a) Real property, including related personal property, determined to be excess to the needs of the Department of Defense is subject to disposition under the Federal Property Act. In the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, and the Trust Territory of the Pacific Islands, Department of the Navy real property determined to be excess to the Department of Defense and not required for the needs and the discharge of the responsibilities of all Federal agencies, is generally disposed of by the General Services Administration as surplus property. Exceptions, however, are property worth less than $1,000; certain leases, permits, licenses, easements or similar interests; certain fixtures, structures, and improvements; and other special classes of property which, when determined to be surplus, are disposed of by the Commander, Naval Facilities Engineering Command, Field Division Directors, and District or Area Public Works Officers under authority delegated in Title II, Regulations of the General Services Administration, or under special delegations from the Administrator of General Services.

(b) Outside the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, and the Trust Territory of the Pacific Islands, Department of the Navy real property determined to be excess to the Department of Defense is disposed of directly by the Commander, Naval Facilities Engineering Command, Field Division Directors, and District or Area Public Works Officers.

(5 U.S.C. 301, 40 U.S.C. 471–514)

[35 FR 10008, June 18, 1970, as amended at 41 FR 26008, June 24, 1976]

### § 736.5 Disposition of real and personal property under special statutory authority.

In addition to the authority to sell personal property to the general public and to transfer real property to the General Services Administration under the provisions of §§ 736.3 and 736.4, the Department of the Navy has further authority to dispose of personal and real property as described in paragraphs (a) through (h) of this section.

(a) *Disposition to other Government agencies.* The Department of the Navy is authorized to transfer real and personal property to other governmental departments or agencies under statutes applicable to particular agencies, the act of March 4, 1915 (38 Stat. 1084) as amended (31 U.S.C. 686) and, as to certain personal property, under directives of the General Services Administration.

(b) *Leases.* Real and personal property under the control of the Department of the Navy not excess to its needs and not for the time being required for public use may be leased, when the Secretary of the Navy shall deem it to be advantageous to the Government, to such lessee or lessees and upon such terms and conditions as in his judgment will promote the national defense or will be in the public interest. Such leases shall be for a period of not exceeding five years unless the Secretary determines that a longer period will promote the national defense or will be in the public interest. Such leases are authorized by the act of August 10, 1956 (70A Stat. 150; 10 U.S.C. 2667). Leases of Government-owned real property where the estimated annual rental is more than 50,000 must be deferred for 30 days

after reporting the proposed transaction to the Armed Services Committees of Congress in accordance with the act of August 10, 1956 70A Stat. 147), as amended (10 U.S.C. 2662).

(c) *Disposition of strategic materials.* Strategic materials may be disposed of by the Department of the Navy under the authority described in § 736.3 only when such property is excess to the needs of the Department of Defense and when the Director of the Office of Civil and Defense Mobilization (acting through the Defense Materials Service of the General Services Administration) determines that the amounts of such materials to be disposed of are so small as to make transfer thereof under the act of June 7, 1939 (53 Stat. 811) as amended (50 U.S.C. 98–98h) economically impractical, or such materials are not necessary for stockpile requirements determined in accordance with section 2 of said act.

(d) *Disposition of vessels.* Vessels stricken from the Naval Vessel Register may be sold by the Department of the Navy under the authority and subject to the limitations of the Federal Property Act (sections 203(i), 63 Stat. 386, 40 U.S.C. 484(i)) and the act of August 10, 1956, (70A Stat. 451; 10 U.S.C. 7304, 7305, 7307) and Executive Order 11765 (39 FR 2577). However, pursuant to section 203(i) of the Federal Property Act (40 U.S.C. 484(i)), the United States Maritime Commission disposes of vessels, other than warships, if over 1,500 gross tons and determined by the Maritime Commission to be merchant vessels or capable of conversion to merchant use. Vessels may be sold for scrapping or for use under such authority or, if such sale is not feasible, the Naval Sea Systems Command may arrange for the demolition of a vessel and sale of the resulting materials by an authorized selling activity as set forth in § 736.3.

(e) Exchange or sale of property for replacement purposes. Under the authority of section 201(c) of the Federal Property Act (40 U.S.C. 481(c)) and consistent with Department of Defense implementing regulations, DOD 4140.1–R and the Defense Federal Acquisition Regulation Supplement, the Department of the Navy is authorized in the acquisition of new equipment to exchange or sell similar items which are not excess to its needs, and apply the exchange allowance or proceeds of sale in whole or part payment for the items acquired.

(f) *Donations and loans of personal property.* (1) Certain personal property of the Department of the Navy, including vessels, which become surplus, may be donated or loaned under the authority contained in the Federal Property Act and the act of August 10, 1956 (70A Stat. 453; 10 U.S.C. 2572, 7308, 7545) to:

(i) Schools such as maritime academies or military, naval, Air Force or Coast Guard preparatory schools, designated by the Secretary of Defense as educational activities of special interest to the armed services.

(ii) Accredited schools, colleges and universities and educational institutions which have been exempted from taxation under section 501(c)(3) of the Internal Revenue Code of 1954 and State Departments of Education for use by tax exempt educational institutions. Applications for donation shall be approved by the Department of Health and Human Services and the Administrator of General Services and may be filed with the field representative of the Department of Health and Human Services located nearest the applicant.

(iii) States, Territories, Commonwealths, or possessions of the United States and political subdivisions, municipal corporations, veterans associations, soldiers' monument associations, State museums, and non-profit educational museums, subject in certain cases to the approval of the Curator for the Navy and to objection by a concurrent resolution of the Congress.

(2) Applications other than those to be filed with the field representative of the Department of Health and Human Services shall be filed with the Department of the Navy and referred to the cognizant Command or Headquarters for action except that applications for vessels and district craft shall be referred to the Chief of Naval Operations, applications for boats to the Naval Sea Systems Command, and applications for barges, floating drydocks, and other floating construction equipment to the

Naval Facilities Engineering Command. Detailed instructions with respect to such applications are set forth in the Defense Material Disposition Manual.

(g) *Disposition of equipment for research.* Under the act of September 6, 1958 (72 Stat. 1793; 42 U.S.C. 1891–1893), equipment purchased with research grant or contract funds may be transferred for the conduct of basic or applied scientific research to (1) non-profit institutions of higher education or (2) non-profit organizations whose primary purpose is the conduct of scientific research. An annual report of such transfers must be made to the appropriate Committees of Congress.

(h) *Assistance in major disaster relief.* Under the Disaster Relief Act of 1974 (Pub. L. No. 93–288) and subject to directions of the Federal Emergency Management Agency, certain excess personal property may be utilized for or donated to States and local governments for relief of suffering and damage resulting from major disasters. Surplus property may also be disposed of to States for sale to small business concerns affected by specific disasters such as hurricanes.

[25 FR 4674, May 27, 1960, as amended at 25 FR 11066, Nov. 22, 1960, 26 FR 12158, Dec. 20, 1961; 35 FR 10008, June 18, 1970; 39 FR 18442, May 28, 1974; 41 FR 26008, June 24, 1976; 47 FR 28371, June 30, 1982; 65 FR 53590, Sept. 5, 2000; 65 FR 67628, Nov. 13, 2000]

### § 736.6 Certification prior to disposition.

The transfer, sale, or other disposition of a battleship, aircraft carrier, cruiser, destroyer, or submarine shall not be made unless and until the Chief of Naval Operations, in accordance with the act of August 10, 1956 (70A Stat. 452; 10 U.S.C. 7307), has certified that such material is not essential to the defense of the United States.

### § 736.7 Approval by the Attorney General.

Prior to the disposition, either competitively or by negotiation, to private interests of a plant or plants, or other property, which cost the Government $1,000,000 or more if real property, or $3,000,000 or more if personal property (other than a patent, process, technique or invention), or of patents, processes, techniques or inventions, irrespective of cost, the Department of the Navy must notify the Attorney General of the proposed disposal and the probable terms and conditions thereof. Within a reasonable time, in no event to exceed sixty days after receiving such notification, the Attorney General will advise the Department of the Navy, whether, insofar as he can determine, the proposed disposition would tend to create or maintain a situation inconsistent with the antitrust laws. In such cases, the Department of the Navy must obtain from the proposed purchaser information regarding its financial status, the anticipated use to be made of the property and any other information as may be required by the Attorney General; the award or final sale must be delayed until the Attorney General advises of his determination.

## PART 744—POLICIES AND PROCEDURES FOR THE PROTECTION OF PROPRIETARY RIGHTS IN TECHNICAL INFORMATION PROPOSED FOR RELEASE TO FOREIGN GOVERNMENTS

Sec.
744.1 Purpose.
744.6 Authorization for release without consent of the owner.

AUTHORITY: Sec. 301, 80 Stat. 379, secs. 5031, 6011, 70A Stat. 278, 375 as amended; 5 U.S.C. 301, 10 U.S.C. 5031, 6011. Interpret or apply the Mutual Security Act of 1954 (68 Stat. 832) as amended, 22 U.S.C. 1750 *et seq.*, and Act of Sept. 4, 1961 (Pub. L. 87–195, 75 Stat. 424), 22 U.S.C. 2151–2406 (2351, 2356).

### § 744.1 Purpose.

This part implements part 264 of this title and the Technical Property Interchange Agreements between the United States and foreign governments which agreements are designed to facilitate the interchange of patent rights and technical information for defense purposes.

[26 FR 12217, Dec. 21, 1961]

### § 744.6 Authorization for release without consent of the owner.

(a) Military equipment including the information essential for its operation,

maintenance and repair and technical information, known or claimed to be proprietary, which is being considered for release in accordance with §264.4(d)(3), may be released when the Chief of Naval Operations or his designee or a bureau chief or deputy bureau chief determines under the authority of the Act that such action clearly warrants the assumption of financial liability that may be incurred and there is no acceptable substitute equipment or information for which consent to release is obtainable or which is not proprietary.

(b) Where any technical information is released in accordance with this section, such release shall be subject to the conditions of release set forth in §264.4(f).

(c) Military equipment, including the information essential for its operation, maintenance, and repair, known or claimed to be privately owned and for which consent for release cannot be obtained may be furnished to foreign governments in accord with §264.4(d)(3) without further legal authorization, provided such release is made pursuant to the grant aid provisions of the Mutual Security Act of 1954, as amended, and provided further, there is no acceptable substitute equipment or information for which consent for release is obtainable or which is not proprietary.

[24 FR 10715, Dec. 25, 1959, as amended at 44 FR 30686, May 29, 1979]

# PART 746—LICENSING OF GOVERNMENT INVENTIONS IN THE CUSTODY OF THE DEPARTMENT OF THE NAVY

Sec.

746.1 Purpose.
746.2 Policy.
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746.13 Transfer of custody of Government inventions.

AUTHORITY: 5 U.S.C. 301; 10 U.S.C. 5031; 40 U.S.C. 486(c); and 41 CFR 101–4.1.

SOURCE: 41 FR 55712, Dec. 22, 1976, unless otherwise noted.

## §746.1 Purpose.

This part implements Department of Defense Directive 5535.3 of November 2, 1973 and 41 CFR subpart 101–4.1, and sets forth the policy, terms, conditions, and procedures for the licensing of rights in domestic patents and patent applications vested in the United States of America and in the custody of the Department of the Navy.

## §746.2 Policy.

(a) A major premise of the Presidential Statement fo Government Patent Policy, August 23, 1971 (36 FR 16887, August 26, 1971), is that government inventions normally will best serve the public interest when they are developed to the point of practical application and made available to the public in the shortest possible time. The granting of express nonexclusive or exclusive licenses for the practice of these inventions may assist in the accomplishment of the national objective to achieve a dynamic and efficient economy.

(b) The granting of nonexclusive licenses generally is preferable, since the invention is thereby laid open to all interested parties and serves to promote competition in industry, if the invention is in fact promoted commercially. However, to obtain commercial utilization of the invention, it may be necessary to grant an exclusive license for a limited period of time as an incentive for the investment of risk capital to achieve practical application of an invention.

(c) Whenever the grant of an exclusive license is deemed appropriate, it shall be negotiated on terms and conditions most favorable to the public interest. In selecting an exclusive licensee, consideration shall be given to the capabilities of the prospective licensee to further the technical and market development of the invention, his plan to undertake the development, the projected impact on competition, and the benefit to the Government and the public. Consideration shall be given

also to assisting small business and minority business enterprises, as well as economically depressed, low income, and labor surplus areas, and whether each or any applicant is a United States citizen or corporation. Where there is more than one applicant for an exclusive license, that applicant shall be selected who is determined to be most capable of satisfying the criteria and achieving the goals set forth in this part.

(d) Subject to the following: (1) Any existing or future treaty or agreement between the United States and any foreign government or inter-governmental organization, or

(2) Licenses under or other rights to inventions made or conceived in the course of or under Department of the Navy research and development contracts where such licenses or other rights to such inventions are provided for in the contract and retained by the party contracting with the Department of the Navy, no license shall be granted or implied in a government invention, except as provided for in this part.

(e) No grant of a license under this part shall be construed to confer upon any licensee any immunity from the antitrust laws or from a charge of patent misuse, and the acquisition and use of rights pursuant to this part shall not be immunized from the operation of state or federal law by reason of the source of the grant.

### § 746.3 Delegation of authority.

The Chief of Naval Research is delegated the authority to administer the patent licensing program, with the authority to redelegate such authority.

### § 746.4 Definitions.

(a) *Government invention* means an invention covered by a domestic patent or patent application that is vested in the United States and in the custody of the Department of the Navy, and is designated by the Chief of Naval Research as appropriate for the grant of an express non-exclusive or exclusive license.

(b) *To the point of practical application* means to manufacture in the case of a composition or product, to practice in the case of a process, or to operate in the case of a machine, under such conditions as to establish that the invention is being worked and that its benefits are reasonably accessible to the public.

### § 746.5 Government inventions available for licensing.

Government inventions normally will be made available for the granting of express nonexclusive or limited exclusive licenses to responsible applicants according to the factors and conditions set forth in §§ 746.6 and 746.7, subject to the applicable procedures of § 746.11. The Chief of Naval Research may remove a prior designation of availability for licensing of any patent(s) or patent application(s), provided that no outstanding licenses to that invention are in effect.

### § 746.6 Nonexclusive license.

(a) *Availability of licenses.* Each government invention normally shall be made available for the granting of nonexclusive revocable licenses, subject to the provisions of any other licenses, including those under § 746.8.

(b) *Terms of grant.* (1) The duration of the license shall be for a period as specified in the license agreement, provided that the licensee complies with all the terms of the license.

(2) The license shall require the licensees to bring the invention to the point of practical application within a period specified in the license, or such extended period as may be agreed upon, and to contine to make the benefits of the invention reasonably accessible to the public.

(3) The license may be granted for all or less than all fields of use of the invention, and throughout the United States of America, its territories and possessions, the Commonwealth of Puerto Rico, and the District of Columbia, or in any lesser geographic portion thereof.

(4) After termination of a period specified in the license agreement, the Chief of Naval Research may restrict the license to the fields of use and/or geographic areas in which the licensee has brought the invention to the point of practical application and continues to make the benefits of the invention reasonably accessible to the public.

(5) The license may extend to subsidiaries and affiliates of the licensee but shall be nonassignable without approval of the Chief of Naval Research, except to the successor of that part of the licensee's business to which the invention pertains.

(6) The Government shall make no representation or warranty as to the validity of any licensed application(s) or patent(s), or of the scope of any of the claims contained therein, or that the exercise of the license will not result in the infringement of any other patent(s), nor shall the Government assume any liability whatsoever resulting from the exercise of the license.

### § 746.7 Limited exclusive license.

(a) *Availability of licenses.* Each government invention may be made available for the granting of a limited exclusive license, provided that:

(1) The invention has been published as available for licensing pursuant to paragraph (a) of § 746.11 for a period of at least six months;

(2) The Chief of Naval Research has determined that:

(i) The invention may be brought to the point of practical application in certain fields of use and/or in certain geographical locations by exclusive licensing;

(ii) The desired practical application has not been achieved under any nonexclusive license granted on the invention; and

(iii) The desired practical application is not likely to be achieved expeditiously in the public interest under a nonexclusive license or as a result of further government-funded research or development;

(3) The notice of the prospective licensee has been published, pursuant to paragraph (d) of § 746.11 for at least 60 days; and

(4) After termination of the period set forth in paragraph (a)(3) of § 746.7 the Chief of Naval Research has determined that no applicant for a nonexclusive license has brought or will bring, within a reasonable period, the invention to the point of practical application, as specified in the exclusive license, and that to grant the exclusive license would be in the public interest.

(b) *Selection of exclusive licensee.* An exclusive licensee will be selected on bases consistent with the policy set forth in § 746.2 and in accordance with the procedures set forth in § 746.11.

(c) *Terms of grant.* (1) The license may be granted for all or less than all fields of use of the government invention, and throughout the United States of America, its territories and possessions, the Commonwealth of Puerto Rico, and the District of Columbia, or in any lesser geographic portion thereof.

(2) Subject to the rights reserved to the Government in paragraphs (c)(6) and (c)(7) of § 746.7, the licensee shall be granted the exclusive right to practice the invention in accordance with the terms and conditions specified in the license.

(3) The duration of the license shall be negotiated but shall be for a period less than the terminal portion of the patent, the period remaining being sufficient to make the invention reasonably available for the grant of a nonexclusive license; and such period of exclusivity shall not exceed 5 years unless the Chief of Naval Research determines, on the basis of a written submission supported by a factual showing, that a longer period is reasonably necessary to permit the licensee to enter the market and recoup his reasonable costs in so doing.

(4) The license shall require the licensee to bring the invention to the point of practical application within a period specified in the license, or within a longer period as approved by the Chief of Naval Research, and to continue to make the benefits of the invention reasonably accessible to the public.

(5) The license shall require the licensee to expend a specified minimum amount of money and/or take other specified actions, within a specified period of time after the effective date of the license, in an effort to bring the invention to the point of practical application.

(6) The license shall be subject to the irrevocable, royalty-free right of the Government of the United States to practice and have practiced the invention throughout the world, by or on behalf of the Government of the United

States, and by or on behalf of any foreign government or intergovernmental organization pursuant to any existing or future treaty or agreement with the United states. If the Chief of Naval Research finds it to be in the public interest, this license may also be expressly subject to this same royalty-free right by or on behalf of state and municipal governments.

(7) The license shall reserve to the Chief of Naval Research the right to require the licensee to grant sublicenses to responsible applicants on terms that are reasonable in the circumstances:

(i) The extent that the invention is required for public use by government regulations, or

(ii) As may be necessary to fulfill health or safety needs, or

(iii) For other public purposes stipulated in the license.

(8) The license may extend to subsidiaries and affiliates of the licensee but shall be nonassignable without approval of the Chief of Naval Research, except to successors of that part of the licensee's business to which the invention pertains.

(9) An exclusive licensee may grant sublicenses under his license, subject to the approval of the Chief of Naval Research. Each sublicense granted by an exclusive licensee shall make reference to the exclusive license, including the rights retained by the Government under the exclusive license, and a copy of such sublicense shall be furnished to the Chief of Naval Research.

(10) The license may be subject to such other terms as may be in the public interest.

(11) The Government shall make no representation or warranty as to validity of any licensed application(s) or patent(s), or of the scope of any of the claims contained therein, or that the exercise of the license will not result in the infringement of any other patent(s), nor shall the Government assume any liability whatsoever resulting from the exercise of the license.

### § 746.8 Additional licenses.

Subject to any outstanding licenses, nothing in this part shall preclude the Chief of Naval Research from granting additional nonexclusive or limited exclusive licenses for government inventions when he determines that to do so would provide for an equitable exchange of patent rights. The following exemplify circumstances wherein such licenses may be granted:

(a) In consideration of the settlement of an interference;

(b) In consideration of a release of a claim of infringement; or

(c) In exchange for, or as part of, the consideration for a license under adversely held patents.

### § 746.9 Royalties.

(a) *Nonexclusive license*. Normally, royalties shall not be changed under nonexclusive licenses granted to United States citizens and United States corporations on government inventions; however, the Chief of Naval Research may require other consideration.

(b) *Limited exclusive license*. A limited exclusive license on a government invention shall contain a royalty provision and/or other consideration flowing to the Government.

### § 746.10 Reports.

A license shall require the licensee to submit periodic reports on his efforts to achieve practical application of the invention. The reports shall contain information within his knowledge, or which he may acquire under normal business practices, pertaining to the commercial use being made of the invention, and other information which the Chief of Naval Research may determine is pertinent to its licensing activities and is specified in the license.

### § 746.11 Procedures.

(a) *Publication requirements*. The Chief of Naval Research shall cause to be published in the FEDERAL REGISTER, the Official Gazette of the United States Patent and Trademark Office, and at least one other publication that the Chief of Naval Research deems would best serve the public interest, a list of the government inventions available for licensing under the conditions specified in this part. The list shall be revised periodically to include directly, or by reference to a previously published list, all inventions currently available for licensing. Other publications on inventions available

for licensing are encouraged, and may include abstracts, when appropriate, as well as information on the design, construction, use, and potential market for the inventions.

(b) *Contents of a nonexclusive license application.* An application for a nonexclusive license under a government invention should be addressed to the Chief of Naval Research (Code 300), Arlington, VA 22217, and shall include:

(1) Identification of the invention for which the license is desired, including the patent application serial number or patent number, title, and date, if known, and any other identification of the invention;

(2) Name and address of the person, company, or organization applying for the license, and whether the applicant is a United States citizen or a United States corporation;

(3) Name and address of the representative of applicant to whom correspondence should be sent;

(4) Nature and type of applicant's business;

(5) Source of information concerning the availability of a license on this invention;

(6) Purpose for which the license is desired and a brief description of applicant's plan to achieve that purpose;

(7) A statement of the fields of use for which applicant intends to practice the invention; and

(8) A statement as to the geographic areas in which the applicant would practice the invention.

(c) *Contents of an exclusive license application.* An application for an exclusive license should be addressed to the Chief of Naval Research (Code 300), Arlington, VA 22217, and, in addition to the information indicated in paragraph (b) of § 746.11, an application for an exclusive license shall include:

(1) Applicant's status, if any, in any one or more of the following categories:

(i) Small business firm;

(ii) Minority business enterprise;

(iii) Location in a surplus labor area;

(iv) Location in a low-income area; and

(v) Location in an economically depressed area;

(2) A statement of applicant's capability to undertake the development and marketing required to achieve the practical application of the invention;

(3) A statement describing the time, expenditure, and other acts which the applicant considers necessary to achieve practical application of the invention and the applicant's offer to invest that sum to perform such acts if the license is granted;

(4) A statement that contains the applicant's best knowledge of the extent to which the government invention is being practiced by private industry and the Government;

(5) Identification of other exclusive licenses granted to applicant under inventions in the custody of other government agencies; and

(6) Any other facts which the applicant believes are evidence that it is in the public interest for the Chief of Naval Research to grant an exclusive license rather than a nonexclusive license, and that such exclusive license should be granted to the applicant.

(d) *Published notices.* (1) A notice that a prospective exclusive licensee has been selected shall be published in the FEDERAL REGISTER, and a copy of the notice shall be sent to the Attorney General. The notice shall include:

(i) Identification of the invention;

(ii) Identification of the selected licensee;

(iii) Duration and scope of the contemplated license; and

(iv) A statement to the effect that the license will be granted unless:

(A) An application for a nonexclusive license, submitted by a responsible applicant pursuant to paragraph (b) of § 746.11, is received by the Chief of Naval Research within 60 days from the publication of the notice in the FEDERAL REGISTER, and the Chief of Naval Research determines in accordance with his prescribed procedures, under which procedures the Chief of Naval Research shall record and make available for public inspection all decisions made pursuant thereto and the basis therefore, that the applicant has established that he has already achieved or is likely to bring the invention to the point of practical application withing a reasonable period under a nonexclusive license; or

(B) The Chief of Naval Research determines that third party has presented evidence and argument which has established that it would not be in the public interest to grant the exclusive license.

(2) If an exclusive license has been granted pursuant to this part, notice thereof shall be published in the FEDERAL REGISTER. Such notice shall include:

(i) Identification of the invention;

(ii) Identification of the licensee; and

(iii) Duration and scope of the license.

(3) If an exclusive license has been modified or revoked pursuant to paragraph (e) § 746.11, notice thereof shall be published in the FEDERAL REGISTER. Such notice shall include:

(i) Identification of the invention;

(ii) Identification of the licensee; and

(iii) Effective date of the modification or revocation.

(e) *Modification or revocation.* (1) Any license granted pursuant to this part may be modified or revoked by the Chief of Naval Research if the licensee at any time defaults in making any report required by the license or commits any breach of covenant or agreement therein contained.

(2) A license may also be revoked by the Chief of Naval Research if the licensee willfully makes a false statement of material fact or willfully omits a material fact in the license application or any report required in the license agreement.

(3) Before modifying or revoking any license granted pursuant to this part for any cause, the Chief of Naval Research shall furnish the licensee and any sublicensee of record a written notice of intention to modify or revoke the license, and the licensee and any sublicensee shall be allowed 30 days after such notice to remedy any breach of any covenant or agreement as referred to in paragraph (e)(1) of § 746.11, or to show cause why the license should not be modified or revoked.

(f) *Appeals.* An applicant for a license, a licensee, or such other third party who has participated under paragraph (d)(1)(iv)(B) of § 746.11 shall have the right to appeal, in accordance with procedures prescribed by the Chief of Naval Research, any decision concerning the granting, denial, interpretation, modification, or revocation of a license.

### § 746.12 Litigation.

The property interest in a patent is the right to exclude. It is not the intent of the Government to transfer the property right in a patent when a license is issued pursuant to this part. Accordingly, the right to sue for infringement shall be retained with respect to all licenses so issued by the Government.

### § 746.13 Transfer of custody of Government inventions.

The Chief of Naval Research may enter into an agreement to transfer custody of a Government invention to another government agency for purposes of administration, including the granting of licenses pursuant to this part.

# SUBCHAPTER E—CLAIMS

## PART 750—GENERAL CLAIMS REGULATIONS

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AUTHORITY: 5 U.S.C. 301, 5 U.S.C. 552, 10 U.S.C. 5013, and 5148.

SOURCE: 57 FR 4722, Feb. 7, 1992, unless otherwise noted.

## Subpart A—General Provisions for Claims

### § 750.1 Scope of subpart A.

(a) *General.* (1) The Judge Advocate General is responsible for the administration and supervision of the resolution of claims arising under the Federal Tort Claims Act (subpart B of this part), the Military Claims Act (subpart C of this chapter), the Nonscope Claims Act (subpart D of this part), the Personnel Claims Act (part 751 of this chapter), the Foreign Claims Act, the International Agreements Claims Act pertaining to cost sharing of claims pursuant to international agreements, the Federal Claims Collection Act (subpart A of part 757 of this chapter), the Medical Care Recovery Act and Health Care Services Incurred on Behalf of Covered Beneficiaries: Collection from Third-party Payers (subpart B of part 757 of this chapter), and postal claims.

(2) The Deputy Assistant Judge Advocate General (Claims and Tort Litigation) (Code 15) is the manager of the Navy claims system established to evaluate, adjudicate, and provide litigation support for claims arising under the acts listed above and is responsible to the Judge Advocate General for the management of that system. The claims system consists of the Claims

and Tort Litigation Division of the Office of the Judge Advocate General (Code 15), and the attorneys and support personnel assigned to the Tort Claims Unit at Naval Station, Norfolk, Virginia. For economy of language, Naval Legal Service Offices and Naval Legal Service Office Detachments are referred to as Naval Legal Service Command Activities.

(3) Commanding officers of commands receiving claims are responsible for complying with the guidance on investigations in Sec. 750.2 and Sec. 750.3, the guidance on handling and forwarding claims found in Sec. 750.5, and the guidance provided in the JAG Instruction 5800.7E (JAGMAN)[1] of 20 June 2007.

(b) This subpart A delineates general investigative and claims-processing requirements to be followed in the handling of all incidents and claims within the provisions of this part. Where the general provisions of this subpart A conflict with the specific provisions of any subsequent subpart of this part, the specific provisions govern.

[57 FR 4722, Feb. 7, 1992, as amended at 72 FR 53417, Sept. 19, 2007]

### § 750.2 Investigations: In general.

(a) *Conducting the investigation.* The command where the incident giving rise to the claim is alleged to have happened is responsible for conducting an investigation in accordance with this part.

(b) *Thorough investigation.* Every incident that may result in a claim against or in favor of the United States shall be promptly and thoroughly investigated under this part. Investigations convened for claims purposes are sufficiently complex that they should be performed with the assistance and under the supervision of a judge advocate or other attorney. Where the command has an attorney assigned, he shall be involved in every aspect of the proceedings. When an attorney is not assigned to the investigating command, consultation shall be sought from the appropriate Naval Legal Service Command activity.

(c) *Recovery barred.* Even when recovery must be barred by statute or case law, all deaths, serious injuries, and substantial losses to property that are likely to give rise to claims must be investigated while the evidence is available. Claims against persons in the naval service arising from the performance of their official duties shall be investigated as though they were claims against the United States. When an incident involves an actual or potential claim against the United States for property damage only and the total amount likely to be paid does not exceed $5,000.00, an abbreviated investigative report may be submitted. Where this monetary figure may be exceeded, but the circumstances indicate an abbreviated report may be adequate to preserve the facts and protect the Government's claims interests, approval to submit a limited investigative report may be sought from the Office of the Judge Advocate General (Claims and Tort Litigation Division) (Code 15), the Tort Claims Unit Norfolk, or the nearest Naval Legal Service Command activity.

(d) *Developing the facts.* Any investigation convened for claims purposes must focus on developing the facts of the incident, *i.e.*, the who, what, where, when, why, and how of the matter. Opinions on the possible liability of the United States under any of the claims statutes listed above shall not be expressed. Early and continuous consultation with claims attorneys at Naval Legal Service Command activities is essential to ensure the timely development of all necessary facts, the identification and preservation of relevant evidence, and to void the need for supplemental inquiries.

(e) *Attorney work product.* (1) The convening order and the preliminary statement of an investigative report prepared to inquire into the facts of an incident giving or likely to give rise to a claim against the United States shall include the following:

This investigation has been convened and conducted, and this report prepared, in contemplation of claims adjudication and litigation and for the express purpose of assisting

[1] JAG Instruction 5800.7E (JAGMAN) may be retrieved at the official Web site of the United States Navy Judge Advocate General's Corps at *http://www.jag.navy.mil*.

attorneys representing the interests of the United States.

(2) When an investigation is prepared by or at the direction of an attorney representing the Department of the Navy and is prepared in reasonable anticipation of litigation, it is exempt from mandatory disclosure under the Freedom of Information Act exemption (b)(5) and is normally privileged from discovery in litigation under the attorney work product privilege. 5 U.S.C. 552(b)(5). Unless an attorney prepares the report or personally directs its preparation, the investigation may not be privileged, even if it was prepared in reasonable anticipation of litigation.

(f) *Advance copy*. An advance copy of an investigation conducted because a claim has been, or is likely to be, submitted shall be forwarded to the Tort Claims Unit Norfolk.

[57 FR 4722, Feb. 7, 1992, as amended at 72 FR 53418, Sept. 19, 2007]

### § 750.3 Investigations: The report.

(a) *Purpose*. The purpose of investigations into claims incidents is to gather all relevant information about the incident so adjudicating officers can either pay or deny the claim. The essential task of the investigating officer is to answer the questions of who, what, where, when, why and how? The Navy's best interests are served when the investigation is thorough and is performed in a timely manner so the claimant can be advised promptly of the action on the claim.

(b) *Duties of the investigating officer*. It is the investigating officer's responsibility:

(1) To interview all witnesses to the incident and prepare summaries of their comments. Obtaining signed statements of Government witnesses is not necessary. Summaries of the witnesses' remarks prepared by the investigating officer are quite sufficient and generally expedite the gathering of information. On the other hand, written signed statements should be obtained from the claimant, wherever possible;

(2) To inspect the property alleged to have been damaged by the action of Government personnel;

(3) To determine the nature, extent, and amount of any damage, and to obtain pertinent repair bills or estimates and medical, hospital, and associated bills necessary to permit an evaluation of the claimant's loss;

(4) To obtain maintenance records of the Navy motor vehicle, plane, or other piece of equipment involved in the claim;

(5) To reduce to writing and incorporate into an appropriate investigative report all pertinent statements, summaries, exhibits, and other evidence considered by the investigator in arriving at his conclusions; and,

(6) To furnish claim forms to any person expressing an interest in filing a claim and to refer such personnel to the Office of the Judge Advocate General, Tort Claims Unit Norfolk, 9620 Maryland Avenue, Suite 100, Norfolk, Virginia 23511–2989.

(c) *Content of the report*. The written report of investigation shall contain information answering the questions mentioned in § 750.3(a) and, depending on the nature of the incident, will include the following:

(1) Date, time, and exact place the accident or incident occurred, specifying the highway, street, or road;

(2) A concise but complete statement of the incident with reference to physical facts observed and any statements by the personnel involved;

(3) Names, grades, organizations, and addresses of military personnel and civilian witnesses;

(4) Opinions as to whether military or civilian employees involved in the incident were acting within the scope of their duties at the time;

(5) Description of the Government property involved in the incident and the nature of any damage it sustained; and,

(6) Descriptions of all private property involved.

(d) *Immediate report of certain events*. The Navy or Marine Corps activity most directly involved in the incident shall notify the Judge Advocate General immediately by message, electronic mail, or telephone in any of the following circumstances:

(1) Claims or possible claims arising out of a major disaster or out of an incident giving rise to five or more possible death or serious injury claims.

(2) Upon filing of a claim that could result in litigation that would involve a new precedent or point of law.

(3) Claims or possible claims that involve or are likely to involve an agency other than the Department of the Navy.

(e) *Request for assistance.* When an incident occurs at a place where the naval service does not have an installation or a unit conveniently located for conducting an investigation, the commanding officer or officer in charge with responsibility for performing the investigation may request assistance from the commanding officer or officer in charge of any other organization of the Department of Defense. Likewise, if a commanding officer or officer in charge of any other organization of the Department of Defense requests such assistance from a naval commanding officer or officer in charge, the latter should normally comply. If a complete investigation is requested it will be performed in compliance with the regulations of the requested service. These investigations are normally conducted without reimbursement for per diem, mileage, or other expenses incurred by the investigating unit or installation.

(f) *Report of Motor Vehicle Accident, Standard Form 91. RCS OPNAV 5100–6.* The operator of any Government motor vehicle involved in an accident of any sort shall be responsible for making an immediate report on the Operator's Report of Motor Vehicle Accident, Standard Form 91. This operator's report shall be made even though the operator of the other vehicle, or any other person involved, states that no claim will be filed, or the only vehicles involved are Government owned. An accident shall be reported by the operator regardless of who was injured, what property was damaged, or who was responsible. The operator's report shall be referred to the investigating officer, who shall be responsible for examining it for completeness and accuracy and who shall file it for future reference or for attachment to any subsequent investigative report of the accident.

(g) *Priority of the investigation.* To ensure prompt investigation of every incident while witnesses are available and before damage has been repaired, the duties of an investigating officer shall ordinarily have priority over any other assignments he may have.

(h) *Contents of the report of investigation.* The report should include the following items in addition to the requirements in § 750.3(c):

(1) If pertinent to the investigation, the investigating officer should obtain a statement from claimant's employer showing claimant's occupation, wage or salary, and time lost from work as a result of the incident. In case of personal injury, the investigating officer should ask claimant to submit a written statement from the attending physician setting forth the nature and extent of injury and treatment, the duration and extent of any disability, the prognosis, and the period of hospitalization or incapacity.

(2) A Privacy Act statement for each person who was asked to furnish personal information shall be provided. Social Security numbers of military personnel and civilian employees of the U.S. Government should be included in the report but should be obtained from available records, not from the individual.

(3) Names, addresses, and ages of all civilians or military personnel injured or killed; names of insurance companies; information on the nature and extent of injuries, degree of permanent disability, prognosis, period of hospitalization, name and address of attending physician and hospital, and amount of medical, hospital, and burial expenses actually incurred; occupation and wage or salary of civilians injured or killed; and names, addresses, ages, relationship, and extent of dependency of survivors of any such person fatally injured should be included.

(4) If straying animals are involved, a statement as to whether the jurisdiction has an ''open range law'' and, if so, reference to such statute.

(5) A statement as to whether any person involved violated any State or Federal statute, local ordinance, or installation regulation and, if so, in what respect. The statute, ordinance, or regulation should be set out in full.

(6) A statement on whether a police investigation was made. A copy of the police report of investigation should be included if available.

(7) A statement on whether arrests were made or charges preferred, and the result of any trial or hearing in civil or military courts.

(i) *Expert opinions.* In appropriate cases the opinion of an expert may be required to evaluate the extent of damage to a potential claimant's property. In such cases the investigating officer should consult Navy-employed experts, experts employed by other departments of the U.S. Government, or civilian experts to obtain a competent assessment of claimant's damages or otherwise to protect the Government's interest. Any cost involved with obtaining the opinion of an expert not employed by the Navy shall be borne by the command conducting the investigation. Any cost involved in obtaining the opinion of a Navy-employed expert shall be borne by the command to which the expert is attached. Medical experts shall be employed only after consultation with the Chief, Bureau of Medicine and Surgery.

(j) *Action by command initiating the investigation and subsequent reviewing authorities.* (1) The command initiating the investigation in accordance with § 750.3 or § 750.5 shall review the report of investigation. If additional investigation is required or omissions or other deficiencies are noted, the investigation should be promptly returned with an endorsement indicating that a supplemental investigative report will be submitted. If the original or supplemental report is in order, it shall be forwarded by endorsement, with any pertinent comments and recommendations. An advance copy of the investigation shall be forwarded to the Tort Claims Unit Norfolk.

(2) A reviewing authority may direct that additional investigation be conducted, if considered necessary. The initial investigation should not be returned for such additional investigation, but should be forwarded by an endorsement indicating that the supplemental material will be submitted. The report shall be endorsed and forwarded to the next-level authority with appropriate recommendations including an assessment of the responsibility for the incident and a recommendation as to the disposition of any claim that may subsequently be filed. If a reviewing authority may be an adjudicating authority for a claim subsequently filed, one copy of the report shall be retained by such authority for at least 2 years after the incident.

(3) It is essential that each investigative report reflect that a good faith effort was made to comply with the Privacy Act of 1974 (5 U.S.C. 552a) as implemented by 32 CFR 701, subpart F. Any indication of noncompliance shall be explained either in the preliminary statement of the forwarding endorsements and, when required, corrected.

[57 FR 4722, Feb. 7, 1992, as amended at 72 FR 53418, Sept. 19, 2007]

### § 750.4 Claims: In general.

(a) *Claims against the United States.* Claims against the United States shall receive prompt and professional disposition. Every effort will be made to ensure an investigation is thoroughly and accurately completed, the claimant's allegations evaluated promptly, and where liability is established, a check issued as quickly as possible to prevent further harm to a meritorious claimant. Similarly, claims not payble will be processed promptly and the claimant advised of the reasons for the denial.

(b) *Claims in favor of the United States.* Potential claims in favor of the United States will be critically evaluated and, where appropriate, promptly asserted and aggressively pursued.

(c) *Assistance to claimants.* Claimants or potential claimants who inquire about their rights or the procedures to be followed in the resolution of their claims should be referred to the Tort Claims Unit Norfolk. The Tort Claims Unit Norfolk will provide claims forms, advise where the forms should be filed, and inform the requester of the type of substantiating information required. Claims officers may provide advice on the claims process but shall not provide advice or opinions about the merits or the wisdom of filing a particular claim. While claims officers have a responsibility to provide general information about claims, they must consider 18 U.S.C. 205, which makes it a crime for an officer or employee of the United States to act as an agent or an

attorney in the prosecution of any claim against the United States.

[57 FR 4722, Feb. 7, 1992, as amended at 72 FR 53418, Sept. 19, 2007]

### § 750.5 Claims: Proper claimants.

(a) *Damage to property cases.* A claim for damage to, or destruction or loss of, property shall be presented by the owner of the property or a duly authorized agent or legal representative. ''Owner'' includes a bailee, lessee, or mortgagor, but does not include a mortgagee, conditional vendor, or other person having title for security purposes only.

(b) *Personal injury and death cases.* A claim for personal injury shall be presented by the person injured or a duly authorized agent or legal representative, or, in the case of death, by the properly appointed legal representative of the deceased's estate or survivor where authorized by State law.

(c) *Subrogation.* A subrogor and a subrogee may file claims jointly or separately. When separate claims are filed and each claim individually is within the Tort Claims Unit Norfolk's adjudicating authority limits, they may be processed by the Tort Claims Unit, even if the aggregate of such claims exceeds the Tort Claims Unit's monetary authority. However, if the aggregate of the claims exceeds the sum for which approval of the Department of Justice (DoJ) is required, currently $200,000.00 under the Federal Tort Claims Act, then the Tort Claims Unit Norfolk must obtain DoJ approval via the Office of the Judge Advocate General, Claims and Tort Litigation Division, before the claims may be settled.

(d) *Limitation on transfers and assignment.* All transfers and assignments made of any claim upon the United States, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, are absolutely null and void unless they are made after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. 31 U.S.C. 203. This statutory provision does not apply to the assignment of a claim by operation of law, as in the case of a receiver or trustee in bankruptcy appointed for an individual, firm, or corporation, or the case of an administrator or executor of the estate of a person deceased, or an insurer subrogated to the rights of the insured.

[57 FR 4722, Feb. 7, 1992, as amended at 72 FR 53418, Sept. 19, 2007]

### § 750.6 Claims: Presentment.

(a) *Written demand and Standard Form 95.* A claim shall be submitted by presenting a written statement with the amount of the claim expressed in a sum certain, and, as far as possible, describing the detailed facts and circumstances surrounding the incident from which the claim arose. The Claim for Damage or Injury, Standard Form 95, shall be used whenever practical for claims under the Federal Tort and Military Claims Acts. Claims under the Personnel Claims Act shall be submitted on DD Form 1842.[2] The claim and all other papers requiring the signature of the claimant shall be signed by the claimant personally or by a duly authorized agent. If signed by an agent or legal representative, the claim shall indicate the title or capacity of the person signing and be accompanied by evidence of appointment. When more than one person has a claim arising from the same incident, each person shall file a claim separately.

(b) *To whom submitted.* Claims under the Federal Tort and Military Claims Acts should be submitted to the Tort Claims Unit Norfolk at the address provided in Sec. 750.3 above, or the Office of the Judge Advocate General, Claims and Tort Litigation Division, 1322 Patterson Avenue, SE., Suite 3000, Washington Navy Yard, Washington, DC 20374–5066. Claims may also be submitted to the commanding officer of the Navy or Marine Corps activity involved if known, the commanding officer of any Navy or Marine activity, preferably the one nearest to where the accident occurred, or the local Naval Legal Service Command activity. The claim should be immediately forwarded to the Tort Claims Unit Norfolk.

[72 FR 53418, Sept. 19, 2007]

[2]The Claim for Damage or Injury, Standard Form 95 and the DD Form 1842 are available at the Web site of the United States Navy Judge Advocate General's Corps at *http://www.jag.navy.mil.*

**§ 750.7 Claims: Action by receiving command.**

(a) *Record date of receipt.* The first command receiving a claim shall stamp or mark the date of receipt on the letter or claim form. The envelope in which the claim was received shall be preserved.

(b) *Determine the military activity involved.* The receiving command shall determine the Navy or Marine Corps activity most directly involved with the claim—usually the command where the incident is alleged to have occurred—and forward a copy of the claim to that activity. The original claim (and the transmittal letter, if a copy is forwarded to a more appropriate activity) should immediately be sent to the Tort Claims Unit Norfolk.

(c) *Initiate an investigation.* A JAGMAN Litigation Report Investigation shall be commenced immediately by the command most directly involved with the claim. Once the investigation has been completed, an advance copy shall be forwarded by the convening authority to the Tort Claims Unit Norfolk. Waiting until endorsements have been obtained before providing a copy of the investigation to the Tort Claims Unit Norfolk is neither required nor desirable. The facts of the incident must be made known to cognizant claims personnel as soon as possible.

[57 FR 4722, Feb. 7, 1992, as amended at 72 FR 53419, Sept. 19, 2007]

**§ 750.8 Claims: Responsibility of the Tort Claims Unit Norfolk.**

(a) *Reviewing prior actions.* The adjudicating authority (Tort Claims Unit Norfolk) determines whether an adequate investigation has been conducted, whether the initial receipt date is recorded on the face of the claim, and whether all holders of the investigation, if completed, are advised of the receipt of the claim.

(b) *Determining the sufficiency of the claim.* The claim should be reviewed and a determination of its sufficiency made. If the claim is not sufficient as received, it shall be immediately returned to the party who submitted it along with an explanation of the insufficiency. This does not constitute denial of the claim. The claim shall not be considered ''presented'' until it is received in proper form.

(c) *Adjudicating the claim.* (1) The Tort Claims Unit Norfolk shall evaluate and either approve or disapprove all claims within its authority, except where the payment of multiple Federal Torts Claims Act claims arising from the same incident will exceed $200,000.00 in the aggregate and thereby require approval of DoJ. In this latter instance, the Torts Claims Unit Norfolk shall contact the Office of the Judge Advocate General, Claims and Tort Litigation Division (OJAG Code 15).

(2) The Tort Claims Unit Norfolk shall evaluate and, where liability is established, attempt to settle claims for amounts within its adjudicating authority. Negotiation at settlement figures above the Tort Claims Unit Norfolk's payment limits may be attempted if the claimant is informed that the final decision on the claim will be made at a higher level.

(3) If a substantiated claim cannot be approved, settled, or compromised within the settlement authority limits of the Tort Claims Unit Norfolk, the Tort Claims Unit Norfolk shall contact OJAG Code 15 to seek additional settlement authority. To obtain the additional settlement authority, the following materials shall be forwarded to OJAG Code 15:

(i) A letter of transmittal containing a recommendation on resolution of the claim.

(ii) A memorandum of law containing a review of applicable law, an evaluation of liability, and a recommendation on the settlement value of the case. This memorandum should concentrate on the unusual aspects of applicable law, chronicle the attempts to resolve the case, provide information about the availability of witnesses, and outline any other information material to a resolution of the claim, *i.e.*, prior dealings with the claimant's attorney, local procedural rules, or peculiarities that may make trial difficult. The memorandum should be tailored to the complexity of the issues presented and provide any expert opinions that have been obtained in the case by the Navy or the claimant.

(d) *Preparing litigation reports.* The Tort Claims Unit Norfolk will prepare

a litigation report when a lawsuit is filed and the complaint is received. The report is sent directly to the DoJ official or the U.S. Attorney having cognizance of the matter. The report is a narrative summary of the facts upon which the suit is based and has as enclosures the claims file and a memorandum of law on the issues presented. A copy of the report and all enclosures should be sent to the Judge Advocate General (OJAG Code 15).

[72 FR 53419, Sept. 19, 2007]

### § 750.9 Claims: Payments.

Claims approved for payment shall be expeditiously forwarded to the disbursing office or the General Accounting Office depending on the claims act involved and the amount of the requested payment. Generally, payment of a Federal tort claim above $2,500.00 requires submission of the payment voucher to the General Accounting Office. All other field authorized payment vouchers are submitted directly to the servicing disbursing office for payment.

### § 750.10 Claims: Settlement and release.

(a) *Fully and partially approved claims.* When a claim is approved for payment in the amount claimed, settlement agreement may not be necessary. When a federal tort, military, or non-scope claim is approved for payment in a lesser amount than that claimed, the claimant must indicate in writing a willingness to accept the offered amount in full settlement and final satisfaction of the claim. In the latter instance, no payment will be made until a signed settlement agreement has been received.

(b) *Release.* (1) Acceptance by the claimant of an award or settlement made by the Secretary of the Navy or designees, or the Attorney General or designees, is final upon acceptance by the claimant. Acceptance is a complete release by claimant of any claim against the United States by reason of the same subject manner. Claimant's acceptance of an advance payment does not have the same effect.

(2) The claimant's acceptance of an award or settlement made under the provisions governing the administrative settlement of Federal tort claims or the civil action provisions of 28 U.S.C. 1346(b) also constitutes a complete release of any claim against any employee of the Government whose act or omission gave rise to the claim.

[57 FR 4722, Feb. 7, 1992, as amended at 72 FR 53419, Sept. 19, 2007]

### § 750.11 Claims: Denial.

A final denial of any claim within this chapter shall be in writing and sent to the claimant, his attorney, or legal representative by certified or registered mail with return receipt requested. The denial notification shall include a statement of the reason or reasons for the denial. The notification shall include a statement that the claimant may:

(a) If the claim is cognizable under the Federal Tort Claims Act, file suit in the appropriate United States District Court within 6 months of the date of the denial notification.

(b) If the claim is cognizable under the Military Claims Act, appeal in writing to the Office of the Judge Advocate General, Claims and Tort Litigation Division within 30 days of the receipt of the denial notification. The notice of denial shall inform the claimant or his representative that is suit is not possible under the act.

[57 FR 4722, Feb. 7, 1992, as amended at 72 FR 53419, Sept. 19, 2007]

### § 750.12 Claims: Action when suit filed.

(a) *Action required of any Navy official receiving notice of suit.* The commencement, under the civil action provisions of the Federal Tort Claims Act (28 U.S.C. 1346(b)), of any action against the United States and involving the Navy, that comes to the attention of any official in connection with his official duties, shall be reported immediately to the Tort Claims Unit Norfolk to take any necessary action and provide prompt notification to the Judge Advocate General. The commencement of a civil action against an employee of the Navy for actions arising from the performance of official duties shall be reported in the same manner.

(b) *Steps upon commencement of civil action.* Upon receipt by the Judge Advocate General or Tort Claims Unit Norfolk of notice from the DoJ or other source that a civil action involving the Navy has been initiated under the civil action provisions of the Federal Tort Claims Act, and there being no investigative report available at the headquarters, a request shall be made to the commanding officer of the appropriate Naval Legal Service Command activity for an investigative report into the incident. If there is not a completed investigation, the request shall be forwarded to the appropriate naval activity to convene and complete such a report. The commanding officer of the Naval Legal Service Command activity shall contact the Tort Claims Unit Norfolk to determine whether an administrative claim had been filed and, if available information indicates none had, the Tort Claims Unit Norfolk shall advise the Office of the Judge Advocate General (Claims and Tort Litigation Division) immediately.

[57 FR 4722, Feb. 7, 1992, as amended at 72 FR 53419, Sept. 19, 2007]

### § 750.13 Claims: Single service responsibility.

(a) The Department of Defense has assigned single-service responsibility for processing claims in foreign countries under the following acts. The service and country assignments are in DODDIR 5515.8 of 9 June 1990.

(1) Foreign Claims Act (10 U.S.C. 2734);

(2) Military Claims Act (10 U.S.C. 2733);

(3) International Agreements Claims Act (10 U.S.C. 2734a and b), on the prorata cost sharing of claims pursuant to international agreement;

(4) NATO Status of Forces Agreement (4 UST 1792, TIAS 2846) and other similar agreements;

(5) Medical Care Recovery Act (42 U.S.C. 2651–2653) claims for reimbursement for medical care furnished by the United States;

(6) Nonscope Claims Act (10 U.S.C. 2737), claims not cognizable under any other provision of law;

(7) Federal Claims Collection Act (31 U.S.C. Sections 3701, 3702, and 3711), claims and demands by the United States Government; and

(8) Public Law 87–212 (10 U.S.C. 2736), advance or emergency payments.

(b) Single service assignments for processing claims mentioned above are as follows:

(1) Department of the Army: Austria, Belgium, El Salvador, the Federal Republic of Germany, Grenada, Honduras, Hungary, Korea, Iraq, Kuwait, Latvia, Lithuania, the Marshall Islands, the Netherlands, Poland, Romania, Slovakia, Slovenia and Switzerland, and as the Receiving State Office in the United States under 10 U.S.C. Sections 2734a—2734b and the NATO Status of Forces Agreement, and other Status of Forces Agreements with countries not covered by the NATO agreement. Claims arising from Operation Joint Endeavor, including the former Yugoslavia, Hungary, Slovakia and the Czech Republic, as well as the Rwanda Refugee Crisis Area are also assigned to the Army.

(2) Department of the Navy: Bahrain, Greece, Iceland, Israel, Italy, Spain and the United Arab Emirates.

(3) Department of the Air Force: Australia, Azores, Canada, Cyprus, Denmark, India, Japan, Luxembourg, Morocco, Nepal, Norway, Pakistan, Saudi Arabia, Tunisia, Turkey, the United Kingdom, Egypt, Oman, and claims involving, or generated by, the United States Central Command (CENTCOM) and the United States Special Operations Command (SOCOM), that arise in countries not specifically assigned to the Departments of the Army and the Navy.

(c) *U.S. forces afloat cases under $2,500.00.* Notwithstanding the single service assignments above, the Navy may settle claims under $2,500.00 caused by personnel not acting within the scope of employment and arising in foreign ports visited by U.S. forces afloat and may, subject to the concurrence of the authorities of the receiving state concerned, process such claims.

[57 FR 4722, Feb. 7, 1992, as amended at 72 FR 53420, Sept. 19, 2007]

**§§ 750.14–750.20 [Reserved]**

## Subpart B—Federal Tort Claims Act

### § 750.21 Scope of subpart B.

This subpart provides information regarding the administrative processing and consideration of claims against the United States under the FTCA. The FTCA is a limited waiver of sovereign immunity. Under the FTCA, an individual can seek money damages for personal injury, death, or property damage caused by the negligent or wrongful act or omission of a Federal employee acting within the scope of employment. The FTCA also provides for compensation for injuries caused by certain intentional, wrongful conduct. The liability of the United States is determined in accordance with the law of the State where the act or omission occured.

### § 750.22 Exclusiveness of remedy.

(a) The Federal Employees Liability Reform and Tort Compensation Act of 1988, Public Law 100–694 (amending 28 U.S.C. 2679(b) and 2679(d)), provides that the exclusive remedy for damage or loss of property, or personal injury or death arising from the negligent or wrongful acts or omissions of all Federal employees, acting within the scope of their employment, will be against the United States. This immunity from personal liability does not extend to allegations of constitutional torts, nor to allegations of violations of statutes specifically authorizing suits against individuals.

(b) Other statutory provisions create immunity from personal liability for specific categories of Federal employees whose conduct, within the scope of their employment, gives rise to claims against the Government. Department of Defense health care providers are specifically protected by 10 U.S.C. 1089, the Gonzalez Act. DOD attorneys are specifically protected by 10 U.S.C. 1054.

### § 750.23 Definitions.

(a) *Negligent conduct*. Generally, negligence is the failure to exercise that degree of care, skill, or diligence a reasonable person would exercise under similar circumstances. Negligent conduct can result from either an act or a failure to act. The law of the place where the conduct occurred will determine whether a cause of action lies against the Government. 28 U.S.C. 1346(b) and 2674.

(b) *Intentional torts*. Although any employee who commits an intentional tort is normally considered to be acting outside the scope of employment, the FTCA does allow claimants to seek compensation for injuries arising out of the intentional torts of assault, battery, false imprisonment, false arrest, abuse of process, and malicious prosecution, if committed by a Federal investigative or law enforcement officer. An ''investigative or law enforcement officer'' is any officer of the United States empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law. 28 U.S.C. 2680(h).

(c) *Government employees*—(1) *General*. ''Employee of the Government,'' defined at 28 U.S.C. 2671, includes officers or employees of any Federal agency, members of the U.S. military or naval forces, and persons acting on behalf of a Federal agency in an official capacity.

(2) *Government contractors*. Government (also referred to as independent) contractors, are those individuals or businesses who enter into contracts with the United States to provide goods or services. Because the definition of ''Federal agency,'' found at 28 U.S.C. 2671, specifically excludes ''any contractor with the United States,'' the United States is generally not liable for the negligence of Government contractors. There are, however, three limited exceptions to the general rule, under which a cause of action against the United States has been found to exist in some jurisdictions. They are:

(i) Where the thing or service contracted for is deemed to be an ''inherently dangerous activity'';

(ii) where a nondelegable duty in the employer has been created by law; or,

(iii) where the employer retains control over certain aspects of the contract and fails to discharge that control in a reasonable manner.

(3) *Employees of nonappropriated-fund activities.* Nonappropriated-fund activities are entities established and operated for the benefit of military members and their dependents, and have been judicially determined to be ''arms'' of the Federal government. These entities operate from self-generated funds, rather than from funds appropriated by Congress. Examples include Navy and Marine Corps Exchanges, officer or enlisted clubs, and recreational services activities. A claim arising out of the act or omission of an employee of a nonappropriated-fund activity not located in a foreign country, acting within the scope of employment, is an act or omission committed by a Federal employee and will be handled in accordance with the FTCA.

(d) *Scope of employment.* ''Scope of employment'' is defined by the law of respondeat superior (master and servant) of the place where the act or omission occurred. Although 28 U.S.C. 2671 states that acting within the scope of employment means acting in the line of duty, the converse is not always true. For administrative purposes, a Government employee may be found ''in the line of duty,'' yet not meet the criteria for a finding of ''within the scope of employment'' under the law of the place where the act or omission occurred.

### § 750.24 Statutory/regulatory authority.

The statutory provisions of the Federal Tort Claims Act (FTCA) are at 28 U.S.C. 1346(b), 2671–2672, and 2674–2680. The Attorney General of the United States has issued regulations on administrative claims filed under the FTCA at 28 CFR part 14. If the provisions of this section and the Attorney General's regulations conflict, the Attorney General's regulations prevail.

### § 750.25 Scope of liability.

(a) *Territorial limitations.* The FTCA does not apply to any claim arising in a foreign country. 28 U.S.C. 2680(k) and *Beattie* v. *United States,* 756 F.2d 91 (D.C. Cir. 1984).

(b) *Exclusions from liability.* Statutes and case law have established categories of exclusions from FTCA liability.

(1) *Statutory exclusions.* Section 2680 of Title 28 lists claims not cognizable under the FTCA. They include:

(i) Claims based on the exercise or performance of, or the failure to exercise or perform, a discretionary Government function;

(ii) Admiralty claims under 46 U.S.C. 741–752 or 781–790. Claims under the Death on the High Seas Act (46 U.S.C. 761), however, are cognizable under the FTCA. All admiralty claims will be referred to the Judge Advocate General for adjudication. Admiralty claims against the Navy shall be processed under part 752 of this Chapter;

(iii) Claims arising from intentional torts, except those referred to in § 750.23(b);

(iv) Claims arising from the combat activities of the military or naval forces, or the Coast Guard, during time of war.

(2) *Additional claims not payable.* Although not expressly statutorily excepted, the following types of claims shall not be paid under the FTCA:

(i) A claim for personal injury or death of a member of the armed forces of the United States incurred incident to military service or duty. Compare *United States* v. *Johnson,* 481 U.S. 681 (1987); *Feres* v. *United States,* 340 U.S. 135 (1950) with *Brooks* v. *United States,* 337 U.S. 49 (1949);

(ii) Any claim by military personnel or civilian employees of the Navy, paid from appropriated funds, for personal property damage occurring incident to service or Federal employment, cognizable under 31 U.S.C. 3721 and the applicable Personnel Claims Regulations, 32 CFR part 751;

(iii) Any claim by employees of nonappropriated-fund activities for personal property damage occurring incident to Federal employment. These claims will be processed as indicated in 32 CFR part 756;

(iv) Any claim for personal injury or death covered by the Federal Employees' Compensation Act (5 U.S.C. 8116c);

(v) Any claim for personal injury or death covered by the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 905 and 5 U.S.C. 8171);

(vi) That portion of any claim for personal injury or property damage, caused by the negligence or fault of a Government contractor, to the extent such contractor may have assumed liability under the terms of the contract (see *United States* v. *Seckinger*, 397 U.S. 203 (1969) and § 750.23(c)(2);

(vii) Any claim against the Department of the Navy by another Federal agency. Property belonging to the Government is not owned by any one department of the Government. The Government does not reimburse itself for the loss of its own property except where specifically provided for by law; and

(viii) Any claim for damage to a vehicle rented pursuant to travel orders.

**§ 750.26 The administrative claim.**

(a) *Proper claimant.* See § 750.5 of this part.

(b) *Claim presented by agent or legal representative.* A claim filed by an agent or legal representative will be filed in the name of the claimant; be signed by the agent or legal representative; show the title or legal capacity of the person signing; and be accompanied by evidence of the individual's authority to file a claim on behalf of the claimant.

(c) *Proper claim.* A claim is a notice in writing to the appropriate Federal agency of an incident giving rise to Government liability under the FTCA. It must include a demand for money damages in a definite sum for property damage, personal injury, or death alleged to have occurred by reason of the incident. The Attorney General's regulations specify that the claim be filed on a Standard Form 95 or other written notification of the incident. If a letter or other written notification is used, it is essential that it set forth the same basic information required by Standard Form 95. Failure to do so may result in a determination that the administrative claim is incomplete. A suit may be dismissed on the ground of lack of subject matter jurisdiction based on claimant's failure to present a proper claim as required by 28 U.S.C. 2675(a).

(d) *Presentment.* A claim is deemed presented when received by the Navy in proper form. A claim against another agency, mistakenly addressed to or filed with the Navy shall be transferred to the appropriate agency, if ascertainable, or returned to the claimant. A claimant presenting identical claims with more than one agency should identify every agency to which the claim is submitted on every claim form presented. Claims officers shall coordinate with all other affected agencies and ensure a lead agency is designated. 28 CFR 14.2.

**§ 750.27 Information and supporting documentation.**

(a) *Proper documentation.* Depending on the type of claim, claimants may be required to submit information, as follows:

(1) *Death.* (i) An authenticated death certificate or other competent evidence showing cause of death, date of death, and age of the decedent;

(ii) Decedent's employment or occupation at time of death, including monthly or yearly earnings and the duration of last employment;

(iii) Full names, addresses, birth dates, relationship, and marital status of the decedent's survivors, including identification of survivors dependent for support upon decedent at the time of death;

(iv) Degree of support provided by decedent to each survivor at time of death;

(v) Decedent's general physical and mental condition before death;

(vi) Itemized bills for medical and burial expenses;

(vii) If damages for pain and suffering are claimed, a physician's detailed statement specifying the injuries suffered, duration of pain and suffering, any drugs administered for pain, and the decedent's physical condition during the interval between injury and death; and,

(viii) Any other evidence or information which may affect the liability of the United States.

(2) *Personal injury.* (i) A written report by attending physician or dentist on the nature and extent of the injury, nature and extent of treatment, any degree of temporary or permanent disability, the prognosis, period of hospitalization, any diminished earning capacity. In addition, the claimant

may be required to submit to a physical or mental examination by a physician employed by any Federal agency. Upon written request, a copy of the report of the examining physician shall be provided;

(ii) Itemized bills for medical, dental, and hospital expenses incurred, or itemized receipts of payments of such expenses;

(iii) A statement of expected expenses for future treatment;

(iv) If a claim is made for lost wages, a written statement from the employer itemizing actual time and wages lost;

(v) If a claim is made for lost self-employed income, documentary evidence showing the amount of earnings actually lost; and

(vi) Any other evidence or information which may affect the liability of the United States for the personal injury or the damages claimed.

(3) *Property damage.* (i) Proof of ownership;

(ii) A detailed statement of the amount claimed for each item of property;

(iii) An itemized receipt of payment for necessary repairs or itemized written estimates of the cost of repairs;

(iv) A statement listing date of purchase, purchase price, and salvage value where repair is not economical; and

(v) Any other evidence or information which may affect the liability of the United States for the property damage claimed.

(b) *Failure to submit necessary documentation.* If claimant fails to provide sufficient supporting documentation, claimant should be notified of the deficiency. If after notice of the deficiency, including reference to 28 CFR 14.4, the information is still not supplied, two follow-up requests should be sent by certified mail, return receipt requested. If after a reasonable period of time the information is still not provided, the appropriate adjudicating authority should deny the claim.

[57 FR 4722, Feb. 7, 1992, as amended at 72 FR 53420, Sept. 19, 2007]

### § 750.28 Amendment of the claim.

A proper claim may be amended at any time prior to settlement, denial, or the filing of suit. An amendment must be submitted in writing and must be signed by the claimant or duly authorized agent or legal representative. No finally denied claim for which reconsideration has not been requested under § 750.31 may be amended.

### § 750.29 Investigation and examination.

Subpart A of this part requires an investigation for every incident that may result in a claim against or in favor of the United States. Where a previously unanticipated claim is filed against the Government and an investigation has not already been conducted, the appropriate claims officer shall immediately request an investigation. See subpart A of this part for specific action required by an adjudicating authority.

### § 750.30 Denial of the claim.

Final denial of an administrative claim shall be in writing and shall be sent to the claimant, his duly authorized agent or legal representative by certified or registered mail, with return receipt requested. The notification of final denial shall include the reasons for the denial. The notification shall include a statement informing the claimant of his right to file suit in the appropriate Federal district court not later than 6 months after the date of the mailing of the notification. 28 CFR 14.9(a).

### § 750.31 Reconsideration.

(a) *Request.* Prior to the commencement of suit and prior to the expiration of the 6-month period for filing suit, a claimant or his duly authorized agent or legal representative may present a request for reconsideration to the authority who denied the claim. The request shall be in writing and shall state the reasons for the requested reconsideration. A request for reconsideration is presented on the date it is received by the DON. 28 CFR 14.9(b).

(b) *Proper basis.* A request for reconsideration shall set forth claimant's reasons for the request, and shall include any supplemental supporting evidence or information. Any writing communicating a desire for reconsideration that reasonably appears to have been presented solely for the purpose of

extending the statutory period for filing suit, shall not be treated as a request for reconsideration. Claimant or claimant's authorized representative shall be notified promptly that the writing is not considered a proper request for reconsideration.

(c) *Effect of presentment of request*. The presentment of a proper request for reconsideration starts a new 6-month period for the DON to act on the request to reconsider. The claimant may not file suit until the expiration of the new 6-month period, or until after the date of mailing of the final denial of the request. Final denial of a request for reconsideration shall be accomplished in the manner prescribed in § 750.30. 28 CFR 14.9(b).

### § 750.32 Suits under the Federal Tort Claims Act (FTCA).

(a) *Venue*. Venue is proper only in the judicial district where the plaintiff resides or where the act or omission complained of occurred. 28 U.S.C. 1402.

(b) *Jury trial*. There is no right to trial by jury in suits brought under the FTCA. 28 U.S.C. 2402.

(c) *Settlement*. The Attorney General of the United States, or designee, may arbitrate, compromise, or settle any action filed under the FTCA. 28 U.S.C. 2677.

(d) *Litigation support*—(1) *Who provides*. The adjudicating authority holding a claim at the time suit is filed shall be responsible for providing necessary assistance to the Department of Justice official or U.S. Attorney responsible for defending the Government's interests.

(2) *Litigation report*. A litigation report, including a legal memorandum emphasizing anticipated issues during litigation, shall be furnished to the appropriate Department of Justice official or U.S. Attorney.

(3) *Pretrial discovery*. Complete and timely responses to discovery requests are vital to the effective defense of tort litigation. Subject to existing personnel and resources available, appropriate assistance shall be provided. The Judge Advocate General should be notified promptly when special problems are encountered in providing the requested assistance.

(4) *Preservation of evidence*. Tort litigation is often accomplished over an extended period of time. Every effort shall be made to preserve files, documents, and other tangible evidence that may bear on litigation. Destruction of such evidence, even in accordance with routine operating procedures, undermines defense of a case.

### § 750.33 Damages.

(a) *Generally*. The measure of damages is determined by the law of the place where the act or omission occurred. When there is a conflict between local and applicable Federal law, the latter governs. 28 U.S.C. 1346(b).

(b) *Limitations on liability*. The United States is not liable for interest prior to judgment or for punitive damages. In a death case, if the place where the act or omission complained of occurred provides for only punitive damages, the United States will be liable in lieu thereof, for actual or compensatory damages. 28 U.S.C. 2674.

(c) *Setoff*. The United States is not obligated to pay twice for the same injury. Claimants under the FTCA may have received Government benefits or services as the result of the alleged tort. The cost of these services or benefits shall be considered in arriving at any award of damages. For example, the cost of medical or hospital services furnished at Government expense, including TRICARE payments, shall be considered. Additionally, benefits or services received under the Veterans Act (38 U.S.C. 101–800) must be considered. *Brooks* v. *United States*, 337 U.S. 49 (1949).

(d) *Suit*. Any damage award in a suit brought under the FTCA is limited to the amount claimed administratively unless based on newly discovered evidence. 28 U.S.C. 2675(b). Plaintiff must prove the increased demand is based on facts not reasonably discoverable at the time of the presentment of the claim or on intervening facts relating to the amount of the claim.

[57 FR 4722, Feb. 7, 1992, as amended at 72 FR 53420, Sept. 19, 2007]

### § 750.34 Settlement and payment.

(a) *Settlement agreement*—(1) *When required*. A settlement agreement, signed by the claimant, must be received prior

to payment in every case in which the claim is either:

(i) Settled for less than the full amount claimed, or

(ii) The claim was not presented on a Standard Form 95.

(2) *Contents.* Every settlement agreement must contain language indicating payment is in full and final settlement of the applicable claim. Each settlement agreement shall contain language indicating acceptance of the settlement amount by the claimant, or his agent or legal representative, shall be final and conclusive on the claimant, or his agent or legal representative, and any other person on whose behalf or for whose benefit the claim has been presented, and shall constitute a complete release of any claim against the United States and against any employee of the Government whose conduct gave rise to the claim, by reason of the same subject matter. 28 CFR 14.10(b). In cases where partial payment will benefit both claimant and the Government, such as payment for property damage to an automobile, the settlement agreement shall be tailored to reflect the terms of the partial settlement. All settlement agreements shall contain a recitation of the applicable statutory limitation of attorneys fees. 28 U.S.C. 2678.

(b) *DON role in settlement negotiations involving the U.S. Attorney or DOJ.* Agency concurrence is generally sought by the Department of Justice or U.S. Attorney's office prior to settlement of suits involving the DON. Requests for concurrence in settlement proposals shall be referred to the appropriate DON adjudicating authority with primary responsibility for monitoring the claim. Adjudicating authorities shall consult with the Judge Advocate General concerning proposed settlements beyond their adjudicating authority.

(c) *Payment of the claim*—(1) *Statutory authority.* Pursuant to 28 U.S.C. 2672 and in accordance with 28 CFR 14.6(a), the Secretary of the Navy or designee, acting on behalf of the United States may compromise or settle any claim filed against the Navy under the FTCA, provided any award, compromise, or settlement by the Navy in excess of $200,000.00 may be effected only with the prior written approval of the Attorney General or designee. Title 28 CFR 14.6 requires consultation with the Department of Justice prior to compromise or settlement of a claim in any amount when:

(i) A new precedent or a new point of law is involved;

(ii) A question of policy is or may be involved;

(iii) The United States is or may be entitled to indemnity or contribution from a third party and the agency is unable to adjust the third party claim;

(iv) The compromise of a particular claim, as a practical matter, will or may control the disposition of a related claim in which the amount to be paid may exceed $100,000.00; or

(v) The DON is informed or is otherwise aware that the United States or an employee, agent, or cost-plus contractor of the United States is involved in litigation based on a claim arising out of the same incident or transaction.

(2) *Specific delegation and designation*—(i) *Payment authority.*

DELEGATED AND DESIGNATED AUTHORITY FEDERAL TORT CLAIMS ACT

Judge Advocate General—$200,000.00
Deputy Judge Advocate General—$200,000.00
Assistant Judge Advocate General (General Law)—$200,000.00
Deputy Assistant Judge Advocate General (Claims and Tort Litigation) and Deputy Division Director—$200,000.00
Head, Tort Claims Branch (Claims and Tort Litigation)—$200,000.00

Any payment of over $200,000.00 must be approved by DoJ. The Judge Advocate General, the Deputy Judge Advocate General, the Assistant Judge Advocate General (General Law), Deputy Assistant Judge Advocate General (Claims and Tort Litigation), and the Head, Tort Claims Branch (Claims and Tort Litigation) may deny Federal Tort Claims in any amount.

(ii) *Adjudicating authority.* The Department of the Navy's tort claims adjudication function is consolidated as the Tort Claims Unit Norfolk (TCU) located at Naval Station, Norfolk, VA. The address is as follows: Department

of the Navy, Office of the Judge Advocate General, Tort Claims Unit Norfolk, 9620 Maryland Avenue Suite 100, Norfolk, VA 23511–2989.

(3) *Funding*. Claims approved for $2,500.00 or less are paid from DON appropriations. Claims approved in excess of $2,500.00 are paid from the judgment fund and must be forwarded to the United States General Accounting Office (GAO) for payment. 28 CFR 14.10(a). Claims arising out of the operation of nonappropriated-fund activities and approved for payment shall be forwarded to the appropriate nonappropriated-fund activity for payment.

[57 FR 4722, Feb. 7, 1992, as amended at 72 FR 53420, Sept. 19, 2007]

### § 750.35 Attorney's fees.

Attorney's fees are limited to 20 percent of any compromise or settlement of an administrative claim, and are limited to 25 percent of any judgment rendered in favor of a plaintiff, or of any settlement accomplished after suit is filed. These amounts are to be paid out of the amount awarded and not in addition to the award. 28 U.S.C. 2678.

### § 750.36 Time limitations.

(a) *Administrative claim*. Every claim filed against the United States under the FTCA must be presented in writing within 2 years after the claim accrues. 28 U.S.C. 2401(b). Federal law determines the date of accrual. A claim accrues when the claimant discovers or reasonably should have discovered the existence of the act giving rise to the claim. In computing the statutory time period, the day of the incident is excluded and the day the claim was presented included.

(b) *Amendments*. Upon timely filing of an amendment to a pending claim, the DON shall have 6 months to make a final disposition of the claim as amended, and the claimant's option to file suit under 28 U.S.C. 2675(a) shall not accrue until 6 months after the presentment of an amendment. 28 CFR 14.2(c).

(c) *Suits*. A civil action is barred unless suit is filed against the United States not later than 6 months after the date of mailing of notice of final denial of the claim. 28 U.S.C. 2401(b). The failure of the DON to make final disposition of a claim within 6 months after it is presented shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim. 28 U.S.C. 2675(a).

### §§ 750.37–750.40 [Reserved]

## Subpart C—Military Claims Act

### § 750.41 Scope of subpart C.

This section prescribes the substantive bases and special procedural requirements for the settlement of claims against the United States for death, personal injury, or damage, loss, or destruction of property:

(a) *Caused by military personnel or civilian employees of the Department of the Navy (DON) (hereinafter DON personnel)*. For the purposes of this section, DON personnel include all military personnel of the Navy and Marine Corps, volunteer workers, and others serving as employees of the DON with or without compensation, and members of the National Oceanic and Atmospheric Administration or of the Public Health Service when serving with the DON. DON personnel does not include DON contractors or their employees.

(b) *Incident to noncombat activities of the DON*. Claims for personal injury or death of a member of the Armed Forces or Coast Guard, or civilian officer or employee of the U.S. Government whose injury or death is incident to service, however, are not payable.

(c) *Territorial limitation*. There is no geographical limitation on the application of the MCA, but if a claim arising in a foreign country is cognizable under the Foreign Claims Act (10 U.S.C. 2734), the claim shall be processed under that statute. See 10 U.S.C. 2733(b)(2).

(d) *Suit*. The MCA authorizes the administrative settlement and payment of certain claims. The United States has not consented to be sued.

### § 750.42 Statutory authority.

10 U.S.C. 2733, as amended, commonly referred to as the Military Claims Act (MCA).

**§ 750.43 Claims payable.**

(a) *General*. Unless otherwise prescribed, a claim for personal injury, death, or damage or loss of real or personal property is payable under this provision when:

(1) Caused by an act or omission determined to be negligent, wrongful, or otherwise involving fault of DON personnel acting within the scope of their employment; or

(2) Incident to noncombat activities of the DON. A claim may be settled under this provision if it arises from authorized activities essentially military in nature, having little parallel in civilian pursuits, and in which the U.S. Government has historically assumed a broad liability, even if not shown to have been caused by any particular act or omission by DON personnel while acting within the scope of their employment. Examples include practice firing of missiles and weapons, sonic booms, training and field exercises, and maneuvers that include operation of aircraft and vehicles, use and occupancy of real estate, and movement of combat or other vehicles designed especially for military use. Activities incident to combat, whether or not in time of war, and use of DON personnel during civil disturbances are excluded.

(b) *Specific claims payable*. Claims payable by the DON under § 750.43(a) (1) and (2) shall include, but not be limited to:

(1) *Registered or insured mail*. Claims for damage to, loss, or destruction, even if by criminal acts, of registered or insured mail while in the possession of DON authorities are payable under the MCA. This provision is an exception to the general requirement that compensable damage, loss, or destruction of personal property be caused by DON personnel while acting within the scope of their employment or otherwise incident to noncombat activities of the DON. The maximum award to a claimant under this section is limited to that to which the claimant would be entitled from the Postal Service under the registry or insurance fee paid. The award shall not exceed the cost of the item to the claimant regardless of the fees paid. Claimant may be reimbursed for the postage and registry or insurance fees.

(2) *Property bailed to the DON*. Claims for damage to or loss of personal property bailed to the DON, under an express or implied agreement are payable under the MCA, even though legally enforceable against the U.S. Government as contract claims, unless by express agreement the bailor has assumed the risk of damage, loss, or destruction. Claims filed under this paragraph may, if in the best interest of the U.S. Government, be referred to and processed by the Office of the General Counsel, DON, as contract claims.

(3) *Real property*. Claims for damage to real property incident to the use and occupancy by the DON, whether under an express or implied lease or otherwise, are payable under the MCA even though legally enforceable against the DON as contract claims. Claims filed under this paragraph may, if in the best interest of the U.S. Government, be referred to and processed by the Office of the General Counsel, DON, as contract claims.

(4) *Property of U.S. military personnel*. Claims of U.S. military personnel for property lost, damaged, or destroyed under conditions in § 750.43(a) (1) and (2) occurring on a military installation, not payable under the Military Personnel and Civilian Employees' Claims Act, are payable under the MCA.

(5) *Health care and Legal Assistance Providers*. Claims arising from the personal liability of DON health care and legal assistance personnel for costs, settlements, or judgments for negligent acts or omissions while acting within the scope of assigned duties or employment are payable under the MCA. See § 750.54.

**§ 750.44 Claims not payable.**

(a) Any claim for damage, loss, destruction, injury, or death which was proximately caused, in whole or in part, by any negligence or wrongful act on the part of the claimant, or his agent or employee, unless the law of the place where the act or omission complained of occurred would permit recovery from a private individual under like circumstances, and then only to the extent permitted by the law.

(b) Any claim resulting from action by the enemy or resulting directly or

indirectly from any act by armed forces engaged in combat.

(c) Any claim for reimbursement of medical, hospital, or burial expenses to the extent already paid by the U.S. Government.

(d) Any claim cognizable under:

(1) Military Personnel and Civilian Employees' Claims Act, as amended. 31 U.S.C. 3721.

(2) Foreign Claims Act. 10 U.S.C. 2734.

(3) 10 U.S.C. 7622, relating to admiralty claims. See part 752 of this Chapter.

(4) Federal Tort Claims Act. 28 U.S.C. 2671, 2672, and 2674–2680.

(5) International Agreements Claims Act. 10 U.S.C. 2734a and 2734b.

(6) Federal Employees' Compensation Act. 5 U.S.C. 8101–8150.

(7) Longshore and Harbor Workers' Compensation Act. 33 U.S.C. 901–950.

(e) Any claim for damage to or loss or destruction of real or personal property founded in written contract [except as provided in § 750.43(b) (2) and (3)].

(f) Any claim for rent of real or personal property [except as provided in § 750.43(b) (2) and (3)].

(g) Any claim involving infringement of patents.

(h) Any claim for damage, loss, or destruction of mail prior to delivery by the Postal Service to authorized DON personnel or occurring due to the fault of, or while in the hands of, bonded personnel.

(i) Any claim by a national, or corporation controlled by a national, of a country in armed conflict with the United States, or an ally of such country, unless the claimant is determined to be friendly to the United States.

(j) Any claim for personal injury or death of a member of the Armed Forces or civilian employee incident to his service. 10 U.S.C. 2733(b)(3).

(k) Any claim for damage to or loss of bailed property when bailor specifically assumes such risk.

(l) Any claim for taking private real property by a continuing trespass or by technical trespass such as overflights of aircraft.

(m) Any claim based solely on compassionate grounds.

(n) Any claim to which the exceptions in 28 U.S.C. 2680 apply.

[57 FR 4722, Feb. 7, 1992, as amended at 72 FR 53420, Sept. 19, 2007]

### § 750.45 Filing claim.

(a) *Who may file.* Under the MCA, specifically, the following are proper claimants:

(1) U.S. citizens and inhabitants.

(2) U.S. military personnel and civilian employees, except not for personal injury or death incident to service.

(3) Persons in foreign countries who are not inhabitants.

(4) States and their political subdivisions (including agencies).

(5) Prisoners of war for personal property, but not personal injury.

(6) Subrogees, to the extent they paid the claim.

(b) *Who may not file.* (1) Inhabitants of foreign nations for loss or injury occurring in the country they inhabit.

(2) U.S. Government agencies and departments.

(c) *When to file/statute of limitations.* Claims against the DON must be presented in writing within 2 years after they accrue. In computing the 2 year period, the day the claim accrues is excluded and the day the claim is presented is included. If the incident occurs in time of war or armed conflict, however, or if war or armed conflict intervenes within 2 years after its occurrence, an MCA claim, on good cause shown, may be presented within 2 years after the war or armed conflict is terminated. For the purposes of the MCA, the date of termination of the war or armed conflict is the date established by concurrent resolution of Congress or by the President. See 10 U.S.C. 2733(b)(1).

(d) *Where to file.* The claim shall be submitted by the claimant to the commanding officer of the naval activity involved, if it is known. Otherwise, it shall be submitted to the commanding officer of any naval activity, preferably the one within which, or nearest to which, the incident occurred, or to the Office of the Judge Advocate General of the Navy, (Claims and Tort Litigation), 1322 Patterson Avenue, SE., Suite 3000, Washington Navy Yard, DC 20375–5066.

(e) *Claim form.* A claim is correct in form if it constitutes written notification of an incident, signed by the claimant or a duly authorized agent or legal representative, with a claim for money damages in a sum certain. A Standard Form 95 is preferred. A claim should be substantiated as discussed in section 750.27 of this part. A claim must be substantiated as required by this part in order to be paid. See 10 U.S.C. 2733(b)(5).

(f) *Amendment of claim.* A proper claim may be amended by the claimant at any time prior to final denial or payment of the claim. An amendment shall be submitted in writing and signed by the claimant or a duly authorized agent or legal representative.

(g) *Payment.* Claims approved for payment shall be forwarded to such disbursing officer as may be designated by the Comptroller of the Navy for payment from appropriations designated for that purpose. If the Secretary of the Navy considers that a claim in excess of $100,000.00 is meritorious and would otherwise be covered by 10 U.S.C. 2733 and § 750.43, he may make a partial payment of $100,000.00 and refer the excess to the General Accounting Office for payment from appropriations provided therefore.

[57 FR 4722, Feb. 7, 1992, as amended at 72 FR 53420, Sept. 19, 2007]

### § 750.46 Applicable law.

(a) *Claims arising within the United States, Territories, Commonwealth, and Possessions.* The law of the place where the act or omission occurred will be applied in determining liability and the effect of contributory or comparative negligence on claimant's right of recovery.

(b) *Claims within foreign countries.* (1) Where the claim is for personal injury, death, or damage to or loss or destruction of real or personal property caused by an act or omission determined to be negligent, wrongful, or otherwise involving fault of DON personnel acting within the scope of their employment, liability of the United States will be assessed under general principles of tort law common to the majority of American jurisdictions.

(2) Apply the law of the foreign country governing the legal effect of contributory or comparative negligence by the claimant to determine the relative merits of the claim. If there is no foreign law on contributory or comparative negligence, apply traditional rules of contributory negligence. Apply foreign rules and regulations on operation of motor vehicles (rules of the road) to the extent those rules are not specifically superseded or preempted by U.S. Armed Forces traffic regulations.

(c) *Principles applicable to all MCA claims.* (1) ''Scope of employment'' is determined in accordance with Federal law. Reported FTCA cases provide guidance on this determination;

(2) Claims for emotional distress will be considered only from the injured person or members of the injured person's immediate family. Claims from the injured person's immediate ''zone of danger'' (*i.e.*, immediate vicinity of the incident) and the claimant substantiates the claim with proof of the physical manifestation(s) of the emotional distress; and

(3) Claims under the MCA do not include the principles of absolute liability and punitive damages.

(d) *Clarification of terms.* Federal law determines the meaning and construction of the MCA.

[57 FR 4722, Feb. 7, 1992, as amended at 72 FR 53420, Sept. 19, 2007]

### § 750.47 Measure of damages for property claims.

Determine the measure of damages in property claims arising in the United States or its territories, commonwealth, or possessions under the law of the place where the incident occurred. Determine the measure of damages in property claims arising overseas under general principles of American tort law, stated as follows:

(a) If the property has been or can be economically repaired, the measure of damages shall be the actual or estimated net cost of the repairs necessary to substantially restore the property to the condition that existed immediately prior to the incident. Damages shall not exceed the value of the property immediately prior to the incident less the value thereof immediately after the incident. To determine the actual or estimated net cost of repairs, the

value of any salvaged parts or materials and the amount of any net appreciation in value effected through the repair shall be deducted from the actual or estimated gross cost of repairs. The amount of any net depreciation in the value of the property shall be added to such gross cost of repairs, if such adjustments are sufficiently substantial in amount to warrant consideration. Estimates of the cost of repairs shall be based upon the lower or lowest of two or more competitive bids, or upon statements or estimates by one or more competent and disinterested persons, preferably reputable dealers or officials familiar with the type of property damaged, lost, or destroyed.

(b) If the property cannot be economically repaired, the measure of damages shall be the value of the property immediately prior to the incident less the value immediately after the incident. Estimates of value shall be made, if possible, by one or more competent and disinterested persons, preferably reputable dealers or officials familiar with the type of property damaged, lost, or destroyed.

(c) Loss of use of damaged property which is economically repairable may, if claimed, be included as an additional element of damage to the extent of the reasonable expense actually incurred for appropriate substitute property, for such period reasonably necessary for repairs, as long as idle property of the claimant was not employed as a substitute. When substitute property is not obtainable, other competent evidence such as rental value, if not speculative or remote, may be considered. When substitute property is reasonably available but not obtained and used by the claimant, loss of use is normally not payable.

### § 750.48 Measure of damages in injury or death cases.

(a) Where an injury or death arises within the United States or its territories, commonwealth, or possessions, determine the measure of damages under the law of the location where the injury arises.

(b) Where an injury or death arises in a foreign country and is otherwise cognizable and meritorious under this provision, damages will be determined in accordance with general principles of American tort law. The following is provided as guidance.

(1) *Measure of damages for overseas personal injury claims.* Allowable compensation includes reasonable medical and hospital expenses necessarily incurred, compensation for lost earnings and services, diminution of earning capacity, anticipated medical expenses, physical disfigurement, and pain and suffering.

(2) *Wrongful death claims arising in foreign countries.* (i) Allowable compensation includes that in paragraph (b)(1) of this section, burial expenses, loss of support and services, loss of companionship, comfort, society, protection, and consortium, and loss of training, guidance, education, and nurturing, as applicable.

(ii) The claim may be presented by or on behalf of the decedent's spouse, parent, child, or dependent relative. Claims may be consolidated for joint presentation by a representative of some or all of the beneficiaries or may be filed by a proper beneficiary individually.

### § 750.49 Delegations of adjudicating authority.

(a) *Settlement authority.* (1) The Secretary of the Navy may settle or deny claims in any amount. The Secretary may pay the first $100,000.00 and report the excess to the Comptroller General for payment under 31 U.S.C. 1304. *See* 10 U.S.C. 2733(d).

(2) The Judge Advocate General has delegated authority to settle claims for $100,000.00 or less.

(3) The Deputy Judge Advocate General, the Assistant Judge Advocate General (General Law), the Deputy Assistant Judge Advocate General (Claims and Tort Litigation), and Head, Tort Claims Branch (Claims and Tort Litigation), have delegated authority to settle claims for $25,000.00 or less, and have denial authority in any amount.

(4) Individuals with settlement authority under paragraph (a)(3) of this section may delegate all or part of their settlement authority. Such delegation must be in writing.

(b) *Appellate authority.* Adjudicating authorities have the same authority as

delegated in paragraph (a) of this section to act upon appeals. No appellate authority below the Secretary of the Navy may deny an appeal of a claim it had previously denied.

[57 FR 4722, Feb. 7, 1992, as amended at 72 FR 53420, Sept. 19, 2007]

**§ 750.50 Advance payments.**

(a) *Scope*. This paragraph applies exclusively to the payment of amounts not to exceed $100,000.00 under 10 U.S.C. 2736 in advance of submission of a claim.

(b) *Statutory authority*. Title 10 U.S.C. 2736 authorizes the Secretary of the Navy or designee to pay an amount not in excess of $100,000.00 in advance of the submission of a claim to or for any person, or the legal representative of any person, who was injured or killed, or whose property was damaged or lost, as the result of an accident for which allowance of a claim is authorized by law. Payment under this law is limited to that which would be payable under the MCA (10 U.S.C. 2733). Payment of an amount under this law is not an admission by the United States of liability for the accident concerned. Any amount so paid shall be deducted from any amount that may be allowed under any other provision of law to the person or his legal representative for injury, death, damage, or loss attributable to the accident concerned.

(c) *Officials with authority to make advance payments*. (1) The Secretary of the Navy has authority to make advance payments up to $100,000.00

(2) The Judge Advocate General has delegated authority to make advance payments up to $100,000.00.

(3) The Deputy Assistant Judge Advocate General (Claims and Tort Litigation) and the Head, Tort Claims Branch (Claims and Tort Litigation) have delegated authority to make advance payments up to $25,000.00.

(4) Naval Legal Service Office commanding officers and the Officer in Charge, U.S. Sending State Office for Italy have delegated authority to make advance payments up to $5,000.00.

(5) Officers in Charge of Naval Legal Service Office Detachments, when specifically designated by cognizant Commanding Officers of Naval Legal Service Offices; and the Staff Judge Advocate at the U.S. Naval Station, Panama Canal have delegated authority to make advance payments up to $3,000.00.

(6) Overseas commands with a Judge Advocate General's Corps officer or a judge advocate of the Marine Corps attached, have delegated authority to make advance payments up to $3,000.00.

(d) *Conditions for advance payments*. Prior to making an advance payment under 10 U.S.C. 2736, the adjudicating authority shall ascertain that:

(1) The injury, death, damage, or loss would be payable under the MCA (10 U.S.C. 2733);

(2) The payee, insofar as can be determined, would be a proper claimant, or is the spouse or next of kin of a proper claimant who is incapacitated;

(3) The provable damages are estimated to exceed the amount to be paid;

(4) There exists an immediate need of the person who suffered the injury, damage, or loss, or of his family, or of the family of a person who was killed, for food, clothing, shelter, medical, or burial expenses, or other necessities, and other resources for such expenses are not reasonably available;

(5) The prospective payee has signed a statement that it is understood that payment is not an admission by the Navy or the United States of liability for the accident concerned, and that the amount paid is not a gratuity but shall constitute an advance against and shall be deducted from any amount that may be allowed under any other provision of law to the person or his legal representative for injury, death, damage, or loss attributable to the accident concerned; and

(6) No payment under 10 U.S.C. 2736 may be made if the accident occurred in a foreign country in which the NATO Status of Forces Agreement (4 U.S.T. 1792, TIAS 2846) or other similar agreement is in effect and the injury, death, damage, or loss

(i) Was caused by a member or employee of the DON acting within the scope of employment or

(ii) Occurred ''incident to noncombat activities'' of the DON as defined in § 750.43.

[57 FR 4722, Feb. 7, 1992, as amended at 72 FR 53421, Sept. 19, 2007]

**§ 750.51 Final disposition.**

(a) *Claimant to be notified.* The adjudicating authority shall notify the claimant, in writing, of the action taken on the claim.

(b) *Final denial.* A final denial, in whole or in part, of any MCA claim shall be in writing and sent to the claimant, or his attorney or legal representative, by certified or registered mail, return receipt requested. The notification of denial shall include a statement of the reason or reasons for denial and that the claimant may appeal. The notification shall also inform the claimant:

(1) The title of the appellate authority who will act on the appeal and that the appeal will be addressed to the adjudicating authority who last acted on the claim.

(2) No form is prescribed for the appeal, but the grounds for appeal should be set forth fully.

(3) The appeal must be submitted within 30 days of receipt by the claimant of notice of action on the claim.

**§ 750.52 Appeal.**

(a) A claim which is disapproved in whole or in part may be appealed by the claimant at any time within 30 days after receipt of notification of disapproval. An appeal shall be in writing and state the grounds relied upon. An appeal is not an adversary proceeding and a hearing is not authorized; however, the claimant may obtain and submit any additional evidence or written argument for consideration by the appellate authority.

(b) Upon receipt, the adjudicating authority examines the appeal, determines whether the appeal complies with this regulation, and reviews the claims investigative file to ensure it is complete. The claim, with the complete investigative file and a memorandum of law, will be forwarded to the appellate authority for action. If the evidence in the file, including information submitted by the claimant with the appeal, indicates the appeal should be approved, the adjudicating authority may treat the appeal as a request for reconsideration.

(c) Processing of the appeal may be delayed pending further efforts by the adjudicating authority to settle the claim. Where the adjudicating authority does not reach a final agreement on an appealed claim, it shall send the entire claim file to the next higher settlement authority, who is the appellate authority for that claim.

(d) The appellate authority shall notify the claimant in writing of the determination on appeal; that such determination constitutes the final administrative action on the claim; and there is no right to sue under the MCA.

**§ 750.53 Cross-servicing.**

(a) See § 750.13 or information about single-service claims responsibility under DODDIR 5515.8 of 9 June 1990.

(b) *Claims settlement procedures.* Where a single service has been assigned a country or area claims responsibility, that service will settle claims cognizable under the MCA under the regulations of that service. The forwarding command shall afford any assistance necessary to the appropriate service in the investigation and adjudication of such claims.

**§ 750.54 Payment of costs, settlements, and judgments related to certain medical or legal malpractice claims.**

(a) *General.* Requests for reimbursement/indemnification of costs, settlements, and judgments cognizable under 10 U.S.C. 1089(f) [for personal injury or death caused by any physician, dentist, nurse, pharmacist, paramedic, or other supporting personnel (including medical and dental technicians, nurse assistants, and therapists)] or 10 U.S.C. 1054(f) (for damages for injury or loss of property caused by any attorney, paralegal, or other member of a legal staff) while acting as DON personnel will be paid if:

(1) The alleged negligent or wrongful actions or omissions arose in connection with either providing health care functions or legal services and within the scope of employment; and

(2) Such personnel furnish prompt notification and delivery of all process served or received, and other documents, information, and assistance as requested; and cooperate in defending the action on the merits.

(b) *Requests for Indemnification.* All requests for indemnification for personal liability of DON personnel for

acts or omissions arising out of assigned duties shall be forwarded to the Judge Advocate General for action.

### § 750.55 Attorney's fees.

Attorney's fees not in excess of 20 percent of any settlement may be allowed. Attorney's fees so determined are to be paid out of the amount awarded and not in addition to the award. These fee limitations shall be incorporated in any settlement agreement secured from a claimant.

### §§ 750.56–750.60 [Reserved]

## Subpart D—Claims Not Cognizable Under Any Other Provision of Law

### § 750.61 Scope of subpart D.

This section provides information on payment of claims against the United States, not payable under any other statute, caused by the act or omission, negligent, wrongful, or otherwise involving fault, of Department of the Navy (DON) military and civilian personnel (hereinafter DON personnel) acting outside the scope of their employment.

### § 750.62 Statutory authority.

Section 2737 of title 10, United States Code, provides authority for the administrative settlement in an amount not to exceed $1,000.00 of any claim against the United States not cognizable under any other provision of law for damage, loss, or destruction of property or for personal injury or death caused by military personnel or a civilian official or employee of a military department incident to the use of a vehicle of the United States at any place, or any other property of the United States on a Government installation. There is no right to sue. There are no territorial limitations and the Act has worldwide application.

### § 750.63 Definitions.

(a) *Civilian official or employee*. Any civilian employee of the DON paid from appropriated funds at the time of the incident.

(b) *Vehicle*. Includes every description of carriage or other artificial contrivance used, or capable of being used, as a means of transportation on land. See 1 U.S.C. 4.

(c) *Government installation*. Any Federal facility having fixed boundaries and owned or controlled by the U.S. Government. It includes both military bases and nonmilitary installations.

### § 750.64 Claim procedures.

(a) The general provisions of subpart A of this part shall apply in determining what is a proper claim, who is a proper claimant, and how a claim is to be investigated and processed under 10 U.S.C. 2737 and this section.

(b) A claim is presented when the DON receives from a claimant or the claimant's duly authorized agent, written notification of a nonscope claim incident accompanied by a demand for money damages in a sum certain.

(c) A claimant may amend a claim at any time prior to final action. Amendments will be submitted in writing and signed by the claimant or the claimant's duly authorized agent.

(d) Claims submitted under the provisions of the Federal Tort Claims Act (FTCA) or Military Claims Act (MCA) shall be considered automatically for an award under this section when payment would otherwise be barred because the DON personnel were not in the scope of their employment at the time of the incident. If a tender of payment under this section is not accepted by the claimant in full satisfaction of the claim, no award will be made, and the claim will be denied pursuant to the rules applicable to the statute under which it was submitted.

(e) Damages caused by latent defects of ordinary, commercial type, Government equipment that were not payable under the MCA, Foreign Claims Act, or FTCA are payable under this section.

(f) Nonscope claims for damages caused by local national DON employees overseas are also payable under this section if the injury was caused by the use of Government equipment.

(g) Payment may not be made on a nonscope claim unless the claimant accepts the amount offered in full satisfaction of the claim and signs a settlement agreement.

(h) Payment for nonscope claims adjudicated by field commands will be affected through their local disbursing

office by use of funds obtained from the Judge Advocate General.

(i) Claims submitted solely under 10 U.S.C. 2737 shall be promptly considered. If a nonscope claim is denied, the claimant shall be informed of reasons in writing and advised he may appeal in writing to the Secretary of the Navy (Judge Advocate General) provided the appeal is received within 30 days of the notice of denial. The provisions of § 750.51(b) of subpart C also apply to denials of nonscope claims.

### § 750.65 Statute of limitations.

(a) A claim must be presented in writing within 2 years after it accrues. It accrues at the time the claimant discovers, or in the exercise of reasonable care should have discovered, the existence of the act or omission for which the claim is filed.

(b) In computing time to determine whether the period of limitation has expired, exclude the incident date and include the date the claim was presented.

### § 750.66 Officials with authority to settle.

Judge Advocate General; Deputy Judge Advocate General; Assistant Judge Advocate General (General Law); Deputy Assistant Judge Advocate General (Claims and Tort Litigation); and Head, Tort Claims Branch (Claims and Tort Litigation) may settle a nonscope claim.

[72 FR 53421, Sept. 19, 2007]

### § 750.67 Scope of liability.

(a) Subject to the exceptions in § 750.68 of specific claims not payable, the United States shall not pay more than $1,000.00 for a claim against the United States, not cognizable under any other provision of law, except Article 139, UCMJ.

(b) Article 139, UCMJ, 10 U.S.C. 939, is not preemptive. The prohibition in 10 U.S.C. 2737 on paying claims ''not cognizable under any other provisions of law'' applies only to law authorizing claims against the United States. Article 139 authorizes claims against servicemembers. See part 755 of this chapter.

### § 750.68 Claims not payable.

(a) A claim for damage, loss, or destruction of property or the personal injury or death caused wholly or partly by a negligent or wrongful act of the claimant or his agent or employee.

(b) A claim, or any part thereof, that is legally recoverable by the claimant under an indemnifying law or indemnity contract.

(c) A subrogated claim.

### § 750.69 Measure of damages.

Generally, the measure-of-damage provisions under the MCA are used to determine the extent of recovery for nonscope claims. Compensation is computed in accordance with §§ 750.47 and 750.48 of subpart C, except damages for personal injury or death under this section shall not be for more than the cost of reasonable medical, hospital, and burial expenses actually incurred and not otherwise furnished or paid for by the United States.

# PART 751—PERSONNEL CLAIMS REGULATIONS

## Subpart A—Claims Against the United States

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751.1 Scope.
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751.13 Partial payments.
751.14 Reconsideration and appeal.
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## Subpart B [Reserved]

AUTHORITY: 5 U.S.C. 301, 10 U.S.C. 5013 and 5148; E.O. 12473, 3 CFR, 1984 Comp., p. 201.

SOURCE: 57 FR 5055, Feb. 12, 1992, unless otherwise noted.

## Subpart A—Claims Against the United States

### § 751.1 Scope.

This part prescribes procedures and substantive bases for administrative settlement of claims against the United States submitted by Department of Navy (DoN) personnel and civilian employees of the naval establishment.

[72 FR 53422, Sept. 19, 2007]

### § 751.2 Claims against the United States: In general.

(a) *Maximum amount payable.* The Military and Civilian Employees' Personnel Claims Act (Personnel Claims Act, 31 U.S.C. 3701, 3702, and 3721 (2004)), provides that the maximum amount payable for any loss or damage arising from a single incident is limited to $40,000.00. Where the loss of or damage to personal property arose from emergency evacuations or other extraordinary circumstances, the maximum is $100,000.00.

(b) *Additional instructions.* The Judge Advocate General of the Navy may issue additional instructions or guidance as necessary to give full force and effect to this section.

(c) *Preemption.* The provisions of this section and the Personnel Claims Act are preemptive of other claims regulations. Claims not allowable under the Personnel Claims Act may, however, be allowable under another claims act.

(d) *Other claims.* Claims arising from the operation of a ship's store, laundry, dry cleaning facility, tailor shop, or cobbler shop should be processed in accordance with NAVSUP P487.

[57 FR 5055, Feb. 12, 1992, as amended at 72 FR 53422, Sept. 19, 2007]

### § 751.3 Authority.

The Personnel Claims Act provides the authority for maximum payment up to $40,000, $100,000 in extraordinary circumstances for loss, damage, or destruction of personal property of military personnel or civilian employees incident to their service. No claim may be paid unless it is presented in writing within 2 years of the incident that gave rise to the claim.

[72 FR 53422, Sept. 19, 2007]

### § 751.4 Construction.

The provisions of this section and the Personnel Claims Act provide limited compensation to service members and civilian employees of the DON for loss and damage to personal property incurred incident to service. This limited compensation is not a substitute for private insurance. Although not every loss may be compensated under the Personnel Claims Act, its provisions shall be broadly construed to provide reasonable compensation on meritorious claims. Adjudications must be based on common sense and the reasoned judgment of the claims examiner giving the benefit of realistic doubt to the claimant.

### § 751.5 Definitions.

(a) *Proper claimants*—(1) *Members of the DON.* All Navy and Marine Corps active duty members and reservists on active duty for training under Federal law whether commissioned, enrolled, appointed, or enlisted. A retired member may only claim under this Act if loss or damage occurred while the claimant was on active duty or in connection with the claimant's last movement of personal property incident to service.

(2) *Civilian employees of the Navy.* Federal employees of the naval establishment paid from appropriated funds. This term does not include Red Cross employees, USO personnel, and employees of Government contractors (including technical representatives).

(3) *Claims by non-appropriated fund employees.* Claims by employees of Navy and Marine Corps non-appropriated fund activities for loss, damage, or destruction of personal property incident to their employment will be processed and adjudicated in accordance with this part and forwarded to the appropriate local non-appropriated fund activity that employs the claimant for payment from non-appropriated funds.

(4) *Separation from service.* Separation from the service or termination of employment shall not bar former military personnel or civilian employees from

filing claims or bar designated personnel from considering, ascertaining, adjusting, determining, and authorizing payment of claims otherwise falling within the provision of these regulations when such claim accrued prior to separation or termination.

(5) *Agent or legal representative*. The authorized agent or legal representative of a proper claimant may file on behalf of the claimant if the agent provides a power of attorney that complies with local law. Certain relatives of a deceased proper claimant may file any claim the claimant could have filed. The PCA identifies these relatives in order of priority. If multiple persons who the statute lists as equals in priority file separate claims, the first claim settled extinguishes the rights of the other claimants. The estate of a deceased proper party claimant is not a proper claimant, nor is an executor or personal representative who cannot file as a survivor. The PCA ranks surviving relatives in the following order of priority:

(i) Spouse;

(ii) Child or children;

(iii) Father, mother, or both;

(iv) Brother, sister, or both.

(b) *Improper claimants*. Insurers, assignees, subrogees, vendors, lienholders, contractors, subcontractors and their employees, and other persons not specifically mentioned as proper claimants.

(c) *Unusual occurrence*. Serious events and natural disaster not expected to take place in the normal course of events and hazards outside the normal risks of day-to-day living and working. Two different types of incidents may be considered unusual occurrences: those of an unusual nature and those of a common nature that occur to an unexpected degree of severity. Examples of unusual occurrences include structural defects in quarters, faulty plumbing maintenance, termite or rodent damage, unusually large size hail, and hazardous health conditions due to Government use of toxic chemicals. Examples of occurrences that are not unusual include potholes or foreign objects in the road, ice and snow sliding off a roof onto a vehicle, and tears, rips, snags, or stains on clothing. Claims that electrical or electronic devices were damaged by a power surge may be paid when lightning has actually struck the claimant's residence or objects outside the residence, such as a transformer box, or when power company records or similar evidence shows that a particular residence or group of residences was subjected to a power surge of unusual intensity. In areas subject to frequent thunderstorms or power fluctuations, claimants are expected to use surge suppressors, if available, to protect delicate items such as computers or videocassette recorders.

(d) *Personal property*. Property including but not limited to household goods, unaccompanied baggage, privately owned vehicles (POV's), mobile homes, and boats.

(e) *Intangible property*. Property that has no intrinsic marketable value such as bankbooks, checks, promissory notes, non-negotiable stock certificates, bonds, baggage checks, insurance policies, money orders, and travelers checks.

(f) *Vehicles*. Include automobiles, motorcycles, mopeds, jet skis, utility trailers, camping trailers, trucks, mounted camper bodies, motor homes, boats, boat trailers, bicycles, and aircraft. Mobile homes and other property used as dwelling places are not considered vehicles.

[57 FR 5055, Feb. 12, 1992, as amended at 72 FR 53422, Sept. 19, 2007]

### § 751.6 Claims payable.

Claims for loss, damage, or destruction of property may be considered as set out below if possession of the property was reasonable and useful under the circumstances and the loss did not result from the negligence of the claimant. The following are examples of more common claims. Not all situations that may result in a claim are covered, but the processes described in the examples on how to approach, investigate, and adjudicate claims are applicable to all claims filed.

(a) *Transportation and storage losses*. (1) Incurred during transportation under orders, whether in possession of the Government, carrier, storage warehouse, or other Government contractor.

(2) Incurred during travel under orders, including temporary duty.

(3) Incurred during travel on a space available basis on a military aircraft, vessel, or vehicle.

(4) *Do-it-yourself (DITY) moves.* In certain circumstances, loss of or damage to property during a DITY move is compensable. Claimants, however, are required to substantiate the fact of loss or damage in shipment. Claimants who do not prepare inventories have difficulty substantiating thefts. In addition, unless evidence shows that something outside the claimant's control caused the damage, breakage is presumed to be the result of improper packing by the claimant. For example, if a claimant's truck is rear-ended by a drunk driver during a DITY move, it is out of claimant's control. If the claimant can substantiate that he was free from negligence, he can file a claim for damages to his household goods.

(5) *Shipment or storage at the claimant's expense.* The Government will not compensate a claimant for loss or damage that occurs while property is being shipped or stored at the claimant's expense, even if the Government reimburses the claimant for the shipment or storage fees. The reason for this is that there is no contract, called a Government Bill of Lading, between the Government and the carrier. In such cases, the claimant must claim against the carrier.

(b) *Losses at assigned quarters or other authorized places.* Damage or loss caused by fire, explosion, theft, vandalism, lightning, flood, earthquake, and unusual occurrences is cognizable. Losses due to theft may only be paid if the claimant took reasonable measures to safeguard the property and theft occurred as a result of a forced entry. Claimants are expected to secure windows and doors of their barracks, quarters, wall lockers, and other storage areas so that the thief must force an entry. If a police report states that there were no signs of forced entry and the claimant asserts with absolute certainty that the area was in fact secure, the claims examiner must consider whether forced entry would have left visible signs. Claimants are also expected to take extra measures to protect cash, valuable jewelry, and similar small, easily pilferable items. Normally, such items should be kept in a locked container within a secured room. It is also advisable that the locked container be large enough that it is not convenient for a thief to carry off. Bicycles located at quarters or on base must be secured to a fixed object. Overseas housing is considered assigned quarters for claimants who are not local inhabitants.

(c) *Vehicle losses.* (1) Losses incurred while a vehicle is used in the performance of a military duty, if such use was authorized or directed for the convenience of the Government, provided the travel did not include commuting to or from a permanent place of duty, and did not arise from mechanical or structural defect of the vehicle. There is no requirement that the loss be due to fire, flood, hurricane, or other unusual occurrence, or to theft or vandalism. As a general rule, however, travel is not considered to be for the convenience of the Government unless it was pursuant to written orders authorizing use for which the claimant is entitled to reimbursement. The claimant must be free from negligence in order to be paid for a collision loss. Travel by the claimant to other buildings on the installation is not loss. Travel by the claimant to other buildings on the installation is not considered to be under orders for the convenience of the Government. Travel off the installation without written orders may only be deemed to be for the convenience of the Government if the claimant was authorized mileage reimbursement for the travel. The issuance of written orders after the fact raises the presumption that travel was not authorized for the convenience of the Government. The maximum payment authorized by the Allowance List-Depreciation Guide (ALDG) still applies to loss of or damage to vehicles and contents. This maximum does not apply to DITY moves.

(2) Losses incurred while a vehicle is shipped at Government expense are compensable provided the loss or damage did not arise from mechanical or structural defect of the vehicle during such shipment. Damage caused during shipment at the claimant's expense or while the vehicle is being moved to or

from the port by an agent of the claimant is not compensable.

(3) Losses incurred while a vehicle is located at quarters or other authorized place of lodging, including garages, carports, driveways, assigned parking spaces, if the loss or damage is caused by fire, flood, hurricane, theft, or vandalism, or other unusual occurrence. Vandalism is damage intentionally caused. Stray marks caused by children playing, falling branches, gravel thrown by other vehicles, or similar occurrences are not vandalism. The amount payable on vandalism claims is limited to the maximum payment authorized by the ALDG.

(4) Incurred while a vehicle is located at places other than quarters but on a military installation, if the loss or damage is caused by fire, flood, hurricane, theft, or vandalism, or other unusual occurrence. ''Military installation'' is used broadly to describe any fixed land area, wherever situated, controlled, and used by military activities or the Department of Defense (DOD). A vehicle properly on the installation should be presumed to be used incident to the claimant's service. A vehicle that is not properly insured or registered in accordance with local regulations is not properly on the installation. A vehicle left in a remote area of the installation that is not a designated long-term parking area for an undue length of time is presumed not to be on the installation incident to service.

(5) *Theft of property stored inside a vehicle.* A loss resulting from theft of property stored inside a vehicle is compensable if it was reasonable for the claimant to have the property in the vehicle and neither the claimant nor the claimant's agents were negligent in protecting the property. Neither the passenger compartment nor the trunk of a vehicle is a proper place for the long-term storage of property unconnected with the use of the vehicle. The passenger compartment of a vehicle does not provide adequate security, except for very short periods of time for articles that are not of high value or easily pilferable. Car covers and bras are payable if bolted or secured to the vehicle with a wire locking device.

(6) *Rental vehicles.* Damage to rental vehicles is considered under paragraphs of the Joint Federal Travel Regulations (JFTR), rather than as a loss incident to service.

(d) *Mobile homes and contents in shipment.* Claims for damage to mobile homes and contents in shipment are payable unless the damage was caused by structural or mechanical defects or by the claimant's negligence in securing the mobile home or packing its contents.

(e) *Borrowed property (including vehicles).* Loss or damage to borrowed property is compensable if it was borrowed for claimant's or dependent's own use. A statement will be provided by the owner of the property attesting to the use of the property by the claimant.

(f) *Clothing and articles being worn.* Repairs/replacement of clothing and articles being worn while on a military installation or in the performance of official duty may be paid if loss is caused by fire, flood, hurricane, theft, or vandalism, or other unusual occurrence. This paragraph shall be broadly construed in favor of compensation, but see §751.5(c) for the definition of unusual occurrence. Articles being worn include hearing aids, eyeglasses, and items the claimant is carrying, such as a briefcase.

(g) *Personal property held as evidence or confiscated property.* If property belonging to the victim of a crime is to be held as evidence for an extended period of time (in excess of 2 months) and the temporary loss of the property will work a grave hardship on the claimant, a claim for the loss may be considered for payment. This provision will not be used unless every effort has been made to determine whether secondary evidence, such as photographs, may be substituted for the item. No compensation is allowed to a person suspected of an offense for property seized from that same person in the investigation of that offense. This also applies to property a foreign government unjustly confiscates or an unjust change in a foreign law that forces surrender or abandonment of property.

(h) *Theft from possession of claimant.* Theft from the person of the claimant is reimbursable if the theft occurred by use of force, violence, or threat to do

bodily harm, or by snatching or pickpocketing, and at the time of theft the claimant was either on a military installation, utilizing a recreation facility operated or sponsored by the Department of Defense or any agency thereof, or in the performance of official duty. The theft must have been reported to appropriate police authorities as soon as practicable, and it must have been reasonable for the claimant to have had on his person the quality and the quantity of the property allegedly stolen.

(i) *Property used for the benefit of the Government.* Compensation is authorized where property is damaged or lost while being used in the performance of Government business at the direction or request of superior authority or by reason of military necessity.

(j) *Money deposited for safekeeping, transmittal, or other authorized disposition.* Compensation is authorized for personal funds delivered to and accepted by military and civilian personnel authorized by the commanding officer to receive these funds for safekeeping, deposit, transmittal, or other authorized disposition, if the funds were neither applied as directed by the owner nor returned to the owner.

(k) *Fees*—(1) *For obtaining certain documents.* The fees for replacing birth certificates, marriage certificates, college diplomas, passports, or similar documents may be allowed if the original or a certified copy is lost or destroyed incident to service. In general, compensation will only be allowed for replacing documents with a raised seal that are official in nature. No compensation will be allowed for documents that are representative of value, such as stock certificates, or for personal letters or records.

(2) *Estimate fees.* An estimate fee is a fixed cost charged by a person in the business of repairing property to provide an estimate of what it would cost to repair property. An estimate fee in excess of $75.00 should be examined with great care to determine whether it is reasonable. A person becomes obligated to pay an estimated fee when the estimate is prepared. An estimate fee should not be confused with an appraisal fee, which is not compensable (see § 751.7(m)). A reasonable estimate fee is compensable if it is not going to be credited toward the cost of repair. If it is to be credited toward the cost of repair, it is not compensable regardless of whether the claimant chooses to have the work done. When an estimate fee is claimed, the file must reflect whether the fee is to be credited.

[57 FR 5055, Feb. 12, 1992, as amended at 72 FR 53422, Sept. 19, 2007]

### § 751.7 Claims not payable.

(a) *Losses in unassigned quarters in the United States.* Claims for property damaged or lost at quarters occupied by the claimant within the United States that are not assigned or otherwise provided by the Government.

(b) *Currency or jewelry shipped or stored in baggage.* Claims for lost currency, shipped or stored in baggage are not payable. Small, valuable, highly pilferable items should normally be hand-carried rather than shipped, however, if expensive or valuable jewelry or coin collections are shipped, a full description of each item of expensive jewelry and of any coin or money collection must be listed and described on the inventory for its loss to be payable. Each item must also be listed as missing at the time of delivery. If not noted at the time of delivery, the claimant must satisfactorily explain why.

(c) *Enemy property or war trophies.* This includes only property that was originally enemy property or a war trophy that passed into the hands of a collector and was then purchased by a claimant.

(d) Unserviceable or Worn-Out Property.

(e) *Loss or damage to property to the extent of any available insurance coverage.* Except for claims for loss or damage to household goods or privately-owned vehicles (POVS) while shipped or stored at Government expense, when the property lost, damaged, or destroyed is insured, the claimant must make a demand for payment against the insurance company under the terms of the policy.

(f) *Inconvenience or loss of use.* Expenses arising from late delivery of personal property, including but not limited to the expenses for food, lodging, and furniture rental, loss of use, interest, carrying charges, attorney's

fees, telephone calls, additional costs of transporting claimant or family members, time spent in preparation of claim, or cost of insurance are not compensable. While such claims do not lie against the Government, members should be referred to the Personal Property Office for assistance in filing their inconvenience claims against the commercial carriers.

(g) *Items of speculative value.* Theses, manuscripts, unsold paintings, or a similar creative or artistic work done by the claimant, friend, or a relative is limited to the cost of materials only. The value of such items is speculative. Compensation for a utilitarian object made by the claimant, such as a quilt or bookcase, is limited to the value of an item of similar quality.

(h) *Loss or damage to property due to negligence of the claimant.* Negligence is a failure to exercise the degree of care expected under the circumstances that is the proximate cause of the loss. Losses due, in whole or in part, to the negligence of the claimant, the claimant's spouse, child, houseguest, employee, or agent are not compensable.

(i) *Business property.* Losses of items acquired for resale or use in a private business are not compensable. If property is acquired for both business and personal use, compensation will not be allowed if business use is substantial, or is the primary purpose for which the item was purchased, or if the item is designed for professional use and is not normally intended for personal use.

(j) *Motor vehicles.* Collision damage is not payable unless it meets the criteria for payment as property used for the benefit of the Government as established in §751.6(c)(1).

(k) *Violation of law or directives.* Property acquired, possessed, or transported unlawfully or in violation of competent regulations or directives. This includes vehicles, weapons, or property shipped to accommodate another person, as well as property used to transport contraband.

(l) *Sales tax.* Sales taxes associated with repair or replacement costs will not be considered unless the claimant provides proof that the sales tax was actually paid.

(m) *Appraisal fees.* An appraisal, as distinguished from an estimate of replacement or repair, is defined as a valuation of an item provided by a person who is not in the business of selling or repairing that type of property. Normally, claimants are expected to obtain appraisals on expensive items at their own expense.

(n) *Quantities of property not reasonable or useful under the circumstances are not compensable.* Factors to be considered are claimant's living conditions, family size, social obligations, and any particular need to have more than average quantities, as well as the actual circumstances surrounding the acquisition and loss.

(o) Intangible Property, such as Bankbooks, Checks, Promissory Notes, Stock Certificates, Bonds, Bills of Lading, Warehouse Receipts, Baggage Checks, Insurance Policies, Money Orders, and Traveler's Checks are not Compensable.

(p) Property Owned by the United States, Except where the Claimant is Responsible to an Agency of the Government other than the DON.

(q) *Contractual coverage.* Losses, or any portion thereof, that have been recovered or are recoverable pursuant to contract are not compensable.

[57 FR 5055, Feb. 12, 1992, as amended at 72 FR 53423, Sept. 19, 2007]

### §751.8 Adjudicating authorities.

(a) *Claims by Navy personnel.* (1) The following officials are authorized to adjudicate and authorize payment of PCA claims up to $100,000:

(i) The Judge Advocate General;

(ii) The Deputy Judge Advocate General;

(iii) Any Assistant Judge Advocate General; and

(iv) The Deputy Assistant Judge Advocate General (Claims and Tort Litigation).

(2) Any individual, when designated by the Deputy Assistant Judge Advocate General (Claims and Tort Litigation Division), may adjudicate and authorize payment of PCA claims up to any designated amount.

(b) *Claims by Marine Corps personnel.* (1) The following officials are authorized to adjudicate and authorize payment of PCA claims up to $40,000:

(i) Commandant of the Marine Corps;

(ii) Deputy Commandant, Manpower and Reserve Affairs Department;

(iii) Director, Personal and Family Readiness Division;

(iv) Head, Military Personnel Services Branch;

(v) Head, Personal Property Claims Section; and

(vi) Any individual personally designated by the Commandant of the Marine Corps may adjudicate and authorize payment of PCA claims up to any delegated amount not to exceed $40,000.

(2) The Assistant Head, Personal Property Claims Section is authorized to adjudicate and authorize payment of PCA claims up to $25,000.

(3) Any individual at Marine Corps Field Transportation Management Office/Claims Activities, when personally designated by the Director, Personal and Family Readiness Division, may be authorized to adjudicate and authorize payment of PCA claims up to any delegated amount not to exceed $40,000.

[72 FR 53423, Sept. 19, 2007]

### § 751.9 Presentment of claim.

(a) *General*. A claim shall be submitted in writing and, if practicable, be presented to the Personnel Claims Unit or Marine Corps claims office serving the area where the claim accrued, such as where the House Hold Goods were delivered. If submission in accordance with the foregoing is impractical under the circumstance, the claim may be submitted in writing to any installation or establishment of the Armed Forces which will forward the claim to the appropriate Navy or Marine Corps claims office for processing. To constitute a filing, a claim must be presented in writing to one of the military departments.

(b) *Statute of limitations*. A claim must be presented in writing to a military installation within 2 years after it accrues. This requirement is statutory and may only be waived if a claim accrues during armed conflict, or armed conflict intervenes before the 2 years have run, and good cause is shown. In this situation, a claim may be presented not later than 2 years after the end of the armed conflict. A claim accrues on the day the claimant knows or should know of the loss. For losses that occur in shipment of personal property, normally the day of delivery or the day the claimant loses entitlement to storage at Government expense (whichever occurs first) is the day the claim accrues. If a claimant's entitlement to Government storage terminates, but the property is later delivered at Government expense, the claim accrues on delivery. In computing the 2 years, exclude the first day (day of delivery or incident) and include the last day. If the last day falls on a non-workday, extend the 2 years to the next workday.

(c) *Substantiation*. The claimant is responsible for substantiating ownership or possession, the fact of loss or damage, and the value of property. Claimants are expected to report losses promptly. The greater the delay in reporting a loss, the more substantiation the claimant is expected to provide.

(1) *Obviously damaged or missing inventory items that are not reported at delivery*. Claimants are expected to list missing inventory items and obvious damage at time of delivery. Claimants who do not should be questioned. Obviously some claimants will simply not notice readily apparent damage. If, however, the claimant cannot provide an explanation or lacks credibility, payment should be denied based on lack of evidence that the item was lost or damaged in shipment.

(2) *Later-discovered shipment loss or damage*. A claimant has 70 days to unpack, discover, and report loss and damage that is not obvious at delivery. In most cases, loss and damage that is discovered later and reported in a timely manner should be deemed to have been incurred in shipment.

(3) *Damage to POVs in shipment*. Persons shipping POVs are expected to list damage on DD Form 788 (Private Vehicle Shipping Document for Automobile) when they pick up the vehicle. Obvious external damage that is not listed is not payable. Damage the claimant could reasonably be expected not to notice at the pickup point should be considered if the claimant reports the damage to claims or transportation office personnel within a short time, normally a few days after arriving at the installation.

(4) *Credibility*. Factors that indicate a claimant's credibility is questionable

include amounts claimed that are exaggerated in comparison with the cost of similar items, insignificant or almost undetectable damage, very recent purchase dates for most items claimed, and statements that appear incredible. Such claimants should be required to provide more evidence than is normally expected.

(5) *Inspections.* Whenever a question arises about damage to property, the best way to determine a proper award is to examine the items closely to determine the nature of the damage. For furniture, undersurfaces and the edges of drawers and doors should be examined to determine whether the material is solid hardwood, fine quality veneer over hardwood, veneer over pressed wood, or other types of material. If the inspection is conducted at the claimant's quarters, the general quality of property should be determined. Observations by repairmen and transportation inspectors are very valuable, but on occasion, claims examiners may request an inspection. Such inspections are necessary to reduce the number of reconsiderations and fraudulent claims and are invaluable in enabling claims personnel to understand the facts in many situations.

[57 FR 5055, Feb. 12, 1992, as amended at 72 FR 53423, Sept. 19, 2007]

### § 751.10 Form of claim.

The claim should be submitted on DD Form 1842 (Claim for Personal Property) accompanied by DD Form 1844 (List of Property). If DD Forms 1842 and 1844[1] are not available, any writing will be accepted and considered if it asserts a demand for a specific sum and substantially describes the facts necessary to support a claim cognizable under these regulations. The claim must be signed by a proper claimant (see § 751.5) or by a person with a power of attorney for a proper claimant. A copy of the power of attorney must be included with the claim.

[57 FR 5055, Feb. 12, 1992, as amended at 72 FR 53424, Sept. 19, 2007]

### § 751.11 Investigation of claim.

Upon receipt of a claim, the claim shall be stamped with the date and receiving office, forwarded to the cognizant PCU and be referred to a claims examiner. The examiner shall consider all information and evidence submitted with the claim and shall conduct such further investigation as may be necessary and appropriate.

[72 FR 53424, Sept. 19, 2007]

### § 751.12 Payments.

Payment of approved personnel claims will be made by the Navy or Marine Corps disbursing officer serving the adjudicating authority. Payments will be charged to funds made available to the adjudicating authority for this purpose.

[72 FR 53424, Sept. 19, 2007]

### § 751.13 Partial payments.

(a) *Partial payments when hardship exists.* When claimants suffer a significant, compensable loss of items that are needed for daily living, and can demonstrate a need for immediate funds to replace some of those items (e.g., food, clothes, baby items, etc.) the adjudicating authority may authorize a partial payment of an appropriate amount, normally one-half of the estimated total payment. When a partial payment is made a copy of the payment voucher and all other information related to the partial payment shall be placed in the claim file. Action shall be taken to ensure the amount of the partial payment is deducted from the adjudicated value of the claim when final payment is made.

(b) *Marine hardship payments.* The Marine claimant's Transportation Management Office shall ensure compliance with all requirements of § 751.14(a), and may request authority for payment by message from the Commandant of the Marine Corps (MRP–2).

(c) *Effect of partial payment.* Partial payments are to be subtracted from the adjudicated value of the claim before

[1] Copies of these forms may be obtained by contacting the legal office or personal property office serving the installation where the claimant is stationed, or nearest to the point where the loss or damage occurred or on the Internet at *http://www.jag.navy.mil.*

payment of the balance due. Overpayments are to be properly recouped.

[72 FR 53424, Sept. 19, 2007]

### § 751.14 Reconsideration and appeal.

(a) *General.* When a claim is denied either in whole or in part, the claimant shall be given written notification of the initial adjudication and of the right to submit a written request for reconsideration to the original adjudicating authority within 6 months from the date the claimant receives notice of the initial adjudication of the claim. If a claimant requests reconsideration and if it is determined that the original action was erroneous or incorrect, it shall be modified and, when appropriate, a supplemental payment shall be approved. If full additional payment is not granted, the file shall be forwarded for reconsideration to the next higher adjudicating authority. For claims originally adjudicated by the Head, Personnel Claims Unit Norfolk, the files will be forwarded to the Judge Advocate General (Claims and Tort Litigation)(Code 15) for final action. The claimant shall be notified of this action either by letter or by copy of the letter forwarding the file to higher adjudicating authority. The forwarding letter shall include a synopsis of action taken on the file and reasons for the action or denial, as well as a recommendation of further action or denial.

(b) *Files forwarded to JAG.* For files forwarded to JAG in accordance with § 751.14(a), the forwarding endorsement shall include the specific reasons why the requested relief was not granted and shall address the specific points or complaints raised by the claimant's request for reconsideration.

(c) *Appeals procedure for claims submitted by Marine Corps personnel.* Where any of the Marine Corps adjudication authorities listed in § 751.8(b) fail to grant the relief requested, or otherwise resolve the claim to the satisfaction of the claimant, the request for reconsideration shall be forwarded together with the entire original file and the adjudicating authority's recommendation, to the Judge Advocate General.

[72 FR 53424, Sept. 19, 2007]

### §§ 751.15–751.20 [Reserved]

## Subpart B [Reserved]

# PART 752—ADMIRALTY CLAIMS

Sec.
752.1 Scope.
752.2 Organization.
752.3 Claims against the Navy.
752.4 Affirmative claims.
752.5 Salvage.

AUTHORITY: 5 U.S.C. 301; 10 U.S.C. 5013, 5148 and 7621–7623; 32 CFR 700.105 and 700.331.

### § 752.1 Scope.

This part applies to admiralty-tort claims. These include claims against the United States for damage caused by a vessel in the naval service or by other property under the jurisdiction of the Navy, or damage caused by a maritime tort committed by an agent or employee of the Navy for which the Navy has assumed an obligation to respond for damage. Affirmative claims by the United States for damage caused by a vessel or floating object to Navy property are covered under this part.

[72 FR 56268, Oct. 3, 2007]

### § 752.2 Organization.

(a) *Administrative authority of the Secretary of the Navy.* The Secretary of the Navy has administrative authority for settlement and direct payment where the amount paid does not exceed $15,000,000 and where the matter is not in litigation, of claims for damage caused by naval vessels or by other property under the jurisdiction of the Navy, or damage caused by a maritime tort committed by an agent or employee of the Navy, and for towage or salvage services rendered to naval vessels (10 U.S.C. 7622). The Secretary also has authority to settle affirmative admiralty claims for damage caused by a vessel or floating object to property under the jurisdiction of the Navy (10 U.S.C. 7623).

(b) *Admiralty and Maritime Law Division of the Office of the Judge Advocate General.* The Navy's admiralty-tort claims are processed and adjudicated in

the Admiralty and Maritime Law Division of the Office of the Judge Advocate General. All correspondence with the Admiralty and Maritime Law Division should be addressed to the Office of the Judge Advocate General (Code 11), 1322 Patterson Avenue SE, Suite 3000, Washington Navy Yard, DC 20374–5066.

(c) *Mission and policy*. The primary mission of the Admiralty and Maritime Law Division is to effect prompt and equitable settlements of admiralty claims, both against and in favor of the United States. The settlement procedure has evolved to eliminate the expenses and delays arising out of litigation and to obtain results advantageous to the financial interests of the United States. Where settlements cannot be made, litigation ensues in the Federal Courts. The final test of whether a settlement is justified is the probable result of litigation. Settlements are therefore considered and determined by the probable results of litigation. The policy of the Navy is to effect fair and prompt settlements of admiralty claims wherever legal liability exists.

(d) *Admiralty-tort claims*. As indicated above, the Admiralty and Maritime Law Division primarily handles admiralty-tort claims. These are claims for damage caused by vessels in the naval service or by other property under the jurisdiction of the Navy, or damage caused by a maritime tort committed by an agent or employee of the Navy, and claims for damage caused by a privately owned vessel to a vessel or property of the Navy (affirmative claims). The Admiralty and Maritime Law Division also handles claims for towage and salvage services rendered to a vessel in the naval service.

(e) *Admiralty-contract claims*. Admiralty-contract claims arising out of the operations of the Military Sealift Command (MSC) are handled by its Office of Counsel. MSC is responsible for the procurement of vessels and space for the commercial ocean transportation of Department of Defense cargo, mail, and personnel. It is also responsible for the maintenance, repair, and alteration of Government-owned vessels assigned to it. The Office of Counsel, MSC, deals with the various claims of a contract nature which arise out of these operations. These include claims for cargo damage, charter hire, redelivery, general average, and claims arising under MSC ship-repair contracts.

(f) *Damage caused by Navy contract stevedores*. Office of Counsel, Naval Supply Systems Command, has cognizance of admiralty claims for damage caused by Navy contract stevedores. Under these stevedore contracts, the stevedoring companies are responsible for negligent acts of their employees which result in vessel damage. It is important that the extent of any such damage be accurately determined and promptly reported to the contracting officer having cognizance of the particular stevedore contract involved.

(g) *Resolving conflicts*. Admiralty-tort claims, such as collision, personal-injury, and death claims, are dealt with by the Admiralty and Maritime Law Division, irrespective of whether an MSC vessel or other naval vessel is involved. Whether any particular claim is to be handled by JAG or by MSC, therefore, is determined by the nature of the claim. Cases may arise which could be handled by either office. If doubt exists, such matters should be reported both to JAG and to MSC. An agreement will then be reached between the Admiralty and Maritime Law Division and the Office of Counsel, MSC, as to how the incident should be handled.

[39 FR 9962, Mar. 15, 1974, as amended at 55 FR 12173, Apr. 2, 1990; 65 FR 60861, 60862, Oct. 13, 2000; 69 FR 20542, Apr. 16, 2004; 72 FR 56268, Oct. 3, 2007]

### § 752.3 Claims against the Navy.

(a) *Settlement authority*. 10 U.S.C. 7622 provides settlement authority for damage caused by a vessel in the naval service or by other property under the jurisdiction of the Department of the Navy; compensation for towage or salvage service, including contract salvage, rendered to a vessel in the naval service or to other property of the Navy; or damage caused by a maritime tort committed by any agent or employee of the Department of the Navy or by property under the jurisdiction of the Department of the Navy. The limit on the Secretary's settlement authority is payment of $15,000,000. A claim

which is settled for an amount over $15,000,000 is certified to Congress for payment. Section 7622 provides that the Secretary may delegate his settlement authority in matters where the amount to be paid is not over $1,000,000. Under the Secretary's delegation, settlements not exceeding $500,000 may be effected by the Judge Advocate General. Under the Secretary's delegation, settlements not exceeding $250,000 may be effected by the Deputy Assistant Judge Advocate General (Admiralty and Maritime Law).

(b) *Settlement is final.* The legislation specifically authorizes the Secretary to settle, compromise, and pay claims. The settlement, upon acceptance of payment by the claimant, is final and conclusive for all purposes.

(c) *Settlement procedures.* Where the amount paid is over $500,000, after agreement is reached with counsel or claimants, the procedure is to prepare a settlement recommendation for the approval of the Secretary of the Navy. When settlement has been approved, the voucher required for effecting payment is prepared. The settlement check is then exchanged, in keeping with the commercial practice, for an executed release. In some situations, where the exchange of documents is impracticable, a claimant is requested to forward the executed release by mail, on the understanding that the release does not become effective until the check is received in payment. Claims settled under 10 U.S.C. 7622 are paid out of annual Department of Defense appropriations.

(d) *Limitation period.* The Secretary's settlement authorization is subject to a two-year limitation. This limitation is not extended by the filing of claim nor by negotiations or correspondence. A settlement agreement must be reached before the end of the two-year period. If settlement is not accomplished, then the claimant must file suit under the appropriate statute to avoid the limitation bar. The agreement reached in negotiations must receive the approval of the Secretary of the Navy or his designee, depending on the amount involved, prior to the expiration of the two-year period.

(e) *Matters in litigation.* When suit is filed, the matter comes within the cognizance of the Department of Justice, and the Secretary of the Navy is no longer able to entertain a claim or to make administrative settlement.

[39 FR 9962, Mar. 15, 1974, as amended at 55 FR 12173, Apr. 2, 1990; 65 FR 60861, 60862, Oct. 13, 2000; 69 FR 20542, Apr. 16, 2004; 72 FR 56268, Oct. 3, 2007]

### § 752.4 Affirmative claims.

(a) *Settlement authority.* The Navy has the same authority to settle affirmative admiralty claims as it does claims against the Navy. The statute conferring this authorization is codified in 10 U.S.C. 7623, and is the reciprocal of 10 U.S.C. 7622 referred to in § 752.3.

(b) *Scope.* 10 U.S.C. 7623 is a tort claims-settlement statute. It is not limited to affirmative claims arising out of collision, but embraces all instances of damage caused by a vessel or floating object to property of the United States under the jurisdiction of the Department of the Navy or for which the Department of the Navy has assumed an obligation to respond. Perhaps the most frequent instance is where a privately owned vessel damages a Navy pier or shore structure. To eliminate any issue of whether the damaging instrumentality was a vessel, the words ''or floating object'' were included.

(c) *Statute of limitation.* The United States is subject to a three-year statute of limitation when it asserts an affirmative claim for money damages grounded in tort. This limitation is subject to the usual exclusions, such as inability to prosecute due to war, unavailability of the ''res'' or defendant, and certain exemptions from legal process (28 U.S.C. 2415, 2416).

(d) *Litigation.* 10 U.S.C. 7623 does not apply to any claim where suit is filed. If the Admiralty and Maritime Law Division is unable to effect settlement, the matter is referred to the Department of Justice for the filing of a complaint against the offending party. Thereafter, as in the case of adverse litigated claims, the Navy has no further authority to effect settlement.

[39 FR 9962, Mar. 15, 1974, as amended at 55 FR 12174, Apr. 2, 1990; 65 FR 60861, Oct. 13, 2000; 69 FR 20542, Apr. 16, 2004; 72 FR 56268, Oct. 3, 2007]

### § 752.5 Salvage.

(a) *Scope*. This section relates to salvage claims against or by the Navy for compensation for towage and salvage services, including contract salvage, rendered to a vessel in the naval service or to other property under the jurisdiction of the Department of the Navy, or for salvage services rendered by the Department of the Navy. Suits for salvage may be maintained under the Public Vessels Act, and salvage claims are within the Secretary of the Navy's administrative-settlement authority under 10 U.S.C. 7622. Salvage claims against the Navy are reported to and processed by the Judge Advocate General (Admiralty and Maritime Law Division). Both claims and suits for salvage against the United States are subject to the two-year limitation of the Public Vessels Act and the Navy's settlement authority.

(b) *Affirmative claims*. Authorization for the settlement of affirmative salvage claims is contained in 10 U.S.C. 7365. Assertion of such claims is handled in the first instance by the Assistant Supervisor of Salvage (Admiralty), USN, Naval Sea Systems Command (SEA OOCL), 2531 Jefferson Davis Highway, NC/3 Room 11E54, Arlington, VA 22242–5160. Salvage claims are referred to the Admiralty Division only if the Assistant Supervisor of Salvage (Admiralty) is unsuccessful in making collection. Any money received in settlement of affirmative salvage claims is credited to appropriations for maintaining salvage facilities by the Navy, pursuant to 10 U.S.C. 7367.

[39 FR 9962, Mar. 15, 1974, as amended at 41 FR 26866, June 30, 1976; 55 FR 12174, Apr. 2, 1990; 65 FR 60861, 60862, Oct. 13, 2000; 69 FR 20542, Apr. 16, 2004]

## PART 755—CLAIMS FOR INJURIES TO PROPERTY UNDER ARTICLE 139 OF THE UNIFORM CODE OF MILITARY JUSTICE

Sec.

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AUTHORITY: 5 U.S.C. 301; 10 U.S.C. 939, 5013, and5148; E.O. 11476, as reported in 3 CFR, 1969 Comp., p. 132; 32 CFR 700.206 and 700.1202.

SOURCE: 56 FR 42232, Aug. 27, 1991, unless otherwise noted.

NOTE 1: This part 755 is chapter IV of the Manual of the Judge Advocate General of the Navy.

NOTE 2: The Uniform Code of Military Justice (10 U.S.C. 801-940) is referred to in this part 755 as the ''UCMJ''. The Manual for Courts-Martial, United States, 1984 (E.O. 12473 of August 1, 1984) is referred to in this part 755 as ''MCM 1984''.

### § 755.1 Statutory authority.

Article 139, UCMJ, redress of injuries to property, is the basis for this chapter.

### § 755.2 Scope.

This chapter provides for assessments against the pay of members of the naval service in satisfaction of claims for property damage caused under certain circumstances. Claims for damage, loss, or destruction of privately owned property caused by a person or persons in the naval service, are payable under Article 139, UCMJ, only if such damage, loss, or destruction is caused by riotous conduct, willful conduct, or acts showing such reckless or wanton disregard of the property rights of others that willful damage or destruction is implied. Acts of the type punishable under Article 109, UCMJ, are cognizable under Article 139, UCMJ. Charges against pay under these regulations shall be made only against the pay of persons shown to have been principal offenders or accessories.

### § 755.3 Claims not cognizable.

The following claims are not cognizable under this chapter.

(a) Claims resulting from simple negligence.

(b) Claims of subrogees.

(c) Claims for personal injury or death.

(d) Claims arising from acts or omissions within the scope of employment of the offender.

(e) Claims for reimbursement for damage, loss, or destruction of Government property.

### § 755.4 Limitation on claims.

(a) *Time limitations*. A claim must be submitted within 90 days of the incident giving rise to it.

(b) *Acts of property owner*. When the acts or omissions of the property owner, his lessee, or agent were a proximate contributing factor to the loss or damage of the property, assessments will not be made against members of the naval service in excess of the amount for which they are found to be directly responsible, *i.e.*, comparative responsibility for the loss will be the standard for determining financial responsibility.

(c) *Only direct damages considered*. Assessment will be made only for direct physical damages to the property. Indirect, remote, or inconsequential damage will not be considered.

### § 755.5 Complaint by the injured party and investigation.

(a) A claim shall contain a statement setting forth the amount of the claim, the facts and circumstances surrounding the claim and any other information that will assist in the investigation and resolution of the matter. When there is more than one complaint resulting from a single incident, each claimant must file a claim separately and individually. The claim shall be personally signed by the claimant or his duly authorized representative or agent.

(b) Where the claim alleges misconduct by members of the command, a commanding officer to whom the claim is submitted shall convene an investigation under this Manual to inquire into the matter. Where a complaint is received by a commanding officer to whose command the alleged offenders do not report, he shall forward the claim and other pertinent information about the matter to the member's commanding officer who will convene an investigation into the incident. Where the command of the alleged offenders cannot be determined, the claim and supporting materials shall be forwarded to the Chief of Naval Personnel or the Commandant of the Marine Corps, as appropriate, for action.

(c) The investigation shall inquire into the circumstances surrounding the claim, gather all relevant information about the matter (answering the who, what, where, when, why, and how questions) and make findings and opinions, as appropriate, about the validity of the claim under Article 139, UCMJ, and these regulations. The investigation shall determine the amount of damage suffered by the property owner.

(d) The investigation shall make recommendations about the amount to be assessed against the pay of the responsible parties. If more than one person is found responsible, recommendations shall be made about the assessments against all individuals.

### § 755.6 Action where offenders are members of one command.

(a) *Action by commanding officer*. The commanding officer shall ensure the alleged offenders are shown the investigative report and are advised they have 20 days within which to submit a statement or additional information on the incident. If the member declines to submit information, he shall so state in writing within the 20 day period. The commanding officer shall review the investigation and determine whether the claim is properly within the provisions of Article 139, UCMJ, and these regulations, and whether the facts indicate responsibility for the damage on members of the command. If the commanding officer finds the claim payable under these regulations, he shall fix the amount to be assessed against the offenders.

(b) *Review*. If the commanding officer has authority to convene a general court-martial, no further review of the investigation is required as to the redress of injuries to property. If the commanding officer does not have general court-martial convening authority, the investigation and the commanding officer's action thereon shall be forwarded to the officer exercising general court-martial jurisdiction (OEGCM) over the command for review and action on the claim. That officer's

action on the claim shall be communicated to the commanding officer who will take action consistent with the determination.

(c) *Charge against pay*. Where the amount does not exceed $5,000.00, the amount ordered by the commanding officer shall, as provided in the Navy Comptroller Manual, be charged against the pay of the offenders and the amounts so collected will be paid to the claimant. Where the amount exceeds $5,000.00, the claim, the investigation, and the commanding officer's recommendation shall be forwarded for review prior to checkage to Headquarters, U.S. Marine Corps (Code JAR) or the Judge Advocate General, as appropriate. The amount charged in any single month against the pay of offenders shall not exceed one-half of basic pay, as defined in paragraph 126h(2), Manual for Courts-Martial. The action of the commanding officer in ordering the assessment shall be conclusive on any disbursing officer for payment to the claimant of the damages assessed, approved, charged, and collected.

### § 755.7 Action where offenders are members of different commands.

(a) *Action by common superior*. The investigative report shall be forwarded to the common superior exercising general court-martial jurisdiction over the commands to which the alleged offenders are assigned. That officer shall ensure the alleged offenders are shown the investigative report and permitted to comment on it, should they desire, before action is taken on the claim. That officer shall review the investigation and determine whether the claim is properly within the provisions of Article 139, UCMJ, and these regulations, and whether the facts indicate responsibility for the damage on members of his command. If the claim is found payable under these regulations, he shall fix the amount to be assessed against the offenders and direct the appropriate commanding officers to take action accordingly.

(b) *Forwarding to SECNAV (JAG)*. Where it is not practical or possible to carry out the procedure in § 755.7(a) of this section, the investigation or investigations shall be forwarded to the Secretary of the Navy (Judge Advocate General) who will take action in the matter. Commanding officers, in such a situation, are not to make charges against the pay of their members until directed by the Secretary of the Navy (Judge Advocate General).

### § 755.8 Reconsideration and appeal.

(a) *Reconsideration*. The OEGCM may, upon a receipt of a request for reconsideration by either the claimant or a member who has been assessed pecuniary liability, reopen the investigation or take any other action he believes is necessary in the interests of justice. If the OEGCM contemplates acting favorably on the request, he will provide all individuals interested in the claim with notice and an opportunity to respond. The basis for any change will be noted in the OEGCM's decision.

(b) *Appeal*. In claims involving $5,000.00 or less, a claimant or member who has been assessed pecuniary liability may appeal the decision to the OEGCM. An appeal must be submitted within 5 days of the receipt of the OEGCM's decision. Appeals will be forwarded, via the OEGCM, to the Judge Advocate General for review and final action. In the event of an appeal, the imposition of the OEGCM's decision will be held in abeyance pending the final action by JAG. If it appears that good cause exists that would make it impracticable for an appeal to be submitted within 5 days, the OEGCM may, in his discretion, grant an extension of time, as appropriate. His decision on extensions is final and nonappealable.

### § 755.9 Effect of court-martial proceedings.

Administrative action under these regulations is separate and distinct from and is not affected by any disciplinary action against the offender. The two proceedings are independent. Acquittal or conviction of the alleged offender by court-martial is evidence for the administrative action, but is not determinative on the issue of responsibility for damages under these regulations.

# PART 756—PROCEDURES FOR PROCESSING CLAIMS INVOLVING NON-APPROPRIATED FUND ACTIVITIES AND THEIR EMPLOYEES

Sec.
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756.3 Notification.
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756.6 Negotiation.
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756.9 Claims by employees.

AUTHORITY: 5 U.S.C. 301, 10 U.S.C. 5013 and 5148.

SOURCE: 57 FR 4736, Feb. 7, 1992, unless otherwise noted.

## § 756.1 Scope.

This part explains how to settle claims for and against the United States for property damage, personal injury, or death arising out of the operation of non-appropriated fund activities (NAFI).[1]

[72 FR 53425, Sept. 19, 2007]

## § 756.2 Definitions.

(a) *Nonappropriated-fund instrumentality (NAFI).* An instrumentality of the Federal Government established to generate and administer non-appropriated-funds for programs and services contributing to the mental and physical well-being of Department of Defense personnel and their dependents. A NAFI is not incorporated under the laws of any State and enjoys the privileges and immunities of the Federal Government.

(b) *Nonappropriated-funds.* Funds generated through the use and patronage of NAFI's, not including funds appropriated by Congress.

(c) *Employees of NAFIs.* Personnel employed by NAFIs whose salaries are paid from non-appropriated funds.

[57 FR 4736, Feb. 7, 1992, as amended at 72 FR 53425, Sept. 19, 2007]

[1] DoD Directive 5515.6 establishes policy governing the administrative processing of claims arising out of the operation of non-appropriated fund activities.

## § 756.3 Notification.

(a) Some NAFI's, such as flying clubs, carry private commercial insurance to protect them from claims for property damage and personal injury attributable to their operations. The Commandant of the Marine Corps, the Chief of Naval Personnel, and the Commander, Naval Supply Systems Command determine whether NAFI's within their cognizance shall carry liability insurance or become self-insurers, in whole or in part.

(b) The Marine Corps requires mandatory participation in the Morale, Welfare and Recreation (MWR) Composite Insurance Program by the following operations: MWR operations and retail services, food and hospitality, recreation; and special NAFI activities including flying clubs, rod and gun clubs, Interservice Rifle Fund, Marine Corps Marathon and Dependent Cafeteria Fund. The following organizations may also participate in the MWR Composite Insurance Program, if desired: Child welfare centers, billeting funds, chapel funds, and civilian welfare funds.

(c) When the operations of NAFI's result in property damage or personal injury, the insurance carrier, if any, should be given immediate written notification. Notification should not be postponed until a claim is filed. When the activity is self-insured, the self-insurance fund shall be notified of the potential liability by the activity.

## § 756.4 Responsibility.

(a) All claims resulting from NAFIs should be submitted to the command having cognizance over the NAFI involved. The claim will then be forwarded to the Tort Claims Unit (TCU) Norfolk located at the following address: Department of the Navy, Office of the Judge Advocate General, Tort Claims Unit Norfolk, 9620 Maryland Avenue, Suite 100, Norfolk, VA 23511–2989.

(b) The TCU Norfolk has cognizance over all DoN claims. Normally, the TCU Norfolk has primary responsibility for the negotiation and settlement of NAFI claims. This is because NAFIs are Federal agencies within the meaning of the Federal Tort Claims Act (FTCA) if the NAFI is charged with an essential function of the DoN and if

the degree of control and supervision by the Navy is more than casual or perfunctory. Compare *United States* v. *Holcombe,* 277 F.2d 143 (4th Cir. 1960) and *Scott* v. *United States,* 226 F. Supp. 846, (D. Ga. 1963). Consequently, to the extent sovereign immunity is waived by the FTCA, 28 U.S.C. 1346(b), 2671–2672, 2674–2680, the United States remains ultimately liable for payment of NAFI claims.

[72 FR 53425, Sept. 19, 2007]

### § 756.5 Investigation.

Claims arising out of the operation of NAFIs, in and outside the United States, shall be investigated in accordance with the procedures for investigating similar claims against appropriated fund activities. The Manual of the Judge Advocate General (JAGMAN), Chapter II[2] provides guidance in conducting an investigation of an incident or event likely to result in claims or civil litigation against or for DoN or the United States.

[72 FR 53425, Sept. 19, 2007]

### § 756.6 Negotiation.

(a) *General.* Claims from NAFIs should be processed primarily through procedures, regulations, and statutes applicable to similar appropriated fund activity claims.

(b) *When the NAFI is insured.* When a NAFI is insured, the insurer or the contracted third-party claims administrator (TPA) will normally conduct negotiations with claimants. The TCU Norfolk shall monitor the negotiations conducted by the insurer or TPA. Monitoring is normally limited to ascertaining that someone has been assigned to negotiate, to obtain periodic status reports, and to close files on settled claims. Any dissatisfaction with the insurer's or TPA's handling of the negotiations should be referred directly to the Judge Advocate General (Claims and Tort Litigation) for appropriate action. If requested by the insurer or TPA, the TCU Norfolk may conduct negotiations. If TCU Norfolk negotiates a final settlement, however, request for payment will be forwarded to the insurer or TPA for payment. Concurrence by the insurer or TPA in the amount of the settlement is not necessary.

(c) *When the NAFI is not insured.* When there is no private commercial insurer and the NAFI has made no independent arrangements for negotiations, the TCU Norfolk is responsible for conducting negotiations. When an appropriate settlement is negotiated by the Navy, the recommended award will be forwarded to the NAFI for payment from non-appropriated funds.

[72 FR 53425, Sept. 19, 2007]

### § 756.7 Payment.

(a) *Claims that can be settled for less than 1,500.00.* A claim not covered by insurance (or not paid by the insurer), that can be settled for $1,500.00 or less, may be adjudicated by the TCU Norfolk or single-service authority and forwarded to the commanding officer of the activity concerned or designee for payment out of funds available to the commanding officer. The TCU Norfolk or single-service authority will obtain the required release from the claimant.

(b) *Claims that cannot be settled for less than $1,500.00.* A claim negotiated by the Navy, not covered by insurance, that is for more than $1,500.00 will be forwarded to the appropriate non-appropriated fund headquarters command for payment from its non-appropriated funds.

(c) *When payment is possible under another statute.* In some cases, neither the NAFI nor its insurer may be legally responsible. In those instances when there is no negligence, and payment is authorized under some other statute, such as the Foreign Claims Act, 10 U.S.C. 2734–2736, the claim may be considered for payment from appropriated funds or may be referred to the TCU Norfolk for appropriate action.

(d) *Other claims.* A NAFI's private insurance policy is usually not available to cover losses that result from some act or omission of a mere participant in a non-appropriated fund activity. In the event the NAFI declines to pay the

[2] JAGMAN Chapter II (JAG Instruction 5800.7E) is available at the Web site of the Navy Judge Advocate General's Corps at *http://www.jag.navy.mil.*

claim, the file shall be forwarded to the TCU Norfolk for determination.

[72 FR 53426, Sept. 19, 2007]

### § 756.8 Denial.

Claims resulting from non-appropriated fund activities may be denied only by the TCU Norfolk. The denial will begin the six-month limitation on filing suit against the United States for claims filed under the FTCA. Denial of a claim shall be in writing and in accordance with subparts A and B of part 750 of this chapter, as appropriate. The TCU Norfolk should not deny claims that have initially been processed and negotiated by a non-appropriated fund activity, its insurer, or TPA, until the activity or its insurer has clearly stated in writing that it does not intend to pay the claim and has elected to defend the claim in court.

[72 FR 53426, Sept. 19, 2007]

### § 756.9 Claims by employees.

(a) *Property*. Claims by employees of NAFIs for loss, damage, or destruction of personal property incident to their employment shall be processed and adjudicated in accordance with subparts A or B of part 751 of this chapter, as appropriate. The claims will then be forwarded to the appropriate NAFI for payment from non-appropriated funds.

(b) *Personal injury or death*—(1) *Personal injury or death of citizens or permanent residents of the United States employed anywhere, or foreign nationals employed within the United States*. Compensation is provided by the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 901–950) for employees of NAFIs who have suffered injury or death arising out of, and in the course of, their employment (5 U.S.C. 8171). That Act is the exclusive basis for Government liability for such injuries or deaths that are covered (5 U.S.C. 8173). A claim should first be made under that Act if there is a substantial possibility the injury or death is covered under the Act's provisions.

(2) *Personal injury or death of foreign nationals employed outside of the continental United States*. Employees who are not citizens or permanent residents, and who are employed outside the continental United States, may be protected by private insurance of the NAFI or by other arrangements. When a non-appropriated fund activity has elected not to obtain insurance coverage or to make other arrangements, compensation is separately provided by Federal statute, military regulations, and agreements with foreign countries. See 5 U.S.C. 8172, DoD 1401.1–M, Personnel Policy Manual for Non-appropriated Fund Instrumentalities and BUPERINST 5300.10A, NAF Personnel Manual.

[72 FR 53426, Sept. 19, 2007]

# PART 757—AFFIRMATIVE CLAIMS REGULATIONS

## Subpart A—Property Damage Claims

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757.3 Regulatory authority.
757.4 Claims that may be collected.
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AUTHORITY: 5 U.S.C. 301; 10 U.S.C. 939, 5013, and 5148; E.O. 11476, 3 CFR, 1969 Comp., p. 132; 32 CFR 700.206 and 700.1202.

SOURCE: 57 FR 5072, Feb. 12, 1992, unless otherwise noted.

## Subpart A—Property Damage Claims

### § 757.1 Scope of subpart A.

Subpart A describes how to assert, administer, and collect claims for damage to or loss or destruction of Government property through negligence or wrongful acts.

### § 757.2 Statutory authority.

(a) *General*. All affirmative claims for damage to or loss of Government property in favor of the United States are processed in accordance with the Federal Collections Claims Act (31 U.S.C. 3711), as amended by the Debt Collection Act of 1982, PL 97–365, 96 Stat. 1749 (25 October 1982), PL 101–552, 104 Stat. 2736 (15 November 1990) and the Debt Collection Improvement Act of 1996, PL 104–134, 110 Stat. 1321, 1358 (26 April 1996). Department of Defense Directive designees, the authority granted to the Secretary of Defense under the Federal Claims Collection Act.

(b) *Statute of limitations*. Subject to specific provisions in other statutes, there is a general 3-year statute of limitations on affirmative Government tort claims pursuant to 28 U.S.C. 2415(b).

[72 FR 53427, Sept. 19, 2007]

### § 757.3 Regulatory authority.

The regulations published in 31 CFR Chapter IX control the collection and settlement of affirmative claims. This section supplements the material contained in those regulations. Where this section conflicts with the materials and procedure published in 31 CFR Chapter IX, the latter controls.

[57 FR 5072, Feb. 12, 1992, as amended at 72 FR 53427, Sept. 19, 2007]

### § 757.4 Claims that may be collected.

(a) *Against responsible third parties for damage to Government property, or the property of non-appropriated fund activities*. It should be noted, however, that as a general rule, the Government does not seek payment from service members and Government employees for damages caused by their simple negligence while acting within the scope of their employment. Exceptions to this general policy will be made when the incident involves aggravating circumstances.

(b) *For money paid or reimbursed by the government for damage to a rental car in accordance with the Joint Federal Travel regulations (volume 1, paragraph U 3415–C and volume 2, paragraph C 2101–2)*. Collection action shall be taken against third parties liable in tort. Collection action shall not be taken against Government personnel who rented the vehicle.

(c) *Other claims*. Any other claim for money or property in favor of the United States cognizable under the Federal Claims Collections Act not specifically listed above.

[72 FR 53427, Sept. 19, 2007]

### § 757.5 Assertion of claims and collection procedures.

(a) *General*. The controlling procedures for administrative collection of claims are established in 31 CFR part 901.

(b) *Officials authorized to pursue claims*. The Judge Advocate General; the Deputy Judge Advocate General; any Assistant Judge Advocate General; the Deputy Assistant Judge Advocate General (Claims and Tort Litigation) are authorized to pursue and collect all affirmative claims in favor of the United States, except in countries where another service has single service responsibility in accordance with DoD Directive 5515.8.

(c) *Dollar limitations*. All of the officers listed in § 757.5(b) are authorized to compromise and terminate collection action on affirmative claims of $100,000.00 or less.

(d) *Determining liability*. Liability must be determined in accordance with the law of the place in which the damage occurred, including the applicable traffic laws, elements of tort, and possible defenses.

(e) *Assertion of a claim*. (1) Assertion of the claim is accomplished by mailing to the tortfeasor a ''Notice of Claim.'' The notice is to be mailed certified mail, return receipt requested, and should include the following information:

(i) Reference to the statutory right to collect;

(ii) A demand for payment or restoration;

(iii) A description of damage and estimate of repair;

(iv) A description of the incident, including date and place; and

(v) The name, phone number, and office address of the claims personnel to contact.

(2) See also 31 CFR part 901.

(f) *Full payment*. When a responsible party or insurer tenders full payment

or a compromise settlement on a claim, the payment should be in the form of a check or money order made payable to ''United States Treasury.'' The check or money order shall then be forwarded to the disbursing officer serving the collecting activity for deposit in accordance with the provisions of the Navy Comptroller Manual. For collections for damages to real property, the collection is credited to the account available for the repair or replacement of the real property at the time of recovery. (10 U.S.C. 2782.) For damages to personal property, the money is returned to the general treasury.

(g) *Installment payments.* See 31 CFR 901.8 for specific procedures. In general, if the debtor is financially unable to pay the debt in one lump sum, an installment payment plan may be arranged. Installment payments will be required on a monthly basis and the size of payment must bear a reasonable relation to the size of the debt and the debtor's ability to pay. The installment agreements should specify payments of such size and frequency to liquidate the Government's claim in not more than 3 years. Installment payments of less than $50.00 per month should be accepted only if justified on the grounds of financial hardship or for some other reasonable cause. In all installment arrangements, a confession of judgment note setting out a repayment schedule should be executed.

(h) *Damage to nonappropriated-fund instrumentality (NAFI) property.* Any amount collected for loss or damage to property of a NAFI shall be forwarded to the headquarters of the nonappropriated-fund activity for deposit with that activity. In those situations where the recovery involves damage to both NAFI-owned property and other Government property, e.g., destruction of an exchange building resulting in damage to both the building and the exchange-owned property inside, recovery for the exchange-owned property shall be forwarded to the NAFI. Recovery for building damage shall be deposited in accordance with § 757.5(f) above.

(i) *Damage to industrial-commercial property.* When a loss or cost of repair has been borne by an industrial-commercial activity, payment shall be deposited in the Navy Industrial Fund of the activity in accordance with the provisions of the Navy Comptroller Manual. When a claim is based on a loss or damage sustained by such an activity, a notation to this effect shall be included in any claim file forwarded to the Judge Advocate General.

(j) *Replacement in kind or repair.* The responsible party, or insurer, may want to repair or replace in kind damaged property. The commanding officer or officer in charge of the activity sustaining the loss is authorized to accept repair or replacement if, in his discretion, it is considered to be in the best interests of the United States.

(k) *Release.* The Supervisory Attorney, Tort Claims Unit, Norfolk is authorized to execute a release of the claim when all repairs have been completed to the Government's satisfaction, and when all repair bills have been paid. No prior approval from the Judge Advocate General is required for this procedure. If repair or replacement is made, a notation shall be made in any investigation or claims file.

[57 FR 5072, Feb. 12, 1992, as amended at 72 FR 53427, Sept. 19, 2007]

### § 757.6 Waiver, compromise, and referral of claims.

(a) *Officials authorized to compromise claims.* The officers identified in § 757.5(b) may collect the full amount on all claims, and may compromise, execute releases or terminate collection action on all claims of $20,000.00 or less. Collection action may be terminated for the convenience of the Government if the tortfeasor cannot be located, is found to be judgment-proof, has denied liability, or has refused to respond to repeated correspondence concerning legal liability involving a small claim. A termination for the convenience of the Government is made after it is determined that the case does not warrant litigation or that it is not cost-effective to pursue recovery efforts.

(b) *Claims over $100,000.00.* Claims in excess of $100,000.00 may not be compromised for less than the full amount or collection action terminated without approval from the Department of Justice (DOJ).

(c) *Notification*. The Judge Advocate General shall be notified prior to all requests made to the DOJ to compromise, terminate collection, or referral for further collection action or litigation.

(d) *Litigation reports*. Litigation reports prepared in accordance with 31 CFR part 904 shall be forwarded through the Judge Advocate General (Claims and Tort Litigation) to the Department of Justice along with any case file for further collection action or litigation as required by the Federal Claims Collections Standards.

[57 FR 5072, Feb. 12, 1992, as amended at 72 FR 53428, Sept. 19, 2007]

**§§ 757.7–757.10 [Reserved]**

## Subpart B—Medical Care Recovery Act (MCRA) Claims and Claims Asserted Pursuant to 10 U.S.C. 1095

### § 757.11 Scope of Subpart B.

Subpart B describes the assertion and collection of claims for medical care under the MCRA and 10 U.S.C. 1095. The MCRA states that when the Federal government provides treatment or pays for treatment of an individual who is injured or suffers a disease, the Government is authorized to recover the reasonable value of that treatment from any third party who is legally liable for the injury or disease. Title 10 U.S.C. 1095 provides for the collection from third-party payers for the value of health care services incurred by the Government on behalf of covered beneficiaries.

[72 FR 53428, Sept. 19, 2007]

### § 757.12 Statutory authorities.

(a) *Medical Care Recovery Act*, 42 U.S.C. 2651–2653 (2005).

(b) *Title 10 U.S.C. 1095* (Health Care Services Incurred on Behalf of Covered Beneficiaries: Collection from Third-Party Payers).

(c) *Title 10 U.S.C. 1079a* (CHAMPUS: Treatment of Refunds and Other Amounts Collected).

[72 FR 53428, Sept. 19, 2007]

### § 757.13 Responsibility for MCRA actions.

(a) *JAG designees*. (1) Primary responsibility for investigating, asserting, and collecting Department of the Navy (DON) MCRA claims and properly forwarding MCRA claims to other Federal departments or agencies rests with the following personnel:

(i) Deputy Assistant Judge Advocate General (Claims and Tort Litigation Division) (Code 15); and the

(ii) Commanding Officer, Naval Legal Service Command Europe and Southwest Asia (NLSC EURSWA), Naples, Italy, in its area of geographic responsibility.

(2) JAG designee may assert and receive full payment on any MCRA claim. Code 15 may agree to compromise or waive claims for $100,000 or less. NLSC EURSWA may agree to compromise or waive claims for $40,000.00 or less. NLSC EURSWA claims in excess of $40,000.00 may be compromised or waived only with Code 15 approval. See Sec. 757.19 for further discussion of waiver and compromise.

(b) *Navy Medical Treatment Facility (MTF)*. (1) Naval MTFs are responsible for ensuring potential MCRA/10 U.S.C. 1095 claims are brought to the attention of the appropriate JAG designee.

(2) The MTF reports all potential MCRA/10 U.S.C. 1095 cases by forwarding a copy of the daily injury log entries and admission records to the cognizant JAG designee within 7 days of treatment for which a third party may be liable. The JAG designee makes the determination of liability. Recovery for the costs of MTF care is based on Diagnostic Related Group rates or a Relative Value Unit. Rates are established by the Office of Management and Budget and/or the DoD, and published annually in the FEDERAL REGISTER.

(c) *TRICARE Fiscal Intermediary*. The TRICARE fiscal intermediary is required to identify and promptly mail claims involving certain diagnostic codes to the cognizant JAG designee. Claims are asserted for the actual amount that TRICARE paid.

(d) *Department of Justice (DoJ)*. Only the DoJ may authorize compromise or waiver of an MCRA/10 U.S.C. 1095 claim in excess of $100,000.00 or settle an MCRA/10 U.S.C. 1095 claim in which the

third party has filed a suit against the United States as a result of the incident which caused the injury and upon which the claim is based.

[72 FR 53428, Sept. 19, 2007]

### § 757.14 Claims asserted.

(a) *General*. The DoN asserts MCRA and 10 U.S.C. 1095 claims when medical care is furnished to Navy and Marine Corps active duty personnel, retirees, or their dependents, or any other person when appropriate, and third-party tort or contract liability exists for payment of medical expenses resulting from an injury or disease. Claims are asserted when the injured party is treated in a MTF or when the DoN is responsible for reimbursing a non-Federal care provider.

(b) *Independent cause of action*. The MCRA creates an independent cause of action for the United States. The Government can administratively assert and litigate MCRA claims in its own name and for its own benefit. Procedural defenses, such as a failure of the injured person to properly file and/or serve a complaint on the third party, that may prevent the injured person from recovering, do not prevent the United States from pursuing its own action to recover the value of medical treatment provided to the injured person. The right arises directly from the statute; the statutory reference to subrogation pertain only to one mode of enforcement. In creating an independent right in the Government, the Act prevents a release given by the injured person to a third party from affecting the Government's claim.

(c) *Liable parties*. MCRA and 10 U.S.C 1095 claims may be asserted against individuals, corporations, associations and non-Federal Government agencies subject to the limitation described in § 757.15.

(d) *Reasonable value of medical care*. The reasonable value of medical care provided to an injured person is determined:

(1) By using the rate set as described in § 757.13 (b)(2) in bills issued by the MTF; or

(2) By the actual amount paid by the Federal Government to non-Federal medical care providers.

(e) *Alternate theories of recovery*. (1) Often, recovery under the MCRA is not possible because no third-party tort liability exists. For example, if a member, retiree, or dependent is driving a vehicle and is injured in single-car accident, there is no tortfeasor. Title 10 U.S.C. 1095 provides the Government alternate means for recovery as a third-party beneficiary of an insurance contract of the injured party.

(2) Recovery may also be possible under State workers' compensation laws. Case law in this area is still emerging, but in most jurisdictions, the United States stands in the position of a lien claimant for services rendered.

[57 FR 5072, Feb. 12, 1992, as amended at 72 FR 53428, Sept. 19, 2007]

### § 757.15 Claims not asserted.

In some cases, public policy considerations limit the DoN's assertion of claims against apparent third-party tortfeasors or a contract where the Government would be a third party beneficiary. Claims are not asserted against:

(a) *Federal Government agencies*. Claims are not asserted against any department, agency or instrumentality of the United States. ''Agency or instrumentality'' includes self-insured, non-appropriated-fund activities but does not include private associations.

(b) *Injured service members, dependents, and employees of the United States*. Claims are not asserted directly against a servicemember, the dependent of a servicemember, or an employee of the United States who is injured as a result of his own willful or negligent acts. The United States does assert, however, against policies that cover the injury.

(c) *Employers of merchant seamen*. Claims are not asserted against the employer of a merchant seaman who receives Federal medical care under 42 U.S.C. 249.

(d) *Department of Veterans' Affairs care for service-connected disability*. Claims are not asserted for care provided to a veteran by the Department of Veterans' Affairs when the care is for a service-connected disability. The United States will, however, claim for the reasonable value of care provided

an individual before he is transferred to a Department of Veterans' Affairs hospital. This policy does not apply in cases where the MTF referred the patient to the Veterans' Affairs hospital and then paid for the care.

[57 FR 5072, Feb. 12, 1992, as amended at 72 FR 53428, Sept. 19, 2007]

### § 757.16 Claims asserted only with OJAG approval.

(a) *Certain Government contractors.* JAG approval is required before asserting a claim against a Federal government contractor when the contract provides that the contractor will be indemnified or held harmless by the Federal government for tort liability.

(b) *U.S. personnel.* JAG approval is required before asserting MCRA claims directly against servicemembers, their dependents and federal employees and their dependents for injury to another person. No approval is necessary to assert claims against their insurance policies, however, except for injuries caused by servicemembers and federal employees acting ''within the scope of their employment.'' Intra-familial tort immunity would not preclude the Government from asserting any claims for care furnished to a tortfeasor's family members.

[72 FR 53429, Sept. 19, 2007]

### § 757.17 Statute of limitations.

(a) *Federal.* Claims asserted under the MCRA or against an automobile liability insurer through 10 U.S.C. 1095 are founded in tort and must be brought within 3 years after the action ''first accrues'' (28 U.S.C. 2415b). Normally, a medical care claim ''first accrues'' on the initial date of treatment.

(b) *Claims asserted under 10 U.S.C. 1095.* Although legal arguments can be made that claims asserted under 10 U.S.C. 1095 against a no-fault or personal injury protection insurer are founded in contract and can be brought within 6 years (28 U.S.C. 2415a), all claims should be asserted within 3 years of the date when the claim accrued. However, some states require notice of such claims to be filed within a shorter period of time.

[72 FR 53429, Sept. 19, 2007]

### § 757.18 Asserting the claim.

(a) *Initial action by the JAG designee.* When advised of a potential claim, the JAG designee will determine the Federal agency or department responsible for investigating and asserting the claim.

(1) When DoN has reimbursed a non-Federal provider for health care, or when TRICARE has made payment for a Navy health care beneficiary, the JAG designee will assert any resulting claim.

(2) When care is provided in a Federal treatment facility, the status of the injured person will determine the agency that will assert a resulting claim. Cost of treatment provided or paid for by an MTF is deposited in that MTF's account, regardless of which service is making the collection.

(i) Where DoN members, retirees, or their dependents receive medical treatment from another Federal agency or department, the DoN will assert any claim on behalf of the United States based on information provided by the treating agency or department.

(ii) Similarly, where a DoN MTF provides care to personnel of another Federal agency or department, that other agency or department will assert any claim on behalf of the United States.

(3) If the claim is one which the DoN should assert, the JAG designee will forward all available information to the appropriate department or agency.

(4) If the claim is one which the DoN should assert, the JAG designee will ensure an appropriate investigation into the circumstances underlying the claim is initiated and will provide notice to the injured party and all third parties who may be liable to the injured person and the United States under the MCRA or 10 U.S.C. 1095.

(b) *Investigating the claim.* While there is no prescribed form or content for investigating these claims, the claims file will contain sufficient information on which to base valuation, assertion, settlement, waiver, and/or compromise decisions.

(c) *Notice of claim.* (1) The JAG designee will assert claims by mailing a notice of claim to identified third-party tortfeasors and their insurers or insurers for third-party beneficiary coverage. Many insured tortfeasors fail

to notify their insurance companies of incidents. This failure may be a breach of the cooperation clause in the policy and may be grounds for the insurer to refuse to defend the insured or be responsible for any liability. The United States, as a claimant, may preclude such an invocation by giving the requisite notification itself. The purpose of the insurance clause is satisfied if the insurer receives actual notice of the incident, regardless of the informant. This notice should be mailed as soon as it appears an identified third party may be liable for the injuries. The prompt assertion of the claim will ensure that the government is named on the settlement draft. If the United States is not so named, and the claim has been asserted, the insurer settles at its own risk.

(2) The JAG designee will also notify the injured person or his legal representative of the Government's interest in the value of the medical care provided by the United States. This notice will advise that:

(i) The United States may be entitled to recover the reasonable value of medical care furnished or paid by the Federal government;

(ii) The injured person is required to cooperate in the efforts of the United States to recover the reasonable value of medical care furnished or paid for by the Federal government;

(d) *Administering the claim.* (1) After investigating and asserting the claim, the JAG designee will maintain contact with all parties, their legal representatives, and insurers.

(2) An effort should be made to coordinate collection of the Federal government's interest with the injured person's action to collect on a claim for damages.

(i) Attorneys representing an injured person may be authorized to include the Federal government's claim as an item of special damages with the injured person's claim or suit.

(ii) An agreement that the Government's claim will be made a party of the injured person's action should be in writing and state the counsel fees will not be paid by the Government or computed on the basis of the Government's portion of recovery.

(3) If the injured person is not bringing an action for damages or is refusing to include the Federal Government's interest, the JAG designee will pursue independent collection. The United States is specifically allowed to intervene or join in any action at law brought by or through the injured person against the liable third person or brings an original suit in its own name or in the name of the injured person. The JAG designee will ensure all parties are aware that the United States must be a party to all subsequent collection negotiation.

(4) When the Government's interests are not being represented by the injured person or his/her attorney, and independent collection efforts have failed, the JAG designee will refer the claims to the DoJ for possible suit.

(e) *Access to DoN records and information.* (1) Copies of medical records in cases that have potential claims will be sent by the MTFs to the cognizant JAG designee. It is considered a routine use of the records for the JAG designee to release them to an insurance company, if requested, in order to substantiate the claim. However, only the MTF as ''keepers of the records'' has the authority to make official releases of medical records to anyone else. Records will be protected in accordance with the provisions of the Privacy Act, 5 U.S.C. 552a, and confidentiality of quality assurance medical records, 10 U.S.C. 1102. Non-routine release requires the authorization from the injured individual or legal representative or an order from a court of competent jurisdiction. A clerk or attorney signed subpoena is not ''an order from a court of competent jurisdiction.'' Subpoenas are processed in accordance with 32 CFR part 725.

(2) Requests for testimony of any Navy employees will be processed in accordance with DoD Directive 5405.2, 32 CFR part 725, and SECNAVINST 5820.8A. If the injured person, or his or her attorney has signed an agreement to protect the Government's interest and is requesting the testimony of a locally available physician who treated the injured person, however, this request falls within an exception to the regulations. See 32 CFR 725.5(g)(3). In this situation, the injured person or

the attorney need only ask the JAG designee for assistance in scheduling the testimony of the treating physician and the JAG designee will coordinate with the physician's command to determine availability. Such testimony is limited to factual issues. The definition of factual issues is slightly different under the regulations than it is in civil litigation. Opinions that are formed prior to, or contemporaneously with, the treatment at issue and are routinely required in the course of the proper performance of professional duties constitute essentially factual matters. For example, the physician will have opined at the time of treatment if further treatment will be necessary. The physician may testify to that as factual, not opinion, testimony. Opinions that are formed after treatment and are not required for continuing treatment, especially those that respond to hypothetical questions, are not factual and are considered to be expert testimony. This expert testimony, regardless of who requests it, will be processed in accordance with 32 CFR part 725, and must be forwarded to OJAG Code 14, General Litigation Division. Requests for expert testimony are rarely granted.

[72 FR 53429, Sept. 19, 2007]

### § 757.19 Waiver and compromise.

(a) *General*. OJAG Code 15 (Claims and Tort Litigation) may authorize waiver or compromise of any claim that does not exceed $100,000.00. NLSO EURSWA may agree to compromise or waive claims for $40,000.00 or less. NLSO EURSWA claims in excess of $40,000.00 may be compromised or waived only with Code 15 approval.

(b) *Waiver and compromise*. The JAG designee may waive the Federal government's MCRA interest when a responsible third-party tortfeasor cannot be located, is judgment proof, or has refused to pay and litigation is not feasible. Waiver or compromise is also appropriate when, upon written request by the injured person or legal representative, it is determined that collection of the full amount of the claim would result in undue hardship to the injured person. In assessing undue hardship, the following should be considered:

(1) Permanent disability or disfigurement;

(2) Lost earning capacity;

(3) Out-of-pocket expenses;

(4) Financial status;

(5) Disability, pension and similar benefits available;

(6) Amount of settlement or award from third-party tortfeasor or contract insurer; and

(7) Any other factors which objectively indicate fairness requires waiver.

[57 FR 5072, Feb. 12, 1992, as amended at 72 FR 53430, Sept. 19, 2007]

### § 757.20 Receipt and release.

The JAG designee will execute and deliver appropriate releases to third parties who have made full or agreed upon compromised payments. A copy of the release will be kept in the claims file.

[72 FR 53430, Sept. 19, 2007]

# SUBCHAPTER F—ISLANDS UNDER NAVY JURISDICTION

## PART 761—NAVAL DEFENSIVE SEA AREAS; NAVAL AIRSPACE RESERVATIONS, AREAS UNDER NAVY ADMINISTRATION, AND THE TRUST TERRITORY OF THE PACIFIC ISLANDS

### Subpart A—Introduction

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### Subpart D—Additional Instructions

761.20 Additional regulations governing persons and vessels in Naval Defensive Sea Areas.

AUTHORITY: 5 U.S.C. 301, 10 U.S.C. 5031, 6011, 18 U.S.C. 2152. The text of part 761 contains additional references, including Executive Orders.

SOURCE: 28 FR 13778, Dec. 18, 1963, unless otherwise noted.

## Subpart A—Introduction

### § 761.1 Scope.

(a) This part provides regulations governing the entry of persons, ships, and aircraft into:

(1) Naval Defensive Sea Areas and Naval Airspace Reservations established by Executive order of the President (see § 761.3(a)).

(2) Areas placed under the Secretary of the Navy for administrative purposes by Executive order of the President (see § 761.3(b)).

(3) The Trust Territory of the Pacific Islands (see § 761.3(c)).

(b) The entry authorizations issued under the authority of this part do not supersede or eliminate the need for visas or other clearances or permits required by other law or regulation.

[28 FR 13778, Dec. 18, 1963, as amended at 35 FR 10008, June 18, 1970]

### § 761.2 Background and general policy.

(a) Certain areas, due to their strategic nature or for purposes of defense, have been subjected to restrictions regarding the free entry of persons, ships, and aircraft. Free entry into the areas listed and defined in this part, and military installations contiguous to or within the boundaries of defense areas, is subject to control as provided for by Executive order or other regulation. The object of controls over entry into naval defensive sea areas, naval airspace reservations, administrative areas, and the Trust Territory of the Pacific Islands, is to provide for the protection of military installations as well as other facilities, including the personnel, property, and equipment assigned to or located therein. Persons, ships, and aircraft are excluded unless and until they qualify for admission under the applicable Executive order or regulation.

(b) The control of entry into or movement within defense areas by persons, ships, or aircraft will be exercised so as to fully protect the physical security of, and insure the full effectiveness of, bases, stations, facilities and other installations within or contiguous to defense areas. However, unnecessary interference with the free movement of persons, ships, and aircraft is to be avoided.

(c) This part will be administered so as to provide for the prompt processing of all applications and to insure uniformity of interpretation and application, insofar as changing conditions permit.

(d) In cases of doubt, the determination will be made in favor of the course of action which will best serve the interests of the United States and national defense as distinguished from the private interests of an individual or group.

[28 FR 13778, Dec. 18, 1963, as amended at 35 FR 10008, June 18, 1970]

### §761.3 Authority.

(a) *Naval Defensive Sea Areas and Naval Airspace Reservations*. By Executive orders, as amended, the President has reserved, set aside, and established the following Naval Defensive Sea Areas and Naval Airspace Reservations under the control of the Secretary of the Navy. Incorporated therein are provisions for the exercise of control by the Secretary over the entry of persons, ships, and aircraft into the areas so described. (See §761.4(b) for delineation of areas where entry controls are suspended.)

(1) *Atlantic areas*. Guantanamo Bay Naval Defensive Sea Area; Guantanamo Bay Naval Airspace Reservation: Executive Order 8749 of May 1, 1941 (6 FR 2252; 3 CFR, 1943 Cum. Supp., p. 931).

(2) *Pacific areas*. (i) Honolulu Defensive Sea Area: Executive Order 8987 of December 20, 1941 (6 FR 6675; 3 CFR, 1943 Cum. Supp., p. 1048).

(ii) Kaneohe Bay Naval Defensive Sea Area; Kaneohe Bay Naval Airspace Reservation: Executive Order 8681 of February 14, 1941 (6 FR 1014; 3 CFR, 1943 Cum. Supp., p. 893).

(iii) Pearl Harbor Defensive Sea Area: Executive Order 8143 of May 26, 1939 (4 FR 2179; 3 CFR, 1943 Cum. Supp., p. 504).

(iv) Johnston Island Naval Defensive Sea Area; Johnston Island Naval Airspace Reservation: Executive Order 8682 of February 14, 1941 (6 FR 1015; 3 CFR, 1943 Cum. Supp., p. 894) as amended by Executive Order 8729 of April 2, 1941 (6 FR 1791; 3 CFR, 1943 Cum. Supp., p. 919) and Executive Order 9881 of August 4, 1947 (12 FR 5325; 3 CFR, 1943–1948 Comp., p. 662).

(v) Kingman Reef Naval Defensive Sea Area; Kingman Reef Naval Airspace Reservation: Executive Order 8682 of February 14, 1941 (6 FR 1015; 3 CFR, 1943 Cum. Supp., p. 894) as amended by Executive Order 8729 of April 2, 1941 (6 FR 1791; 3 CFR, 1943 Cum. Supp., p. 919) and Executive Order 9881 of August 4, 1947 (12 FR 5325; 3 CFR, 1943–1948 Comp., p. 662).

(vi) Midway Island Naval Defensive Sea Area; Midway Island Naval Airspace Reservation: Executive Order 8682 of February 14, 1941 (6 FR 1015; 3 CFR, 1943 Cum. Supp., p. 894) as amended by Executive Order 8729 of April 2, 1941 (6 FR 1791; 3 CFR, 1943 Cum. Supp., p. 919) and Executive Order 9881 of August 4, 1947 (12 FR 5325; 3 CFR, 1943–1948 Comp., p. 662).

(vii) Wake Island Naval Defensive Sea Area; Wake Island Naval Airspace Reservation: Executive Order 8682 of February 14, 1941 (6 FR 1015; 3 CFR, 1943 Cum. Supp., p. 894) as amended by Executive Order 8729 of April 2, 1941 (6 FR 1791; 3 CFR, 1943 Cum. Supp., p. 919) and Executive Order 9881 of August 4, 1917 (12 FR 5325; 3 CFR, 1943–1948 Comp., p. 662).

(viii) Kiska Island Naval Defensive Sea Area; Kiska Island Naval Airspace Reservation: Executive Order 8680 of February 14, 1941 (6 FR 1014; 3 CFR 1943 Cum. Supp., p. 892) as amended by Executive Order 8729 of April 2, 1941 (6 FR 1791; 3 CFR, 1943 Cum. Supp., p. 919).

(ix) Kodiak Naval Defensive Sea Area: Executive Order 8717 of March 22, 1941 (6 FR 1621; 3 CFR, 1943 Cum. Supp., p. 915). Kodiak Naval Airspace Reservation: Executive Order 8597 of November 18, 1940 (5 FR 4559; 3 CFR, 1943 Cum. Supp., p. 837) as amended by Executive Order 9720 of May 8, 1946 (11 FR 5105; 3 CFR, 1943–1948 Comp., p. 527).

(x) Unalaska Island Naval Defensive Sea Area, Unalaska Island Naval Airspace Reservation: Executive Order 8680 of February 14, 1941 (6 FR 1014; 3 CFR, 1943 Cum. Supp., p. 892) as amended by Executive Order 8729 of April 2, 1941 (6 FR 1791; 3 CFR, 1943 Cum. Supp., p. 919). See §761.4(d) for delineation of areas where entry controls are suspended.

(b) *Administrative areas*. By Executive orders, as amended, the President has reserved, set aside, and placed under the control and jurisdiction of the Secretary of the Navy for administrative purposes the following named areas including their appurtenant reefs and territorial waters:

(1) Johnston Island—Executive Order 6935 of December 29, 1934 as amended by Executive Order 11048 of September 4, 1962 (27 FR 8851; 3 CFR, 1962 Supp., p. 241).

(2) Kingman Reef—Executive Order 6935 of December 29, 1934 as amended by Executive Order 11048 of September 4, 1962 (27 FR 8851; 3 CFR, 1962 Supp., p. 241).

(3) Midway Island—Executive Order 11048 of September 4, 1962 (27 FR 8851; 3 CFR, 1962 Supp., p. 241).

(4) Sand Island—Executive Order 6935 of December 29, 1934 as amended by Executive Order 11048 of September 4, 1962 (27 FR 8851; 3 CFR, 1962 Supp., p. 241).

(c) *Trust Territory of the Pacific Islands.* The Trust Territory of the Pacific Islands is a strategic area administered by the United States under the provisions of a trusteeship agreement with the United Nations. Under Executive Order 11021 of May 7, 1962 (27 FR 4409; 3 CFR, 1959–1963 Comp., p. 600), the Secretary of the Interior is charged with responsibility for administration of the civil government of the Trust Territory of the Pacific Islands. Under July 1, 1963 amendment two agreements effective July 1, 1951 and July 1, 1962 between the Department of the Navy and the Department of the Interior concerning responsibility for administration of the Government of the Trust Territory, the entry of individuals, ships and aircraft into the Trust Territory (other than areas under the control of the Department of the Army (Kwajalein Atoll) and of the Defense Nuclear Agency (Eniwetok Atoll) see § 761.4) is controlled by the High Commissioner of the Trust Territory and the Department of the Navy as follows:

(1) Entry of U.S. citizens and nationals and citizens of the Trust Territory, into areas of the Trust Territory other than those areas under control of the Department of the Army and the Defense Nuclear Agency as outlined above, shall be controlled by the High Commissioner.

(2) All other persons: Applications for entry into the Trust Territory except for those areas under control of the Department of the Army or of the Defense Nuclear Agency, of all persons who are not U.S. citizens, U.S. nationals, or who are not citizens of the Trust Territory, shall be made to the High Commissioner for processing in accordance with the laws and regulations of the Trust Territory: *Provided*, That prior to the issuance of an authorization to enter the Trust Territory, the High Commissioner shall provide the Department of the Navy in all cases (with the exception of alien individuals who possess a valid U.S. visa and seek admission to the Trust Territory for a period of 30 days or less for the purpose of tourism) information on the applicants for its consideration and comment, granting thereby the Department of the Navy the right to object to the issuance of an authorization.

(3) Ships and aircraft: (i) The entry of ships and aircraft, other than U.S. public ships and aircraft, documented under either the laws of the United States or the laws of the Trust Territory into areas of the Trust Territory, excepting those areas where entry is controlled by the Department of the Army (Kwajalein Atoll) and the Defense Nuclear Agency (Eniwetok Atoll), shall be controlled solely by the High Commissioner.

(ii) Applications for entry into the Trust Territory, except for those areas under military control, of ships and aircraft not documented under the laws of the United States or the laws of the Trust Territory, shall be made to the High Commissioner for processing in accordance with the laws and regulations of the Trust Territory: *Provided*, That prior to the issuance of an authorization to enter the Trust Territory, the High Commissioner shall provide the Department of the Navy in all cases with information on the applicants for its consideration and comment, granting thereby the right of the Department of the Navy to object to the issuance of an authorization.

(d) [Reserved]

(e) *Exercise of authority.* The authority of the Secretary of the Navy to control entry of ships, planes, and persons into the areas listed is exercised through the Chief of Naval Operations and certain of his subordinates as prescribed in this part.

(f) *Penalties.* Penalties are provided by law: (1) For violations of orders or regulations governing persons or ships within the limits of defensive sea areas

(62 Stat. 799; 18 U.S.C. 2152); (2) for entering military, naval or Coast Guard property for prohibited purposes or after removal or exclusion therefrom by proper authority (62 Stat. 765; 18 U.S.C. 1382); (3) for violation of regulations imposed for the protection or security of military or naval aircraft, airports, air facilities, vessels, harbors, ports, piers, waterfront facilities, bases, forts, posts, laboratories, stations, vehicles, equipment, explosives, or other property or places subject to the jurisdiction, administration, or in the custody of the Department of Defense, any department or agency of which said department or agency consists, or any officer of employee of said department or agency (sec. 21 of the Internal Security Act of 1950 (50 U.S.C. 797) and Department of Defense Directive 5200.8 of 20 August 1954 (19 FR 5446)); and (4) for knowingly and willfully making a false or misleading statement or representation in any matter within the jurisdiction of any department or agency of the United States (18 U.S.C. 1001).

[28 FR 13778, Dec. 18, 1963, as amended at 35 FR 10008, June 18, 1970; 36 FR 21889, Nov. 17, 1971; 41 FR 28957, July 14, 1976]

### § 761.4 Special provisions.

(a) Entry into islands in the Kwajalein Atoll under military jurisdiction is controlled by the Department of the Army. Inquiries concerning entries into islands under military control in the Kwajalein Atoll should be directed to: National Range Commander, U.S. Army Safeguard System Command, ATTN: SSC-R, P.O. Box 1500, Huntsville, AL 35807.

(b) Entry into Eniwetok Atoll is controlled by the Defense Nuclear Agency. Inquiries concerning entries into Eniwetok Atoll should be directed to: Commander, Field Command, Defense Nuclear Agency, Kirtland Air Force Base, NM 87115.

(c) Entry into Johnston Atoll is controlled by the Defense Nuclear Agency. Inquiries concerning entries into Johnston Atoll should be directed to: Commander, Johnston Atoll (FCDNA), APO San Francisco, CA 96305.

(d) *Suspension of restrictions.* Restrictions imposed under the authority of the above cited Executive Orders on entry into the following Naval Defensive Sea Areas and Naval Airspace Reservations and Administrative Areas have been suspended subject to reinstatement without notice at any time when the purposes of national defense may require.

(1) All Naval Airspace Reservations, except the Guantanamo Bay Naval Airspace Reservation

(2) Honolulu Defensive Sea Area.

(3) Kiska Island Naval Defensive Sea Area.

(4) Kodiak Island Naval Defensive Sea Area.

(5) Unalaska Island Naval Defensive Sea Area.

(6) Wake Island Naval Defensive Sea Area except for entry of foreign flag ships and foreign nationals.

(7) The portion of Kaneohe Defensive Sea Area lying beyond a 500 yard buffer zone around the perimeter of the Kaneohe Marine Corps Air Station (Mokapu Peninsula) and eastward therefrom to Kapoho Point, Oahu.

(e) Suspension of restrictions on entry into a naval airspace reservation, naval defensive sea area, or naval administrative area, does not affect the authority of a commanding officer or other appropriate commander to control entry into or passage through any base, station, or other installation or area, including port or harbor facilities under Navy control.

[41 FR 28957, July 14, 1976]

### § 761.5 Definitions.

(a) *Defense area.* A naval defensive sea area, naval airspace reservation, or naval administrative area established by Executive order of the President.

(b) *Department of Defense.* The Department of Defense, including the Departments of the Army, Navy, and Air Force.

(c) *Entry authorization.* A document which authorizes a ship, aircraft, or person to enter a defense area.

(d) *Entry Control Commander.* A commander empowered to issue entry authorizations for one or more defense areas (see § 761.9).

(e) *Excluded person.* A person who does not hold a currently valid entry authorization for the area concerned and who has been notified by an Entry Control Commander that authority for

him to enter any defense area has been denied, suspended or revoked.

(f) *Foreign nationals*. Persons who are not citizens or nationals of the United States.

(g) *Military installation*. A military (Army, Navy, Air Force, Marine Corps, and/or Coast Guard) activity ashore, having a commanding officer, and located in an area having fixed boundaries, within which all persons are subject to military control and to the immediate authority of a commanding officer.

(h) *Public vessel or aircraft*. A ship or aircraft owned by or belonging to a government and not engaged in commercial activity.

(i) *Territorial sea*—(1) *Trust Territory*. In accordance with title 19, section 101(3), of the Trust Territory Code ''* * * that part of the sea comprehended within the envelope of all arcs of circles having a radius of three marine miles drawn from all points of the barrier reef, fringing reef, or other reef system of the Trust Territory, measured from the low water line, or, in the absence of such reef system, the distance to be measured from the low water line of any island, islet, atoll, reef, or rocks within the jurisdiction of the Trust Territory.''

(2) *Other areas*. That part of the sea included within the envelope of all arcs of circles having a radius of three marine miles with centers on the low water line of the coast. For the purpose of this definition, the term ''coast'' includes the coasts of islands, islets, rocks, atolls, reefs and other areas of land permanently above the high water mark.

(j) *Trust Territory Registry*. Registration of a ship or aircraft in accordance with the laws of the Trust Territory.

(k) *U.S. Registry*. Registration of a ship or aircraft in accordance with the laws and regulations of the United States.

(l) *U.S. Armed Forces*. Military personnel of the Department of Defense, the Departments of the Army, Navy, Air Force, and the United States Coast Guard.

[28 FR 13778, Dec. 18, 1963, as amended at 35 FR 10009, June 18, 1970; 41 FR 28958, July 14, 1976]

## Subpart B—Criteria and Basic Controls

### § 761.6 Criteria.

(a) *General*. (1) Entry authorizations may be issued only after an Entry Control Commander, or a duly authorized subordinate acting in his behalf, has determined that the presence of the person, ship, or aircraft will not, under existing or reasonably foreseeable future conditions, endanger, place an undue burden upon, or otherwise jeopardize the efficiency, capability, or effectiveness of any military installation located within or contiguous to a defense area. Factors to be considered shall include, but not be limited to, the true purpose of the entry, the personal history, character and present or past associates of the individuals involved, the possible burdens or threats to the defense facilities which the presence of the ship, aircraft or the individual or individuals involved impose or might reasonably be expected to impose on the related base complex.

(2) Requests for entry authorizations will be evaluated and adjudged as to whether the entry at the time and for the purpose stated will or will not be inimical to the purposes of national defense.

(b) *Adverse*. Substantial evidence of any of the following shall preclude the granting of entry authorization except with the specific approval of the Chief of Naval Operations in each case:

(1) Prior noncompliance with entry control regulations or failure to observe terms under which any entry authorization may have been granted;[1]

(2) Willfully furnishing false, incomplete, or misleading information in an application for an entry authorization;[1]

(3) Advocacy of the overthrow or alteration of the Government of the United States by unconstitutional means;

(4) Commission of, or attempt or preparation to commit, an act of espionage, sabotage, sedition, or treason, or conspiring with or aiding or abetting another to commit such an act;

[1] The criteria so marked are applicable only to those applications concerning entry into areas under military cognizance.

(5) Performing, or attempting to perform, duties, or otherwise acting so as to serve the interest of another government to the detriment of the United States;

(6) Deliberate unauthorized disclosure of classified defense information;

(7) 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 (hereinafter 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 United States or of any State, or which seeks to overthrow the Government of the United States or any State or subdivision thereof by unlawful means;

(8) Serious mental irresponsibility evidenced by having been adjudged insane, or mentally irresponsible, or an incompetent, or a chronic alcoholic, or treated for serious mental or neurological disorders or for chronic alcoholism, without evidence of cure;[1]

(9) Conviction of any of the following offenses under circumstances indicative of a criminal tendency potentially dangerous to the security of a strategic area containing military establishments; arson, unlawful trafficking in drugs, murder, kidnaping, blackmail, or sex offenses involving minors or perversion.

(10) Chronic alcoholism or addiction to the use of narcotic drugs without adequate evidence of rehabilitation;[1]

(11) Illegal presence in the United States, its territories or possessions, having been finally subject to deportation order, or voluntary departure in lieu of deportation order, by the United States Immigration and Naturalization Service;[1]

(12) Being the subject of proceedings for deportation or voluntary departure in lieu of deportation for any reasons which have not been determined in the applicant's favor;[1]

(13) Conviction of larceny of property of the United States, willful injury to or destruction of property of the United States, fraudulent enlistment, impersonation of a commissioned officer of the United States or any state or territory thereof, or any offense involving moral turpitude, except offenses, which, in the jurisdiction within which the conviction was obtained, are punishable by imprisonment for not more than one year or a fine of not more than one thousand dollars.[1]

(c) *Aliens.* (1) Entry of aliens for employment or residence in an area entirely within the borders of a defense area is not authorized except when such entry would serve the interests of National Defense, and then only for specified periods and under prescribed conditions.

(2) Entry of aliens for any purpose into areas over which the United States exercises sovereignty is further subject to requirements imposed by law for the obtaining of a United States visa. Naval authorization for entry into areas covered by this part will not be issued to foreign nationals for purposes, places, or periods of time in excess of those stipulated in the visa.

(3) Alien spouses and bona fide dependents of U.S. citizen employees of the United States may, if otherwise qualified, be granted entry authorization so long as the U.S. citizen sponsor or principal remains on duty or resident within the defense area.

(d) *Renewals.* Entry authorizations having been granted and utilized may be extended or renewed upon request at the expiration of the period for which the entry was originally authorized or extended, provided the justification for remaining in the area or for making a reentry meets the criteria set forth in this part. It shall be the responsibility of every applicant to depart the defense area for which entry was authorized upon expiration of the time prescribed in the authorization, unless such authorization has been extended or renewed. Failure to comply herewith will be considered as evidence of violation

[1] The criteria so marked are applicable only to those applications concerning entry into areas under military cognizance.

of this part and may result in denial of future authorizations.

[28 FR 13778, Dec. 18, 1963, as amended at 36 FR 21890, Nov. 17, 1971; 41 FR 28958, July 14, 1976]

### § 761.7 Basic controls.

(a) *General*. Except for such persons, ship, or aircraft as are issued an authorization to enter by an Entry Control Commander:

(1) No person, except persons aboard public vessels or aircraft of the United States, shall enter any defense area.

(2) No vessel or other craft, except public vessels of the United States shall enter any naval defensive sea area or other defense area.

(3) No aircraft, except public aircraft of the United States, shall be navigated within any naval airspace reservation of the airspace over other defense areas.

(b) *Excluded persons*—(1) *Entry prohibited*. Excluded persons, as defined in § 761.5(e), are prohibited from entering any defense area. In a bona fide emergency which requires an excluded person's presence in or transit through a military installation which is also a defense area, the commanding officer of the installation may grant permission to enter or transit subject to such restrictions as may be imposed by regulation or which may, in his discretion, be required.

(2) *Carrying prohibited*. Except in a bona fide emergency and after being authorized by the appropriate local authority, no vessel or aircraft, except public vessels and aircraft of the United States, shall enter into or be navigated within any defense area while carrying any excluded person, as defined in this part, as passenger, officer or crew member.

(c) *Control of violators*. No commanding officer of a military installation shall permit any ship or aircraft which has entered the limits of his command by passing through a defense area without authorization to land, except in emergency, or, if permitted to land, to disembark passengers or cargo except as authorized by the appropriate Entry Control Commander. Commanding officers will take appropriate action to apprehend violators who come within their jurisdiction and request disposition instructions from the appropriate Entry Control Commander.

(d) *Trust Territory*. An authorization from the High Commissioner is required for all persons desiring to enter the Trust Territory, except for those areas under military jurisdiction where entry is controlled by the Department of the Army (Kwajalein Atoll) and the Defense Nuclear Agency (Eniwetok Atoll).

(e) *Military areas*. Entries authorized under this Instruction do not affect the authority of a commanding officer or other appropriate commander to impose and enforce proper regulations pertaining to movement into or within naval stations or other military installations.

(f) *Waiver prohibited*. No officer of the U.S. Armed Forces, except as authorized in writing by the Chief of Naval Operations, has authority to waive the requirements of this part, and any waiver must be in writing and signed by an authorized person.

[28 FR 13778, Dec. 18, 1963, as amended at 36 FR 21890, Nov. 17, 1971; 41 FR 28958, July 14, 1976]

## Subpart C—Entry Authorization

### § 761.8 General.

(a) As indicated in § 761.7(a), certain persons, ships, and aircraft must be specifically authorized under the provisions of this part to enter defense areas.

(b) When entering or transiting a defense area each person, ship, or aircraft must have a valid authorization or satisfactory evidence thereof.

### § 761.9 Entry Control Commanders.

The following commanders are designated Entry Control Commanders with authority to approve or disapprove individual entry authorizations for persons, ships, or aircraft as indicated (Commander Seventeenth Coast Guard District has been designated an Entry Control Commander by the authority of the Commandant, U.S. Coast Guard and Commander, Western Area, U.S. Coast Guard);

(a) *Chief of Naval Operations*. Authorization for all persons, ships, or aircraft to enter all defense areas.

(b) *Commander in Chief, U.S. Atlantic Fleet*. Authorization for all persons, ships, or aircraft to enter defense areas in the Atlantic.

(c) *Commander in Chief, U.S. Pacific Fleet*. Authorization for all persons, ships, or aircraft to enter defense areas in the Pacific.

(d) *Commander U.S. Naval Forces Caribbean*. Authorization for all persons, ships, and aircraft to enter the Guantanamo Bay Naval Defensive Sea Area and the Guantanamo Naval Airspace Reservation. (This authority delegated to Commander U.S. Naval Base, Guantanamo Bay.)

(e) *Commander U.S. Naval Base, Guantanamo Bay*. Authorization for all persons, ships, and aircraft to enter the Guantanamo Bay Naval Defensive Sea Area and the Guantanamo Naval Airspace Reservation.

(f) *Commander Third Fleet*. Authorization for U.S. citizens and U.S. registered private vessels to enter Midway Island, Kingman Reef, Kaneohe Bay Naval Defensive Sea Area, Pearl Harbor Defensive Sea Area and Filipino workers employed by U.S. contractors to enter Wake Island.

(g) *Commander U.S. Naval Forces, Marianas*. Authorization in conjunction with the High Commissioner, for non-U.S. citizens, ships, or aircraft documented under laws other than those of the United States or the Trust Territory to enter those portions of the Trust Territory where entry is not controlled by the Department of the Army or the Defense Nuclear Agency.

(h) *Senior naval commander in defense area*. Emergency authorization for persons, ships, or aircraft in cases of emergency or distress. In all cases the Chief of Naval Operations, and as appropriate, the Commander in Chief, U.S. Atlantic Fleet or the Commander in Chief, U.S. Pacific Fleet, and other interested commands, shall be informed immediately of the nature of the emergency, and action taken.

(i) *U.S. Coast Guard*. The U.S. Coast Guard regulates the movement of shipping within the Honolulu Harbor under the authority of Executive Orders 10173 and 10289; such shipping is considered to be under U.S. authorized supervision within the meaning of Executive Order 8987. The Commandant, Fourteenth Naval District, as representative of the Secretary of the Navy, retains responsibility for security of the Honolulu Defensive Sea Area, as required by naval interest, and, as such, issues amplifying instructions relating to the Honolulu Defensive Sea Area.

[41 FR 28958, July 14, 1976]

### § 761.10 Persons: Group authorizations.

Persons in the following categories, except those persons who have been denied individual authorization or have had a prior authorization revoked, may enter the defense areas indicated without individual authorization:

(a) Persons aboard U.S. public vessels or aircraft entering a Naval Defensive Sea Area or a Naval Airspace Reservation.

(b) Military members of the U.S. Armed Forces or U.S. civil service employees of the Department of Defense when traveling on official orders.

(c) U.S. ambassadors, cabinet members, elected U.S. Government officers and U.S. citizen civil service employees of the U.S. Government traveling on official orders on U.S. Government business may enter defense areas as required by their orders.

(d) Dependents of military members of the U.S. Armed Forces and U.S. citizen dependents of U.S. civil service employees traveling on official orders and entering for purposes of joining a principal permanently stationed in an area covered by this part.

(e) U.S. Navy Technicians, U.S. Army Contract Technicians, or U.S. Air Force Contract Technicians, who are traveling on official (does not include invitational) travel orders on U.S. Government business, may enter defense areas as specifically required by such orders.

(f) [Reserved]

(g) Individuals on board any foreign public vessel or aircraft which has been granted diplomatic or other official U.S. Government authorization to enter an area covered by this part.

(h) Through passengers and bona fide regularly employed crew members, unless otherwise excluded, on nonpublic vessels authorized to enter areas covered by this part. This does not include an authorization to disembark at a

port contiguous to or within the areas covered in this part. Application for authorization to disembark may be submitted to an Entry Control Commander having jurisdiction over the particular port.

(i) Through passengers and bona fide regularly employed crew members, unless otherwise excluded, on nonpublic aircraft authorized to enter areas covered by this part. Such persons are subject to local regulations governing entry into or movement within military air stations or facilities. Application for authorization to disembark may be submitted to an Entry Control Commander having jurisdiction over the air facility.

(j) U.S. citizen news correspondents and photographers when properly accredited by the Department of Defense to enter areas covered by this part except that special authorization is required to enter the restricted areas listed in § 761.4(a).

[28 FR 13778, Dec. 18, 1963, as amended at 36 FR 21890, Nov. 17, 1971]

### § 761.11 Persons: Individual authorizations.

(a) *Application; filing*. Applications for authorization to enter defense areas shall be filed with one of the following:

(1) Chief of Naval Operations.

(2) Commander in Chief, U.S. Atlantic Fleet.

(3) Commander in Chief, U.S. Pacific Fleet.

(4) Any Naval Sea Frontier Commander.

(5) Any Naval Fleet or Force Commander.

(6) Any Naval District Commandant.

(7) Any Naval Attache. The Commander or Attache with whom the application is filed is responsible for taking such action on the application as he may be empowered to do or for forwarding the application to the nearest Entry Control Commander authorized by this part to take action thereon. Applications received in the United States and those received indicating that the applicant has resided in the United States for the major portion of ten years immediately prior to date of request will normally be forwarded to the Chief of Naval Operations for action. In all cases where the forwarding activity has information regarding the applicant or his employer, appropriate comment and/or recommendation for disposition will be included in the forwarding letter.

(b) *Form*. (1) Applications for entry authorizations will be made on the standard form Statement of Personal History, DD 398, which is available at most military installations. In addition to the information required by the form, an entry application shall include the following additional information under Item 20, ''Remarks'':

21. Purpose of proposed visit: (Detailed statement including names of principal persons, firms, or establishments to be visited)
22. Proposed duration of visit:
23. Estimated date of arrival:
24. Address to which authorization should be mailed:

In the event that a DD 398 form is not available, a locally produced form containing identical information including the certification and signature of applicant and witness may be utilized.

(2) Incomplete forms will be returned for completion.

(3) When time is of the essence, emergency applications may be forwarded by message to the appropriate Entry Control Commander. Such messages shall include the following:

(i) Name of applicant.

(ii) Date and place of birth.

(iii) Citizenship.

(iv) Residence for last ten (10) years.

(v) Employers and their addresses for last ten (10) years.

(vi) Results of Local Agency Check, if pertinent.

(vii) Place to be entered and date of entry.

(viii) Purpose of entry and duration of stay.

(ix) Comments and/or recommendations of forwarding officer as appropriate.

(x) A statement that a completed DD 398 or appropriate substitute has been mailed prior to the sending of the message.

(c) *Processing*. The Entry Control Commander empowered to issue entry authorizations shall upon receipt of an application take the following action:

(1) Initiate or conduct such investigation as may be required to establish

facts upon which to make a determination that the entry of the applicant at the time and for the purpose indicated is or is not in accordance with the criteria set forth in § 761.6.

(2) Request additional information from the applicant if required, or

(3) Issue an entry authorization as requested or modified as circumstances require, or

(4) Deny the request and advise the applicant of his right to appeal, or,

(5) Forward the application to the next superior in command together with a statement of the investigation conducted and the reason for forwarding and comments or recommendations as appropriate.

(d) *Authorizations.* Entry authorizations will state the purpose for which the entry is authorized and such other information and conditions as are pertinent to the particular authorization. Authorizations to enter and re-enter may be issued to resident U.S. citizens and be valid for a specified time not to exceed two years. Authorizations may be issued to U.S. citizens residing abroad and to aliens to enter and re-enter for a specified period of time required to accomplish the purpose for which the authorization was issued not to exceed one year.

[28 FR 13778, Dec. 18, 1963, as amended at 41 FR 28958, July 14, 1976]

### § 761.12 Ships: Group authorizations.

Ships or other craft in the following categories, except those ships which have been denied individual authorization or have had a prior authorization revoked, may enter the defense areas indicated without individual authorizations:

(a) U.S. Public vessels, to enter all defense areas.

(b) U.S. private vessels which are: (1) Under charter to the Department of Defense (including the Military Sealift Command), or (2) operating under a contract or charter with the Department of Defense providing for the employment of such vessels, or (3) routed by a Naval Control of Shipping Office, or (4) employed exclusively in support of and in connection with a Department of Defense construction, maintenance, or repair contract and whose crews carry individual entry clearances, to enter defense areas as authorized by controlling Defense Department agency.

(c) [Reserved]

(d) Privately owned local craft, registered with and licensed by appropriate local U.S. Government authorities, and owned and operated by local inhabitants who have been granted an authorization to enter the local defense area at the discretion of the local commanders.

(e) Foreign flag ships traveling on diplomatic or other special clearance or for which special arrangements have been made under international agreements or treaties.

(f) Ships operating under a group authorization issued by the Chief of Naval Operations.

(g) Ships in distress, subject to local clearances and control by senior officer present.

[28 FR 13778, Dec. 18, 1963, as amended at 36 FR 21890, Nov. 17, 1971]

### § 761.13 Ships: Individual authorizations.

(a) *Applications; form; filing.* Applications for authorization to navigate ships within the limits of defense areas shall be filed with the cognizant Entry Control Commander by letter or telegram including the following information and any additional information that may be relative to the proposed operation:

(1) Name of ship.

(2) Place of registry and registry number.

(3) Name, nationality and address of operator.

(4) Name, nationality and address of owner.

(5) Gross tonnage of ship.

(6) Nationality and numbers of officers and crew (include crewlist when practicable).

(7) Number of passengers (include list when practicable).

(8) Last port of call prior to entry into area for which clearance is requested.

(9) Purpose of visit.

(10) Proposed date of entry and estimated duration of stay.

(b) *Processing.* Authorization for single entries or for multiple entries for a period not to exceed one year may be

granted or denied by an Entry Control Commander. Authorizations for multiple entries for a period to exceed one year or for special group entries must be forwarded to the Chief of Naval Operations with appropriate comments and recommendations.

### § 761.14 Aircraft: Group authorizations.

Aircraft in the following categories, except those aircraft which have been denied individual authorization or have had a prior authorization revoked, may enter the defense areas indicated without individual authorization:

(a) U.S. public aircraft to enter all defense areas.

(b) U.S. private aircraft which are under charter to the Department of Defense (including the Military Airlift Command), or operating under a contract with the Department of Defense providing for the employment of such aircraft to overfly U.S. island positions to enter defense areas as authorized by controlling Defense Department agency. If landing at U.S. military facilities is required, see § 761.15(a).

(c) Foreign flag aircraft for which special arrangements have been made under international agreements or treaties.

(d) Aircraft operated by companies authorized to utilize naval facilities in defense areas for regular commercial activity, to enter defense areas associated therewith. For landing clearance at U.S. military facilities, see § 761.15(a).

(e) Any aircraft in distress, subject to local clearance and control by senior officer present.

[41 FR 28958, July 14, 1976]

### § 761.15 Aircraft: Individual authorizations.

(a) *Special procedures*. In addition to the entry authorization to enter or navigate within the defense area concerned, certain special procedures must be followed by aircraft:

(1) If landing at U.S. naval aviation facilities, an Aviation Facility License must be obtained, in accordance with Secretary of the Navy Instruction 3770.1B, Use of Department of the Navy aviation facilities by other than United States Department of Defense aircraft.

(2) If landing at U.S. Air Force aviation facilities, a Civil Aircraft Landing Permit must be obtained, in accordance with Department of the Airforce Regulation 55–20, Use of United States Air Force installations by other than United States Department of Defense aircraft.

(3) Foreign public aircraft must obtain diplomatic clearance or clearance under applicable special agreements or treaties.

(b) *Application; Form; Filing*. Applications for authorization to navigate aircraft within the limits of defense areas shall be made by letter or telegram addressed to the appropriate entry control commander as indicated in § 761.9 with information copies to the Chief of Naval Operations, Commander in Chief, U.S. Atlantic (or Pacific) Fleet, as appropriate, and other local commanders who are known to be concerned. Applications shall include the following:

(1) Type and serial number of aircraft (the number of aircraft in flight if a mass movement is involved), nationality and name of registered owner.

(2) Name and rank of senior pilot.

*(3) Number in crew.

*(4) Number of passengers and whether military or civilian; include name (and rank) of distinguished passengers.

(5) Purpose of flight.

(6) Plan of flight route, including:

(i) Point of origin of flight and its destination.

(ii) Estimated date and times of arrival and departure at all airspaces covered by this part 761 including stops within the Trust Territory, when pertinent.

(7) Radio call signs of aircraft and radio frequencies available.

(8) Whether cameras are to be carried and whether they will be used.

*(9) Whether arms are to be carried.

*(10) Whether authorization to land as indicated in § 761.15(a) has been obtained.

NOTE: Information on those items marked with an asterisk (*) need not be reported when the aircraft will only overfly the areas covered by this part.

(c) *Processing*. Authorization for individual entries or for multiple entries for a period not to exceed three months may be granted by an Entry Control

*See ''Note'' to this paragraph.

Commander. Authorizations for multiple entries over a period to exceed three months and applications for group authorizations must be forwarded to the Chief of Naval Operations with appropriate comments and recommendations.

[41 FR 28958, July 14, 1976]

### § 761.16 Notice of action.

All applicants will be kept advised of action being taken relative to the processing of applications. Individuals whose applications cannot be processed promptly (usually within ten working days) or whose applications must be forwarded to another office for processing will be notified of the anticipated delay and advised of the approximate time when action may be expected to be taken. Under no circumstances will a notice of disapproval include a statement of the reason therefor. Copies of all notices will be distributed to commands and Entry Control Commanders concerned. Copies of all notices of disapproval will be mailed to the Chief of Naval Operations concurrently with the mailing to the applicant.

### § 761.17 Revocation.

Entry authorizations will be revoked only by an Entry Control Commander upon being advised of the discovery of information which would have been ground for denial of the initial request. Such a revocation will be confirmed in writing to the holder of an entry authorization. No reason for revocation of the entry authorization will be given. When an entry authorization is revoked, a one-way permit will be issued as appropriate, to permit the ship, aircraft, or person to transit the defense area in order to depart from a contiguous area.

### § 761.18 Appeals.

(a) Appeals may be filed with the Entry Control Commander who issued the denial or revocation. It shall contain a complete statement of the purpose of the proposed entry and a statement of reasons why the entry should be authorized, including a showing that the entry will be consistent with the purposes of national defense.

(b) Appeal letters shall be forwarded promptly to the next superior Entry Control Commander with an endorsement setting forth the reasons for the denial or revocation and a recommendation as to the action to be taken by the superior.

(c) The superior may act on the appeal and notify the applicant of the decision, or he may forward the appeal to the next superior and notify the applicant of this referral.

[28 FR 13778, Dec. 18, 1963, as amended at 41 FR 28959, July 14, 1976]

### § 761.19 Forms.

The following forms shall be used in connection with the processing of applications for authorization to enter defense areas and for revocation of authorizations as indicated:

(a) *Application.* Statement of Personal History (Form DD 398, Stock Number 0102–004–220) may be obtained from NAVPUBFORMCEN, Building 26, 5801 Tabor Ave., Philadelphia, PA 19120.

(b) *Entry authorization.* (1) Defense Area Entry Authorization (OPNAVForm 4600–2 (Rev. 5–59) may be obtained from Office of the Chief of Naval Operations (OP–09B33), Navy Department, Washington, DC 20350.

(2) Letter or message authorization.

(c) *Disapproval of request for entry authorization.*

MY DEAR _____: Your application of _____ has been reviewed and we regret to advise you that the requested authorization for _____ to enter _____ is not granted as the entry at this time for the purpose stated is not considered to be in the interest of national defense.

The application may be resubmitted again in six months at which time it will be reconsidered in the light of then existing circumstances.

If you desire to appeal this decision, you may do so by submitting a letter to this office setting forth in full why you consider that the granting of the application would be in the interest of national defense and any other information that you believe will be of value of this person considering the appeal. Your letter will be forwarded to the appropriate authority for review and you will be advised in due course of his determination.

Sincerely yours,

(d) *Revocation of entry authorization.*

MY DEAR _____: This is to notify you that entry authorization to enter

_____ granted by (issuing activity) on _____ is hereby revoked effective this date.

Sincerely yours,

[41 FR 28959, July 14, 1976]

## Subpart D—Additional Instructions

### § 761.20 Additional regulations governing persons and vessels in Naval Defensive Sea Areas.

(a) By virtue of the authority vested in the President by section 44 of the United States Criminal Code, as amended and reenacted in 18 U.S.C. 2152, the President has prescribed the following additional regulations in Executive Order 9275 of November 23, 1942 (7 FR 9767; 1943 Cum. Supp. p. 1227) to govern persons and vessels within the limits of defensive sea areas theretofore or thereafter established.

(1) No person shall have in his possession within the limits of any defensive sea area, any camera or other device for taking pictures, or any film, plate or other device upon or out of which a photographic imprint, negative or positive, can be made, except in the performance of official duty or employment in connection with the national defense, or when authorized pursuant to the provisions of the Act approved June 25, 1942 (Pub. L. 627, 77th Congress), as amended (50 U.S.C. App. 781–785), and the regulations promulgated thereunder (7 FR 7307; 32 CFR 765.19(b)).

(2) It shall be the duty of the master or officer in charge of any vessel to take custody of and safeguard all cameras or other devices for taking pictures, or film, plate or other device upon or out of which a photographic imprint, positive or negative, can be made, the possession of which is prohibited by Executive Order 9275, from any person, prior to the time any vessel enters any defensive sea area or upon the boarding by any person of any vessel while within a defensive sea area, and to retain custody thereof until such vessel is outside the defensive sea area or the person is about to disembark.

(3) There shall be prominently displayed on board all vessels, except public war vessels of the United States manned by personnel in the naval service, a printed notice containing the regulations prescribed in Executive Order 9275.

(4) Any person violating section 1 of Executive Order 9275 (restated in paragraph (a)(1) of this section) shall be liable to prosecution as provided in section 44 of the Criminal Code as amended and reenacted in 18 U.S.C. 2152.

(b) The regulations stated in paragraph (a) of this section are not a limitation on prosecution under any other statute that may have been violated by acts or omissions prohibited by Executive Order 9275.

# PART 762 [RESERVED]

# PART 763—RULES GOVERNING PUBLIC ACCESS

## Subpart A—Entry Regulations for Kaho'olawe Island, Hawaii

Sec.
763.1 Purpose.
763.2 Definition.
763.3 Background.
763.4 Entry restrictions.
763.5 Entry procedures.
763.6 Violations.

AUTHORITY: 50 U.S.C. 797; DOD Dir. 5200.8 of August 20, 1954; 5 U.S.C. 301; 10 U.S.C. 6011, 32 CFR 700.702; 32 CFR 700.714; E.O. No. 10436, 3 CFR 1949–1953 Comp. p. 930, (1958).

SOURCE: 47 FR 27553, June 25, 1982, unless otherwise noted.

## Subpart A—Entry Regulations for Kaho'olawe Island, Hawaii

### § 763.1 Purpose.

The purpose of this subpart is to promulgate regulations for entry to Kaho'olawe Island, Hawaii, and its adjacent waters.

### § 763.2 Definition.

For the purpose of this subpart, Kaho'olawe Island includes that portion reserved for naval purposes by Executive Order No. 10436 of February 20, 1953.

### § 763.3 Background.

(a) Kaho'olawe Island is used by the armed forces of the United States as a training area including bombing and gunnery training ranges under authority granted by Executive Order No.

10436. Training operations frequently involve the use of live ordnance, creating an obvious danger to persons on or near the island. Moreover, a large amount of unexploded ordnance is present on Kaho'olawe Island and in adjacent waters.

(b) Individuals who enter the island of Kaho'olawe without authority expose themselves to extremely hazardous conditions. In addition, the presence of unauthorized persons on Kaho'olawe Island or in adjacent waters is likely to interfere with the use of the island for military training. Accordingly, it is necessary to prohibit entry to Kaho'olawe Island except under the controlled circumstances set forth in this subpart.

### § 763.4 Entry restrictions.

(a) Entry by any person upon Kaho'olawe Island for any purpose is prohibited without advance authorization from Commander Naval Base. This prohibition applies to all areas of Kaho'olawe Island reserved for naval purposes by Executive Order 10436.

(b) Entry by any person into the restricted waters adjacent to Kaho'olawe Island for any purpose is prohibited without advance authorization from Commander Naval Base. This prohibition applies to all waters described in 33 CFR 204.223(4).

[47 FR 27553, June 25, 1982, as amended at 52 FR 20074, May 29, 1987]

### § 763.5 Entry procedures.

(a) It is the policy of the Commander Naval Base to authorize, in accordance with the spirit of the American Indian Religious Freedom Act (1978), reasonable access to Kaho'olawe Island during periods when it is not used for military training. However, because there are bombs and other explosives on and under the surface and in the waters of the island, and because there are significant archaeological resources thereon (in 1981, the island was placed on the National Register of Historical Places as an Archaeological District), Navy representatives accompany each island visitation to safeguard both the vistitor(s) and the island's archaeological resources. In this regard, in order to ensure the safety of visitors to the island and its archaeological resources, persons and organizations wishing access to Kaho'olawe Island must comply with the following appropriate procedures: Civilians (except authorized U.S. and State representatives) must:

(1) Request, in writing, access authorization from Commander Naval Base (Code 01K), Pearl Harbor, Hawaii 96860, at least 15 days prior to the access requested, providing therein confirmed access plans (including the exact number of visitors, time, and location of access, designation of person in charge, and any other pertinent information); and

(2) Submit to Commander Naval Base (at the aforementioned address) properly endorsed Standard Liability Release Form (obtainable from Commander Naval Base), for each access participant, at least five (5) days prior to the requested access.

(b) In evaluating each request, the factors just enumerated will be weighed against training commitments, safety requirements, specical projects, and the amount and cost of military supervision necessitated by a granting of the request. Requests for entry will be considered on an individual basis. If a request is granted, the permission to enter Kaho'olawe Island authorizes one visit only, and shall not be construed as authorization for more than one entry unless the authorization itself specifically states otherwise. Moreover, entry pursuant to advance consent, which is not in accordance with the terms and conditions permitted by Commander Naval Base, shall be deemed a violation of this subpart.

(c) For safety reasons, it is not Commander Naval Base policy to permit children below the age of 15 access to Kaho'olawe Island.

(d) The following safety regulations are applicable to visitors to Kaho'olawe Island:

(1) All visitors to the island are required to execute and submit a waiver of government liability form to a designated Navy representative prior to arrival at the island.

(2) Visitors to the island will be escorted by Navy designated Explosive Ordnance Disposal (EOD) technicians to ensure that they stay on cleared

paths, avoid impact areas, and do not touch high explosives. For visitor safety, the directions of the military escorts must be followed.

(3) No person will interfere with any EOD escort in the performance of his duties.

(4) Any actual or suspected ordnance found by a visitor shall be reported to the Special Assistant for Kaho'olawe as soon as possible. If he is not in the vicinity, a description and location of the ordnance should be provided to the nearest EOD technician. Everyone, other than EOD personnel, shall remain clear of any ordnance found.

(5) Only the qualified EOD technicians shall touch, examine, remove, attempt to remove, handle either directly or indirectly, or detonate any ordnance, whether found on the surface, beneath the surface or in the waters surrounding Kaho'olawe.

(6) Any proposed hike and procession route shall be provided to the Special Assistant for Kaho'olawe (or his designated representative) for approval and escort coordination at least twenty-four hours in advance of the planned event. Deviation from approved routes will not be allowed. Proposed campsites for overnight hikes shall be similarly provided to, and approved by, the Special Assistant for Kaho'olawe or his designated representative.

(7) No person shall move about the island after sunset unless a bonafide emergency situation arises. The senior Naval officer present shall be immediately notified in case of such emergency.

(8) No person shall commit any offense proscribed by either Federal law or the State of Hawaii Penal Code, as incorporated under the Federal Assimilative Crimes Act, while on the island of Kaho'olawe. Any individual who violates any provisions of these penal codes may be prosecuted by the Federal Government and/or barred from any future access to Kaho'olawe.

(9) No person shall deface, alter, remove, spoil, or destroy any archeological object, feature, or site on the island.

(10) Children shall remain with their parents at all times while on the island.

(11) Visitors are responsible for removing their own trash from the island.

(12) Individuals failing to abide by these safety guidelines will be precluded from future visitations.

[47 FR 27553, June 25, 1982, as amended at 52 FR 20074, May 29, 1987; 52 FR 45455, Nov. 30, 1987]

### § 763.6 Violations.

(a) Any person who violates this subpart is subject to prosecution under 18 U.S.C. 1382, which provides in relevant part:

> Whoever * * * goes upon any * * * naval * * * reservation * * * for any purpose prohibited by law or lawful regulation * * * shall be fined not more than $500 or imprisoned not more than six months, or both.

(b) Additionally, persons who violate this Subpart are subject to prosecution under the Internal Security Act of 1950 (50 U.S.C. 797), violations of which may result in a maximum penalty of imprisonment for one year, or a fine of $5,000 or both.

# SUBCHAPTER G—MISCELLANEOUS RULES

## PART 765—RULES APPLICABLE TO THE PUBLIC

Sec.
765.1–765.5 [Reserved]
765.6 Regulations for Pearl Harbor, Hawaii.
765.9–765.11 [Reserved]
765.12 Navy and Marine Corps absentees; rewards.
765.13 Insignia to be worn on uniform by persons not in the service.
765.14 Unofficial use of the seal, emblem, names, or initials of the Marine Corps.

AUTHORITY: Secs. 5031, 6011, 70A Stat. 278, 375, as amended; sec. 133, 76 Stat. 517; sec. 301, 80 Stat. 379; 5 U.S.C. 301, 10 U.S.C. 133, 956, 5031, 6011, 7881; DOD 7000.14–R, Financial Management Regulation, Vol. 10.

### §§ 765.1–765.5 [Reserved]

### § 765.6 Regulations for Pearl Harbor, Hawaii.

The Commander, U.S. Naval Base, Pearl Harbor, Hawaii, is responsible for prescribing and enforcing such rules and regulations as may be necessary for insuring security and for governing the navigation, movements, and anchorage of vessels in the waters of Pearl Harbor and in the entrance channel thereto.

(Sec. 1, 37 Stat. 341, 62 Stat. 799; 18 U.S.C. 2152, 33 U.S.C. 475; E.O. 8143, 4 FR 2179, 3 CFR 1943 Cum. Supp. 504)

[31 FR 16620, Dec. 29, 1966]

### §§ 765.9–765.11 [Reserved]

### § 765.12 Navy and Marine Corps absentees; rewards.

The following is set forth as it applies to Navy and Marine Corps absentees. The term ''absentee,'' as used in this section, refers to a service member who commits the offense of absence without leave. Cf. article 86 of the Uniform Code of Military Justice (10 U.S.C. 886).

(a) *Payment of rewards*—(1) *Authority*. When authorized by military officials of the Armed Forces, any civil officer having authority to arrest offenders may apprehend an individual absent without leave from the military service of the United States and deliver him into custody of the military authorities. The receipt of Absentee Wanted by the Armed Forces (DD Form 553) or oral or written notification from military officials or Federal law enforcement officials that the person is absent and that his return to military control is desired is authority for apprehension and will be considered as an offer of a reward. When such a reward has been offered, persons or agency representatives (except salaried officers or employees of the Federal Government, or service members) apprehending or delivering absentees or deserters to military control will be entitled to a payment of

(i) $50 for the apprehension and detention until military authorities assume control, or

(ii) $75 for the apprehension and delivery to military control.

Payment of reward will be made to the person or agency representative actually making the arrest and the turnover or delivery to military control. If two or more persons or agencies join in performing these services, payment may be made jointly or severally but the total payment or payments will not exceed $50 or $75 as applicable. Payment of a reward is authorized whether the absentee or deserter voluntarily surrenders to civil authorities or is apprehended. Payment is not authorized for information merely leading to the apprehension of an absentee or deserter.

(2) *Payment procedure*. The disbursing officer, special disbursing agent or agent officer of the military activity to which an absentee or deserter is first delivered will be responsible for payment of the reward. Payment of rewards will be made on SF 1034 or NAVCOMPT Form 2277 supported by a copy of DD Form 553 or other form or notification that an individual is absent and that his return to military control is desired, and a statement signed by the claimant specifying that he apprehended (or accepted voluntary surrender) and detained the absentee or deserter until military authorities assumed control, or that he apprehended (or accepted voluntary surrender) and delivered the absentee or deserter to

military control. If oral notification was made in lieu of written notification, the claimant will so certify and provide the date of notification and the name, rank or rate, title, and organization of the person who made the authorized notice of reward for apprehension of the absentee or deserter.

(b) *Reimbursement for actual expenses*—(1) *Authority*. When a reward has not been offered or when conditions for payment of a reward otherwise cannot be met, reimbursement, not to exceed $75, may be made to any person or agency for actual expenses incurred in the apprehension and detention or delivery to military control of an absentee or deserter. If two or more persons or agencies join in performing these services, payment may be made jointly or severally, but the total payment or payments may not exceed $25. Reimbursement may not be made for the same apprehension and detention or delivery for which a reward has been paid. Actual expenses for which reimbursement may be made include:

(i) Transportation costs, including mileage at the rate established by the Joint Travel Regulation for travel by privately owned vehicle, for a round trip from either the place of apprehension or civil police headquarters to place of return to military control;

(ii) Meals furnished the service member for which the cost was assumed by the apprehending person or agency representative;

(iii) Telephone or telegraph communication costs;

(iv) Damages to property of the apprehending person or agency if caused directly by the service member during the apprehension, detention, or delivery;

(v) Such other reasonable and necessary expenses incurred in the actual apprehension, detention, or delivery as may be considered justifiable and reimbursable by the commanding officer. Reimbursement will not be made for:

(*a*) Lodging at nonmilitary confinement facilities;

(*b*) Transportation performed by the use of official Federal, State, county, or municipal vehicles;

(*c*) Personal services of the apprehending, detaining, or delivering person or agency.

(2) *Payment procedure*. The disbursing officer or special disbursing agent of the military activity to which an absentee or deserter is first delivered will be responsible for making reimbursement for actual expenses. Reimbursement will be effected on SF 1034 or NAVCOMPT Form 2277 supported by an itemized statement in triplicate signed by the claimant and approved by the commanding officer.

(c) *Reimbursement for subsistence furnished*—(1) *Authority*. Civil authorities may be reimbursed for the cost of subsistence furnished absentees or deserters placed in their custody for safekeeping at the request of military authorities. Such reimbursement will be in addition to rewards and reimbursement for actual expenses authorized in paragraphs (a) and (b) of this section.

(2) *Payment procedure*. The disbursing officer or special disbursing agent of the military activity requesting the safekeeping confinement will be responsible for making reimbursement for subsistence furnished by civil authorities. Reimbursement will be effected on SF 1034 or NAVCOMPT Form 2277 supported by an itemized statement signed by the claimant and approved by the officer who requested the confinement.

(d) Nothing said in this section shall be construed to restrict or exclude authority to apprehend an offender in accordance with law.

(Sec. 807, 70A Stat. 39; 10 U.S.C. 807. Interpret or apply secs. 808, 7214, 70A Stat. 40, 445; 10 U.S.C. 808, 7214)

[25 FR 1075, Feb. 6, 1960, as amended at 51 FR 22283, June 19, 1986; 65 FR 53172, Sept. 1, 2000]

### § 765.13 Insignia to be worn on uniform by persons not in the service.

(a) Under title 10 U.S.C., section 773, members of military societies composed of persons discharged honorably or under honorable conditions from the United States Army, Navy, Air Force or Marine Corps, regular or reserve, may, when authorized by regulations prescribed by the President, wear the uniform duly prescribed by such societies to be worn by the members thereof.

(b) The law cited in paragraph (a) of this section further provides that instructors and members of duly organized cadet corps at certain institutions of learning may wear the uniform duly prescribed by the authorities of such institutions.

(c) The law cited in paragraph (a) of this section further provides that the uniform worn by members of the military societies or by members and instructors of the cadet corps referred to in paragraph (a) of this section shall include some distinctive mark or insignia prescribed by the Secretary of the military department concerned to distinguish such uniforms from the uniforms of the Army, Navy, Air Force, or Marine Corps.

(d) Accordingly, except as otherwise provided in this paragraph, the following mark is hereby designated to be worn by all persons wearing the Navy or Marine Corps uniform as provided in paragraphs (a), (b), and (c) of this section: A diamond, 3½ inches long in the vertical axis, and 2 inches wide in the horizontal axis, of any cloth material, white on blue clothing, forestry green on khaki clothing, and blue on white clothing. The figure shall be worn on all outer clothing on the right sleeve, at the point of the shoulder, the upper tip of the diamond to be one-fourth inch below the shoulder seam. For persons who are participating in United States Marine Corps Junior ROTC programs, the following mark is designated to be worn: A round patch, three inches in diameter, which contains a gold Marine Corps emblem centered on a scarlet field. The scarlet field is surrounded with a blue border containing the words ''United States Marine Corps Junior ROTC'' in white lettering. Surrounding the blue field will be a gold border. Unless otherwise directed, the patch will be worn in the manner described above in connection with the ''diamond'' insignia.

(e) Within the meaning of paragraph (a) of this section, the occasions when members of the military societies may wear the uniform of their respective society are official functions which such a member attends in his capacity as a war veteran or as a member of such military society.

(f) Marine Corps Uniform Regulations may be examined and individual copies of pertinent provisions thereof may be purchased in accordance with § 701.1 of this chapter.

(Sec. 773, 70A Stat. 35; 10 U.S.C. 773)

[13 FR 8971, Dec. 28, 1948, as amended at 26 FR 11794, Dec. 12, 1961; 37 FR 6472, Mar. 30, 1972; 44 FR 37610, June 28, 1979]

### § 765.14 Unofficial use of the seal, emblem, names, or initials of the Marine Corps.

(a) *Purpose*. To establish procedures to determine whether to grant permission to use or imitate the seal, emblem, names, or initials of the Marine Corps in connection with commercial and certain noncommercial activities pursuant to 10 U.S.C. 7881. The Secretary of the Navy, in Secretary of the Navy Instruction 5030.7, has provided the policy and delegated to the Commandant of the Marine Corps (CMC), power to subdelegate to certain subordinate officers in writing, the authority to grant permission required by section 7881(b) of 10 U.S.C. for such use or imitation.

(b) *Scope*. The provisions of this Order requiring prior approval of the Secretary of the Navy, CMC, or the designee apply only to the use or imitation of the seal, emblem, names, or initials of the Marine Corps that suggest official approval, endorsement, or authorization is in connection with a promotion, goods, services, or commercial activity.

(c) *Standards*—(1) *No unofficial use or imitation of the Marine Corps seal*. Reproduction and use of the Marine Corps seal, as designated in Executive Order No. 10538 of June 22, 1954, is restricted to materials emanating from Headquarters Marine Corps. Except for manufacture of official letterhead stationery and related items of official Marine Corps use, reproduction and use of the Marine Corps seal is prohibited.

(2) *Unofficial use or imitation of the Marine Corps emblem, names, or initials*. Requests from civilian enterprises to use or imitate the Marine Corps emblem, names, or initials will ordinarily be approved where use or imitation merely provides a Marine Corps accent or flavor to otherwise fungible goods. Disapproval, however, usually may be

expected where such use or imitation reasonably would:

(i) Imply any official or unofficial connection between the Marine Corps and the user;

(ii) Tend to create the impression that the Marine Corps or the United States is in any way responsible for any financial or legal obligation of the user;

(iii) Give the impression that the Marine Corps selectively benefits the particular manufacturer, commercial entity, or other user, as in displaying the Marine Corps emblem, names, or initials on musical instruments, weapons, or the like, and in using the emblem, names, or initials in connection with advertising, naming, or describing products and services such as insurance, real estate, or financial services; or

(iv) Tend to subject the Marine Corps to discredit or would be inimical to the health, safety, welfare, or morale of the members of the Marine Corps.

(3) *Acceptable use of imitation of the Marine Corps insignia*. No request for permission is required when a use or imitation of the Marine Corps emblem, names, or initials includes prominent display of the disclaimer, ''Neither the United States Marine Corps nor any other component of the Department of Defense has approved, endorsed, or authorized this product (or promotion, or service, or activity)'' as an integral part of the use of imitation. A ''prominent display'' is one located on the same page as the first use of the insignia, prominent in that use, and printed in letters at least one half the size and density of the insignia.

(d) *Action*—(1) *When permission required*. Commercial or noncommercial use or imitation of the Marine Corps emblem, names, or initials is prohibited unless permission is first obtained in writing from the CMC, except when such use does not suggest that the use or imitation is approved, endorsed, or authorized by the Marine Corps or any other component of the Department of Defense.

(2) *Redelegation of authority*. The CMC hereby redelegates, pursuant to the authorization in paragraph 4 of the Secretary of the Navy 5030.7, authority to grant written permission to use the Marine Corps emblem, names, or initials to the Director, Administration Resource Management (ARDE). Prior to granting approval for commercial usage of the Marine Corps insignia, the CMC (ARDE) shall forward such requests to the Head, Marine Corps Exchange Service Branch, Facilities and Services Division, Installations and Logistics Department (CMC) (LFE)) and to the Counsel for the Commandant (CMC (CL)) for comment and concurrence. All other requests shall be routed to the Director, Judge Advocate Division (CMC (JAR)) for comment and concurrence.

(3) *Procedures for obtaining written permission*. Requests for written permission to use or imitate the Marine Corps emblem, names, or initials shall be in writing and shall be directed to the CMC (ARDE). The request should, at a minimum, contain the following information:

(i) Name and address of the requester.

(ii) A description of the type of activity in which the requester is engaged or proposes to engage.

(iii) A statement of whether the requester considers the proposed use or imitation to be commercial or noncommercial, and why.

(iv) A brief description and illustration or sample of the proposed use or imitation, as well as a description of the product or service in connection with which it will be used. This description will provide sufficient detail to enable the Marine Corps to determine whether there is a reasonable tendency to suggest such use or imitation is approved, endorsed, or authorized by the Marine Corps or any other component of the Department of Defense.

(v) In the case of a noncommercial use of imitation, a copy of the charter, constitution, bylaws, and similar organizational documents of the requester, together with a detailed description of its function or purpose. Insufficiently specific requests will be returned for additional information.

(e) *Reserve applicability*. This Order is applicable to the Marine Corps Reserve.

[51 FR 45467, Dec. 19, 1986, as amended at 65 FR 62619, Oct. 19, 2000]

# PART 766—USE OF DEPARTMENT OF THE NAVY AVIATION FACILITIES BY CIVIL AIRCRAFT

Sec.

766.1 Purpose.
766.2 Definition of terms.
766.3 Authority.
766.4 Policy.
766.5 Conditions governing use of aviation facilities by civil aircraft.
766.6 Approving authority for landings at Navy/Marine Corps aviation facilities.
766.7 How to request use of naval aviation facilities.
766.8 Procedure for review, approval, execution and distribution of aviation facility licenses.
766.9 Insurance requirements.
766.10 Cancellation or suspension of the aviation facility license (OPNAV Form 3770/1).
766.11 Fees for landing, parking and storage.
766.12 Unauthorized landings.
766.13 Sale of aviation fuel, oil, services and supplies.

AUTHORITY: 49 U.S.C. 1507.

SOURCE: 35 FR 14451, Sept. 15, 1970, unless otherwise noted.

NOTE: The provisions of this part 766 are SECNAV Instruction 3770.1B of 30 June 1970.

## § 766.1 Purpose.

This part establishes the policy and procedures for the use of Navy and Marine Corps aviation facilities by aircraft other than U.S. Department of Defense aircraft.

## § 766.2 Definition of terms.

For the purpose of this part certain terms are defined as follows:

(a) *Alternate use.* Use of the aviation facility, specified in the flight plan, to which an aircraft may divert when a landing at the point of first intended landing becomes impractical because of weather. (Aircraft may not be dispatched, prior to takeoff from the airport of origin, to a facility licensed for alternate use.)

(b) *Civil aircraft.* Domestic or foreign aircraft operated by private individuals or corporations, or foreign government-owned aircraft operated for commercial purposes. This includes:

(1) *Contract aircraft.* Civil aircraft operated under charter or other contract to any U.S. Government department or agency.

(2) *Leased aircraft.* U.S. Government-owned aircraft delivered by the Government to a lessee subject to terms prescribed in an agreement which does not limit the lessee's use of the aircraft to Government business.

(c) *Civil aviation.* All flying activity by civil aircraft including:

(1) *Commercial aviation.* Transportation by aircraft of passengers or cargo for hire and the ferrying of aircraft as a commercial venture.

(2) *General aviation.* All types of civil aviation other than commercial aviation as defined above.

(d) *Facility.* A separately located and officially defined area of real property in which the Navy exercises a real property interest and which has been designated as a Navy or Marine Corps aviation facility by cognizant authority; or where the Department of the Navy has jurisdiction over real property agreements, expressed or implied, with foreign governments, or by rights of occupation. (This definition does not include aircraft carriers nor any other type of naval vessel with a landing area for aircraft.)

(e) *Government aircraft.* Aircraft owned or operated by any department or agency of either the United States or a foreign government (except a foreign government-owned aircraft operated for commercial purposes). Also aircraft owned by any department, agency, or political subdivision of a State, territory, or possession of the United States when such local government has sole responsibility for operating the aircraft. Government aircraft includes:

(1) *Military aircraft.* Aircraft used in the military services of any government.

(2) *Bailed aircraft.* U.S. Government-owned aircraft delivered by the Government to a Government contractor for a specific purpose directly related to a Government contract.

(3) *Loaned aircraft.* U.S. Government-owned aircraft delivered gratuitously by any Department of Defense agency to another Government agency, to a U.S. Navy or Marine Corps Flying Club, or to a U.S. Army or Air Force Aero Club.

(f) *Joint-use facility*. A Navy or Marine Corps facility where a specific agreement between the Department of the Navy and a civilian community, or between the U.S. Government and a foreign government, provides for civil aircraft use of the runways and taxiways. Civil aircraft terminal, parking, and servicing facilities are established and controlled by civil authorities in an area separate from those of the Navy or Marine Corps.

(g) *Official business*. Business, in the interest of the U.S. Government, which personnel aboard an aircraft must transact with U.S. Government organizations or personnel at or near the naval aviation facility concerned. Use of a facility to solicit U.S. Government business is not ''official business.''

(h) *Provisional use*. Use of a naval aviation facility for the purpose of providing adequate service to a community where, because of repair, construction or the performance of other work, the regular civil airport servicing the community is not available for an extended period. (An aircraft may be dispatched prior to takeoff from the airport of origin to a naval aviation facility authorized for provisional use.)

(i) *Scheduled use*. Use of a facility on a scheduled or regularly recurring basis by an air carrier certified by the Civil Aeronautics Board to provide passenger and cargo service to a community or area.

(j) *Services in connection with Government contracts*. This type of operation, cited on the Aviation Facility License, indicates the use of a facility for transporting the contractor's supplies and personnel for the performance of work at the facility under the terms of a specific U.S. Government contract.

(k) *Technical stop*. An en route landing for the purpose of obtaining fuel, oil, minor repairs, or crew rest. This does not include passenger accommodations nor passenger/cargo enplaning or deplaning privileges unless specifically authorized by the Chief of Naval Operations.

(l) *User*. An individual, corporation, or company named in the Aviation Facility License and the Certificate of Insurance.

## § 766.3 Authority.

Section 1107(a) of the Federal Aviation Act of 1958 (49 U.S.C. 1507, 1508) states that ''Air navigation facilities owned or operated by the United States may be made available for public use under such conditions and to such extent as the head of the department or other agency having jurisdiction thereof deems advisable and may by regulation prescribe.'' (See § 766.13 for restrictions imposed by the Federal Aviation Act of 1958.)

## § 766.4 Policy.

Navy and Marine Corps aviation facilities are established to support the operation of Navy and Marine Corps aircraft. Equipment, personnel and material are maintained only at a level necessitated by these requirements and shall not be used to support the operation or maintenance of civil aircraft or non U.S. Government aircraft, except as noted below. (Nothing in this part, however, should be interpreted to prohibit any aircraft from landing at any suitable Navy or Marine Corps aviation facility in case of a bona fide emergency.) (See § 766.5(i).)

(a) *General*. Subject to the procedures established elsewhere in this part, civil aircraft and government aircraft, other than those belonging to the U.S. Government may use Navy or Marine Corps facilities, if necessary, *Provided*, That:

(1) They do not interfere with military requirements, and the security of military operations, facilities, or equipment is not compromised.

(2) No adequate civil airport is available. (Exception to this provision may be made when the aircraft is operated in connection with official business as defined in this part.)

(3) Pilots comply with regulations promulgated by the cognizant military agency and the commanding officer of the facility.

(4) Civil aircraft users assume the risk in accordance with the provisions of the Aviation Facility License.

(5) Each aircraft is equipped with two-way radio which provides a capability for voice communications with the control tower on standard Navy/Marine Corps frequencies.

(6) The user, or requesting government, has obtained permission through diplomatic channels from the host country wherein the facility of intended landing is located, if applicable.

(b) *Civil Aircraft owned and operated by*—(1) *Military personnel.* Private aircraft owned and operated by active duty U.S. military personnel or by Navy/Marine Corps Reservists on inactive duty may be authorized to land at a facility, provided such aircraft is not engaging in air commerce, and such landing is for official business required by written orders. Under no conditions shall such aircraft be allowed to base or operate from a facility for personal convenience nor base at a facility under the guise of official business.

(2) *Civil employees of the U.S. Government.* Private aircraft owned and operated by civil employees of the U.S. Government may be authorized to land at a facility, provided such aircraft is not engaging in air commerce, and such landing is for official business required by written orders. Such aircraft shall not be allowed to base or operate from a facility for personal convenience. (Employees of U.S. Government contractors are not considered civil employees of the U.S. Government.)

(3) *Non-U.S. Government personnel.* An individual or corporation owned and/or operated aircraft may be authorized to land at a facility for:

(i) Sales or service representation to authorized military agents (e.g. the exchange, commissary, or contracting officer).

(ii) Services in connection with U.S. Government contracts. Contracting agency and contract number(s) must be cited in the application for an Aviation Facility License.

(c) *Department of defense charter or contract.* Aircraft operating under a Military Traffic Management and Terminal Service (MTMTS), Military Airlift Command (MAC), or Navy charter or contract for the movement of DOD passengers or cargo may be authorized to use Navy or Marine Corps aviation facilities when required for loading, en route or terminal stops.

(d) *Test and experimental use.* Aircraft being produced for a military agency under contract may use Navy/Marine Corps facilities for testing and experimental purposes, if the contract so provides, or if it is determined to be in the best interests of the U.S. Government to do so. Unless otherwise provided in the contract, an Aviation Facility License is required, and the user shall furnish a Certificate of Insurance as provided in this part.

(e) *Aircraft demonstrations.* Manufacturers of aircraft or installed equipment may be authorized to use Navy/Marine Corps facilities in demonstrating and/or showing aircraft or installed equipment to officials of the U.S. Government when:

(1) It is determined to be in the best interest of the U.S. Government.

(2) The aircraft was produced in accordance with U.S. Government specifications either with or without the aid of Federal funds.

(3) There is an expressed interest on the part of the U.S. Government officials responsible for procurement, approval, or certification of the aircraft.

(f) *Joint use.* When a specific agreement is entered into by the Department of the Navy pertaining to joint civil/military use of a Navy or Marine Corps facility, the terms of that agreement shall take precedence over the provisions of this part.

(g) *Diplomatic agreements.* For diplomatic agreements and clearances to use U.S. Navy and Marine Corps aviation facilities in foreign countries, the provisions of this part are subject to the provisions of status of forces agreements, treaties of mutual cooperation or other international agreements. This part shall be used as a guide in negotiating agreements at the local level with representatives of a foreign military service, the U.S. Embassy, and the host government concerning the use of naval facilities by other than U.S. military aircraft. Approval shall be obtained from the Chief of Naval Operations for proposed terms which are in conflict with this part.

### § 766.5 Conditions governing use of aviation facilities by civil aircraft.

(a) *Risk.* The use of Navy or Marine Corps aviation facilities by civil aircraft shall be at the risk of the operator. Except as hereinafter provided for U.S. Government contractors, the Department of the Navy shall assume no

liability or responsibility by reason of the condition of the landing area, taxiways, radio and navigational aids, or other equipment or for notification of such condition; or by the acts of its agents in connection with the granting of the right to use such naval facility. No responsibility is assumed for the security of or damage to aircraft while on property owned or controlled by the U.S. Government.

(b) *Military rules.* Operators of civil aircraft utilizing a Navy or Marine Corps aviation facility shall be required to comply with the air and ground rules promulgated by the Department of the Navy and the commanding officer of the aviation facility. Such compliance shall pertain specifically to clearance authorization for the entry, departure, or movement of aircraft within the confines of the terminal area normally controlled by the commanding officer of the aviation facility.

(c) *Federal aviation regulations.* Operators of civil aircraft shall be required to comply with all Federal Aviation Administration (FAA) rules and regulations including filing of flight plans. When such flight plans are required, they shall be filed with the commanding officer or his authorized representative prior to the departure of the aircraft. When such a flight plan is not required, a list of passengers and crew members, the airport of first intended landing, the alternate airport, and fuel supply in hours shall be placed on file prior to takeoff, with the commanding officer or with the local company representative as appropriate.

(d) *Hours of operation.* The use of a Navy/Marine Corps aviation facility by civil aircraft shall be limited to the hours when the facility is normally in operation.

(e) *Weather minimums.* Civil aircraft shall comply with weather minimums as follows:

(1) Visual Flight Operations shall be conducted in accordance with Federal Aviation Regulations (FAR), § 91.105 of this title. If more stringent visual flight rules minimums have been established for the point of departure or destination, as noted in the aerodrome remarks section of the Department of Defense Flight Information Publication (en Route) Instrument Flight Rules—Supplement, then the ceiling and visibility must be at or above these minimums in the applicable control zone.

(2) Instrument flight operations shall be conducted in accordance with FAR, § 91.116 of this title.

(f) *Inspection.* The commanding officer may conduct such inspection of a transiting civil aircraft and its crew, passengers and cargo as he may consider appropriate or necessary to the carrying out of his duties and responsibilities.

(g) *Customs, immigration, agriculture, and public health inspection.* (1) The civil aircraft commander shall be responsible for compliance with all applicable customs, immigration, agriculture, and public health laws and regulations. He shall also be responsible for paying fees, charges for overtime services, and for all other costs connected with the administration of such laws and regulations.

(2) The commanding officer of the Navy/Marine Corps aviation facility will inform the appropriate public officials of the arrival of civil aircraft subject to such laws and regulations. He will not issue clearances for a civil aircraft to takeoff until such laws and regulations have been complied with. Procedures for insuring compliance with such laws and regulations shall be as mutually agreed to by the commanding officer of the aviation facility and the local public officials.

(h) *Weather alternate.* If a Navy/Marine Corps aviation facility has been approved for use as an alternate airport, radio clearance must be obtained from such facility as soon as the decision is made en route for such use.

(i) *Emergency landings.* Any aircraft may land at a Navy/Marine Corps aviation facility when necessary as a result of a bona fide emergency. However, whenever the nature of the emergency permits the pilot to select the time and place of landing, it is preferred that the pilot land his aircraft at a civil field.

(1) The commanding officer of the aviation facility will require that the pilot of the aircraft pay all fees and charges and execute the Aviation Facility License. A statement explaining the circumstances of the emergency

landing must be noted in §766.5 of the license application. If a narrative report from the pilot is available, it may be attached to the application.

(2) *Clearance of runway*. The Department of the Navy reserves the right to use any method to clear a runway of aircraft or wreckage consistent with operational requirements. Care will be exercised to preclude unnecessary damage in removing wrecked aircraft; however, the Navy assumes no liability as a result of such removal.

(3) *Repairs*. (i) Aircraft requiring major repairs may be stored temporarily in damaged condition. If repairs cannot be completed within a reasonable time, the aircraft must be removed from the facility by the owner or operator of the aircraft without delay.

(ii) No aircraft will be given a major or minor overhaul.

(iii) Engine or air frame minor components may be furnished, when not available through commercial sources, provided such supplies can be spared and are not known to be in short supply. The issuance of such supplies must be approved by the commanding officer.

(iv) Minor components in short supply or major components for which there is a repeated demand can be furnished only on message authority obtained from the Aviation Supply Office, Philadelphia, PA (for continental facilities) or local fleet air command or major aviation supply depot (for extracontinental facilities). Complete engines, airplane wings, or other major items of equipment shall not be furnished under this authority.

(v) If the commanding officer believes it is desirable to furnish requested material or services in excess of the restrictions stated herein, he shall request instructions from the Chief of Naval Operations, giving a brief description of the material or services requested together with his recommendations.

(4) *Reimbursement for costs*. (i) The civil user making an emergency landing will be billed in accordance with paragraphs 032500–032503 of the NAVCOMPT Manual and paragraphs 25345–25363 of the NAVSUP Manual for payment of all costs incurred by the Government as a direct result of the emergency landing. Such costs will include those associated with labor, material, rental of equipment, vehicles or tools, etc., for:

(*a*) Spreading foam on runway before the aircraft attempts emergency landing.

(*b*) Fire and crash control and rescue.

(*c*) Movement and storage of aircraft or wreckage.

(*d*) Damage to runway, lights, navigation aids, etc.

(ii) There will be no charge for naval meteorological services and naval communications facilities for the handling of arrival and departure reports, air traffic control messages, position reports and safety messages.

(iii) The determination as to whether landing fees shall be charged pursuant to an emergency landing for maintenance or repair shall be the prerogative of the commanding officer of the facility.

[35 FR 14451, Sept. 15, 1970, as amended at 51 FR 22804, June 23, 1986]

### §766.6 Approving authority for landings at Navy/Marine Corps aviation facilities.

(a) Except as indicated in paragraphs (b) and (c) of this section, the commanding officer of an active Navy/Marine Corps aviation facility may approve or disapprove landings of civil aircraft at his facility when such landing is:

(1) Directly connected with or in support of U.S. Government business (except those listed in paragraph (c) of this section).

(2) In connection with U.S. Government or community interests on an infrequent basis when no adequate civil airport is reasonably available.

(3) By aircraft owned and operated by Navy/Marine Corps Flying Clubs or U.S. Army or Air Force Aero Clubs which are operated as instrumentalities of the U.S. Government.

(4) By aircraft owned and operated by U.S. Government personnel when such use is in accordance with §766.4(b) (1) and (2).

(5) By civil aircraft either owned or personally chartered by:

(i) The President or Vice President of the United States or a past President of the United States.

(ii) The head of any Federal department or agency.

(iii) A Member of Congress.

(6) By a bailed, leased, or loaned aircraft (as defined in § 766.2) when operated in connection with official business only.

(7) By aircraft owned and operated by States, counties, or municipalities of the United States when used for official business of the owner.

(b) Except as limited by paragraph (c) of this section, the Commander in Chief, U.S. Naval Forces, Europe; Chief of Naval Material; Commander in Chief, U.S. Atlantic Fleet; Commander in Chief, U.S. Pacific Fleet; Chief of Naval Air Training; Commander, Pacific Missile Range; Commander, Marine Corps Air Bases, Eastern Area; Commander, Marine Corps Air Bases, Western Area; and Commanding General, Fleet Marine Force, Pacific may approve civil aircraft use of any active aviation facility under their control. (At overseas locations, aircraft landing authorizations must be in consonance with the provisions of applicable international agreements.)

(c) The Chief of Naval Operations may approve any of the above requests, and is the only agency empowered to approve all other requests for use of naval facilities by civil and government aircraft, for example:

(1) Applications for use of more than one facility when the facilities are not under the control of one major command.

(2) Application for use of naval aviation facilities when participating in U.S. Government or Department of Defense single-manager contract and charter airlift operations; *i.e.*, Military Airlift Command (MAC) or Military Traffic Management and Terminal Service (MTMTS).

(3) Application for a facility to be used as a regular civil airfield for a community, by either commercial or general aviation.

(4) Requests for use of a facility by foreign civil or government aircraft when:

(i) Such use is not covered by an agreement between the U.S. Government and the government of the aircraft's registry, or

(ii) The facility is located in a country other than that in which the foreign aircraft is registered.

### § 766.7 How to request use of naval aviation facilities.

(a) *Forms required*. Each applicant desiring use of a Navy/Marine Corps aviation facility will be required to:

(1) Execute an application for an Aviation Facility License (OPNAV Form 3770/1 (Rev. 7–70)).

(2) Submit a Certificate of Insurance (NAVFAC 7–11011/36) showing coverage as provided by § 766.9 of this part.

(b) *Exceptions*. Exceptions to the foregoing requirements are:

(1) Aircraft owned and operated by departments or agencies of the U.S. Government for official business.

(2) Aircraft owned and operated or noncommercial purposes by agencies of a foreign government, except in cases where the foreign government charges fees for U.S. Government aircraft.

(3) Aircraft owned and operated by States, possessions, and territories of the United States and political subdivisions, thereof, when used for official business of the owner.

(4) Aircraft owned and operated by either Navy/Marine Corps Flying Clubs or Aero Clubs of other military services which are operated as instrumentalities of the U.S. Government.

(5) Bailed aircraft, provided the bailment contract specifies that the U.S. Government is the insurer for liability.

(c) *Obtaining forms*. The applicant may obtain the required forms listed in paragraph (a) of this section, from the commanding officer of any Navy or Marine Corps aviation facility or from the Chief of Naval Operations (OP–53C). Navy units may obtain the forms through regular supply channels as a Cog ''I'' item.

(d) *Preparation of forms*. (1) The license application will be completed in quadruplicate by the applicant in accordance with detailed instructions set forth in Aviation Facility License (OPNAV Form 3770/1 (REV. 7–70)).

(2) The Certificate of Insurance will be completed by the insurer. Only the signed original certificate and one copy are required to be submitted.

(e) *Submission of forms.* (1) The forms executed by the applicant shall be submitted to the commanding officer of the aviation facility concerned, except that applications requiring approval by higher authority shall be submitted to the appropriate approving authority, as indicated in paragraph (b) or (c) of this section at least 30 days prior to the first intended landing.

(2) Once the NAVFAC 7–11011/36, Certificate of Insurance, is on file with an executing authority, it is valid until insurance expiration date and may be used by that executing authority as a basis for his action on any subsequent OPNAV Forms 3770/1 submitted for approval.

(f) *Security deposit.* All applications, other than those listed in § 766.11(a) contemplating more than one landing per month, will be accompanied by a security deposit in the form of a certified check payable to the ''Treasurer of the United States'' in payment of the estimated costs of landing, hangar and outside parking fees, for 3 months in advance, calculated as provided in § 766.11 (c) and (d). Security deposits will be handled as set forth in paragraph 032102 of the NAVCOMPT Manual.

(g) *Nonexclusive use airports.* When either the Chief of Naval Operations or Commandant of the U.S. Marine Corps does not have exclusive operational control over a landing area, the aircraft operator will obtain permission to land from the appropriate civil or military authority.

### § 766.8 Procedure for review, approval, execution and distribution of aviation facility licenses.

(a) *Review of application by the commanding officer.* The commanding officer will review each application for Aviation Facility License and Certificate of Insurance received and determine whether such forms have been completed by the applicant in accordance with the instructions for their preparation as indicated in the Aviation Facility License (OPNAV Form 3770/1 (REV. 7–70)) and the Certificate of Insurance (NAVFAC 7–11011/36(7–70)). As appropriate, the commanding officer will require each applicant to furnish a security deposit as stipulated in § 766.7(f).

(b) *Processing application.* The commanding officer will approve/disapprove the application or forward it to higher authority for approval as required by § 766.6(b) or (c). If the application is approved, the approving authority will then forward all copies of the license and Certificate of Insurance to the Commander, Naval Facilities Engineering Command or his designated representative for review and execution of the license.

(c) *Action by the Commander, Naval Facilities Engineering Command or his designated representative.* (1) Upon receipt, the Commander, Naval Facilities Engineering Command, or his designated representative, will review the license and Certificate of Insurance. He shall determine whether the insurance coverage conforms to the requirements prescribed by § 766.9 of this part or to such requirements as may be promulgated from time to time by the Chief of Naval Material.

(2) Upon approval, he will then execute the license in triplicate, conform all additional copies, and make distribution as provided in paragraph (d) of this section. Applications which are not approved will be returned to the applicant with an explanation of deficiencies which must be corrected prior to execution.

(d) *Distribution.* (1) After execution of a license, distribution will be made as follows:

Original—To the licensee.
Executed copy—To the commanding officer.
Executed copy—To the Commander, Naval Facilities Engineering Command or his designated representative.
Conformed copy—To the Chief of Naval Operations (OP–53).
Conformed copy—To the cognizant commander under § 766.6(b).
Conformed copy—To the disbursing officer serving the performing activity in the case of local deposits, and to the Office of the Navy Comptroller (NAFC3) in the case of central deposits held at the Washington, DC level.
Conformed copy—To the Military Airlift Command (MAC) for DOD contract or charter airlift operations.
Conformed copy—To the Military Traffic Management and Terminal Service (MTMTS) for DOD contract or charter airlift operations.

(2) Licenses issued under this authority are to be disposed of under provisions of paragraph 4280 of SECNAVINST 5212.5B, Disposal of Navy and Marine Corps Records. In accordance therewith, official executed copies of licenses are to be retained for a period of 6 years after completion or termination of the agreement. They may be transferred to the nearest Federal records center when superseded, revoked, canceled, or expired for retention by the center until expiration of the 6-year retention period.

### § 766.9 Insurance requirements.

(a) *Control of insurance.* The Commander, Naval Facilities Engineering Command, or his designee, shall be responsible for requiring aircraft owners or operators to procure and maintain liability insurance conforming to the standards prescribed by the Chief of Naval Material. The insurance policy must be obtained at the expense of the civil aircraft owner or operator and with a company acceptable to the U.S. Navy.

(b) *Insurance coverage.* Except for those aircraft exempted by paragraph (c) below, each civil aircraft is required to be covered by insurance of the types and minimum limits established by the Chief of Naval Material. The Certificate of Insurance, must state all coverages in U.S. dollars. Current minimums are:

(1) Privately owned commercially-operated aircraft used for cargo carrying only and aircraft being flight-tested or ferried without passengers will be insured for:

(i) *Bodily injury liability.* At least $100,000 for each person in any one accident with at least $1 million for each accident.

(ii) *Property damage liability.* At least $1 million for each accident.

(2) Privately owned commercially-operated aircraft used for passenger carrying and privately owned noncommercially-operated aircraft of 12,500 pounds or more certified maximum gross takeoff weight will be insured for:

(i) *Bodily injury liability* (*excluding passengers*). At least $100,000 for each person in any one accident with at least $1 million for each accident.

(ii) *Property damage liability.* At least $1 million for each accident.

(iii) *Passenger liability.* At least $100,000 for each passenger, with a minimum for each accident determined as follows: multiply the minimum for each passenger, $100,000 by the next highest whole number resulting from taking 75 percent of the total number of passenger seats (exclusive of crew seats). For example: The minimum passenger coverage for each accident for an aircraft with 94 passenger seats is computed: $94 \times 0.75 = 70.5$—next highest whole number resulting in 71. Therefore, $71 \times \$100,000 = \$7,100,000$.

(3) Privately owned noncommercially-operated aircraft of less than 12,500 pounds will be insured for:

(i) *Bodily injury liability* (*excluding passengers*). At least $100,000 for each person in any one accident with at least $500,000 for each accident.

(ii) *Property damage liability.* At least $500,000 for each accident.

(iii) *Passenger liability.* At least $100,000 for each passenger, with a minimum for each accident determined by multiplying the minimum for each passenger, $100,000 by the total number of passenger seats (exclusive of crew seats).

(4) Aircraft insured for a single limit of liability must have coverage equal to or greater than the combined required minimums for bodily injury, property damage, and passenger liability for the type of use requested and for the passenger capacity and gross takeoff weight of the aircraft being operated. For example: the minimum single limit of liability acceptable for an aircraft operating as described in paragraph (b)(2) of this section is $1,000,000 + $1,000,000 + $7,100,000 = $9,100,000.

(5) Aircraft insured by a combination of primary and excess policies must have combined coverage equal to or greater than the required minimums for bodily injury, property damage, and passenger liability, for the type of use, and for the passenger capacity and gross takeoff weight of the aircraft.

(6) Each policy must specifically provide that:

(i) The insurer waives any right to subrogation the insurer may have against the United States by reason of

any payment under the policy for damage or injury which might arise out of or in connection with the insured's use of any Navy installation or facility.

(ii) The insurance afforded by the policy applies to the liability assumed by the insured under OPNAV Form 3770/1, Aviation Facility License.

(iii) If the insurer cancels or reduces the amount of insurance afforded under the listed policy, the insurer shall send written notice of the cancellation or reduction to Commander, Naval Facilities Engineering Command, Department of the Navy, Washington, DC 20390 by registered mail at least 30 days in advance of the effective date of the cancellation; the policy must state that any cancellation or reduction will not be effective until at least 30 days after such notice is sent, regardless of the effective date specified therein.

(iv) If the insured requests cancellation or reduction, the insurer shall notify the Commander, Naval Facilities Engineering Command, Department of the Navy, Washington, DC 20390 immediately upon receipt of such request.

(c) *Exemption*. Government aircraft, as defined in § 766.2(e) are exempt from the insurance requirements specified above. However, this exemption applies to bailed aircraft only if the contract under which the aircraft is bailed specifies that insurance is not required.

### § 766.10 Cancellation or suspension of the aviation facility license (OPNAV Form 3770/1).

(a) *Cancellation*. (1) If the user fails to comply with the terms of the Aviation Facility License (OPNAV Form 3770/1) or of any applicable regulations, all current Aviation Facility Licenses for that user will be canceled. A canceled Aviation Facility License cannot be reinstated; a new application must be submitted for approval as explained in § 766.7.

(2) If the commanding officer of a naval aviation facility has reason to believe that the use of an Aviation Facility License is not in accordance with the terms of the license he should immediately notify the Chief of Naval Operations, giving the name of the user, the Aviation Facility License number, and citing the circumstances of the misuse.

(b) *Suspension*. The approving authority, or the commanding officer of the facility, may suspend an approved Aviation Facility License when such licensed use would be inconsistent with Navy/Marine Corps or national defense interests. Whenever possible, the Department of the Navy will avoid suspension of licenses which have been issued for official business or scheduled air carrier use. In all cases, suspensions will be lifted as quickly as possible. A suspension will not have the effect of extending the expiration date of an approved Aviation Facility License.

### § 766.11 Fees for landing, parking and storage.

(a) The commanding officer of a facility will collect landing, parking, and storage fees, as applicable, from all users required to have an Aviation Facility License by § 766.7 except for the following:

(1) Government aircraft (see definition § 766.2(g)) except that foreign government aircraft will be charged fees if their government charges similar fees for U.S. Government aircraft.

(2) Aircraft being produced under a contract of the U.S. Government.

(3) Any contract aircraft (see definition § 766.2(b)(1)) or other civil aircraft which is authorized to use the facility on official business.

(4) Aircraft employed to train operators in the use of precision approach systems (GCA, ILS, et al.) provided full-stop or touch-and-go landings are not performed.

(5) Aircraft owned and operated by either Navy/Marine Corps Flying Clubs or Aero Clubs or other military services which are operated as instrumentalities of the U.S. Government.

(6) Aircraft owned and operated by military personnel on active duty (Regular and Reserve) or retired, provided the aircraft is not used for commercial purposes.

(7) Landing fees incident to emergency landings for which the landing fee has been waived by the commanding officer in accordance with § 766.5(i)(5)(i).

(b) *Fee for unauthorized landing*. If an aircraft lands at a Navy/Marine Corps aviation facility without obtaining prior permission (except for a bona fide

emergency landing), a landing fee in excess of the normal landing fee will be charged to cover the additional expenses incurred due to special handling and processing. The fee for an unauthorized landing will be as follows:

(1) For aircraft weighing less than 12,500 pounds: $100.

(2) For aircraft weighing 12,500 pounds but less than 40,000 pounds: $250.

(3) For aircraft weighing 40,000 pounds but less than 100,000 pounds: $500.

(4) For aircraft weighing above 100,000 pounds: $600.

(c) *Normal landing fee*. The normal landing fee is based on the aircraft maximum authorized gross takeoff weight, to the nearest 1,000 pounds. The maximum gross takeoff weight may be determined either from item 7F of OPNAV Form 3770/1 or from the ''Airplane Flight Manual'' carried aboard each aircraft. If the weight cannot be determined, it should be estimated.

CHARGE PER LANDING

Inside CONUS—0.20/1,000 pounds or any portion thereof with a minimum of $5.

Outside CONUS—0.30/1,000 pounds or any portion thereof with a minimum of $7.50.

(d) *Parking and storage fees*. Fixed and rotary wing aircraft parking and storage fees are based upon the gross takeoff weight of the aircraft as follows:

(1) *Outside a hangar*. Charges begin 6 hours after the aircraft lands. The rate is 10 cents per thousand pounds for each 24-hour period or fraction thereof, with a minimum charge of $1.50 per aircraft.

(2) *Inside a hangar*. Charges begin as soon as the aircraft is placed inside the hangar. The rate is 20 cents per 1,000 pounds for each 24-hour period or fraction thereof, with a minimum charge of $5 per aircraft.

(e) *Reimbursement*. Collections incident to direct (out of pocket) costs will be credited to local operating and maintenance funds. All other collections, such as for landing, parking, and storage fees will be credited to Navy General Fund Receipt Account 172426. Accumulation of costs and preparation of billing documents are prescribed in paragraphs 032500–032503 of the NAVCOMPT Manual.

## § 766.12 Unauthorized landings.

An aircraft that lands at a Navy/Marine Corps aviation facility without obtaining prior permission from an approving authority, except in a bona fide emergency, is in violation of this part. Civil aircraft landing in violation of this regulation will have to pay the fee prescribed in § 766.11(b). In those cases where an unauthorized landing is made at a facility within a Naval Defense Area, proclaimed as such by Executive order of the President, civil aircraft may be impounded and the operator prosecuted as indicated in OPNAVINST 5500.11C of November 12, 1963. In any event, before the aircraft is authorized to depart, the commanding officer of the facility will:

(a) Inform the aircraft operator of the provisions of this part and the OP NAVINST 5500.11C of November 12, 1963, if applicable.

(b) Require the aircraft operator (or owner), before takeoff, to pay all fees and charges and to comply with the following procedure:

(1) Execute OPNAV Form 3770/1, explaining in item 6 of that form the reason for the landing.

(2) In lieu of submitting a Certificate of Insurance (NAVFAC 7–11011/36), the insurer must furnish evidence of sufficient insurance to include waiver of any right of subrogation against the United States, and that such insurance applies to the liability assumed by the insured under OPNAV Form 3770/1.

(3) When it appears that the violation may have been deliberate, or is a repeated violation, departure authorization must be obtained from the Chief of Naval Operations.

(4) Waiver of the requirements in paragraphs (b)(1) and (2) of this section may be obtained from the Chief of Naval Operations to expedite removal of these aircraft when such waiver is considered appropriate.

[35 FR 14451, Sept. 15, 1970, as amended at 51 FR 22804, June 23, 1986]

## § 766.13 Sale of aviation fuel, oil, services and supplies.

(a) *General policy*. In accordance with sections 1107 and 1108 of the Federal Aviation Act of 1958 (72 Stat. 798 as amended, 49 U.S.C. 1507, 1508), Navy/

Marine Corps Aviation fuel, oil, services, and supplies are not sold to civil aircraft in competition with private enterprise. Sections 1107 and 1108 of Federal Aviation Act of 1958 (72 Stat. 798 as amended, 49 U.S.C. 1507, 1508), however, does authorize the sales of fuel, oil, equipment, supplies, mechanical service, and other assistance by reason of an emergency. Such sales will be made only where there is no commercial source and only in the amount necessary for the aircraft to continue on its course to the nearest airport operated by private enterprise.

(b) *Contract aircraft.* The sale of aviation fuel, oil, supplies, etc. to aircraft under U.S. Government contract or charter is permitted at, and limited to, points where passengers or cargo are loaded into or discharged from the aircraft under terms of the contract or charter. Sales are not authorized at naval aviation facilities where commercial supplies and service are available.

# PART 767—GUIDELINES FOR PERMITTING ARCHAEOLOGICAL INVESTIGATIONS AND OTHER ACTIVITIES DIRECTED AT SUNKEN MILITARY CRAFT AND TERRESTRIAL MILITARY CRAFT UNDER THE JURISDICTION OF THE DEPARTMENT OF THE NAVY

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767.27 References.

AUTHORITY: 10 U.S.C. 113 note; Pub. L. 108–375, Title XIV, sections 1401 to 1408, Oct. 28, 2004, 118 Stat. 2094; 5 U.S.C. 301; 16 U.S.C. 470.

SOURCE: 80 FR 52594, Aug. 31, 2015, unless otherwise noted.

## Subpart A—Regulations and Obligations

### § 767.1 Purpose.

The purpose of this part is:

(a) To assist the Secretary in managing sunken military craft under the jurisdiction of the Department of the Navy (DON) pursuant to the Sunken Military Craft Act (SMCA), 10 U.S.C. 113 note; Public Law 108–375, Title XIV, sections 1401 to 1408, Oct. 28, 2004, 118 Stat. 2094.

(b) To establish the procedural rules for the issuance of permits authorizing persons to engage in activities directed at sunken military craft and terrestrial military craft under the jurisdiction of the DON for archaeological, historical, or educational purposes, when the proposed activities may disturb, remove, or injure the sunken military craft or terrestrial military craft.

(c) To set forth the procedures governing administrative proceedings for assessment of civil penalties or liability damages in the case of a sunken military craft permit violation or violation of section 1402 of the SMCA.

**§ 767.2 [Reserved]**

**§ 767.3 Definitions.**

*Agency* means the Department of the Navy.

*Artifact* means any portion of a sunken military craft or terrestrial military craft that by itself or through its relationship to another object or assemblage of objects, regardless of age, whether in situ or not, may carry archaeological or historical data that yields or is likely to yield information that contributes to the understanding of culture or human history.

*Associated Contents* means:

(1) The equipment, cargo, and contents of a sunken military craft or terrestrial military craft that are within its debris field; and

(2) The remains and personal effects of the crew and passengers of a sunken military craft or terrestrial military craft that are within its debris field.

*Debris field* means an area, whether contiguous or non-contiguous, that consists of portions of one or more sunken military craft or terrestrial military craft and associated artifacts distributed due to, or as a consequence of, a wrecking event and post-depositional site formation processes.

*Directed at* means an intentional or negligent act that disturbs, removes, or injures a craft that the person knew or should have known to be a sunken military craft.

*Disturb* or *disturbance* means to affect the physical condition of any portion of a sunken military craft or terrestrial military craft, alter the position or arrangement of any portion of a sunken military craft or terrestrial military craft, or influence the wrecksite or its immediate environment in such a way that any portion of a craft's physical condition is affected or its position or arrangement is altered.

*Historic in the case of a sunken military craft or a terrestrial military craft* means fifty (50) years have elapsed since the date of its loss and/or the craft is listed on, eligible for, or potentially eligible for listing on the National Register of Historic Places.

*Injure* or *injury* means to inflict physical damage on or impair the soundness of any portion of a sunken military craft or terrestrial military craft.

*Permit holder* means any person authorized and given the right by the Naval History and Heritage Command (NHHC) to conduct activities authorized under these regulations.

*Permitted activity* means any activity that is authorized by the NHHC under the regulations in this part.

*Person* means an individual, corporation, partnership, trust, institution, association; or any other private entity, or any officer, employee, agent, instrumentality, or political subdivision of the United States.

*Possession* or *in possession of* means having physical custody or control over any portion of a sunken military craft or terrestrial military craft.

*Remove* or *removal* means to move or relocate any portion of a sunken military craft or terrestrial military craft by lifting, pulling, pushing, detaching, extracting, or taking away or off.

*Respondent* means a vessel or person subject to a civil penalty, enforcement costs and/or liability for damages based on an alleged violation of this part or a permit issued under this part.

*Secretary* means the Secretary of the Navy or his or her designee. The Director of the NHHC is the Secretary's designee for DON sunken military craft and terrestrial military craft management and policy; the permitting of activities that disturb, remove, or injure DON sunken military craft and terrestrial military craft; the permitting of activities that disturb, remove, or injure sunken military craft of other departments, agencies or sovereigns incorporated into the DON permitting program; the initiation of enforcement actions; and, assessment of civil penalties or liability for damages. The Secretary's designee for appeals of Notices of Violations is the Defense Office of Hearings and Appeals (DOHA).

*Secretary concerned* means:

(1) The Secretary of a military department;

(2) In the case of a Coast Guard sunken military craft, the Secretary of the Department in which the Coast Guard is operating.

*Sunken military craft* means all or any portion of:

(1) Any sunken warship, naval auxiliary, or other vessel that was owned or operated by a government on military noncommercial service when it sank;

(2) Any sunken military aircraft or military spacecraft that was owned or operated by a government when it sank;

(3) The associated contents of a craft referred to in paragraph (1) or (2) of this definition;

(4) Any craft referred to in paragraph (1) or (2) of this definition which may now be on land or in water, if title thereto has not been abandoned or transferred by the government concerned.

*Sunken Military Craft Act* refers to the provisions of 10 U.S.C. 113 note; Public Law 108–375, Title XIV, sections 1401 to 1408, Oct. 28, 2004, 118 Stat. 2094.

*Terrestrial military craft* means the physical remains of all or any portion of a historic ship, aircraft, spacecraft, or other craft, intact or otherwise, manned or unmanned, along with all associated contents, located on land and under the jurisdiction of the DON. Terrestrial military craft sites are distinguished from sunken military craft by never having sunk in a body of water.

*United States Contiguous Zone* means the contiguous zone of the United States declared by Presidential Proclamation 7219, dated September 2, 1999. Accordingly, the contiguous zone of the United States extends to 24 nautical miles from the baselines of the United States determined in accordance with international law, but in no case within the territorial sea of another nation.

*United States internal waters* means all waters of the United States on the landward side of the baseline from which the breadth of the United States territorial sea is measured.

*United States sunken military craft* means all or any portion of a sunken military craft owned or operated by the United States.

*United States territorial sea* means the waters of the United States territorial sea claimed by and described in Presidential Proclamation 5928, dated December 27, 1988. Accordingly, the territorial sea of the United States extends to 12 nautical miles from the baselines of the United States determined in accordance with international law.

*United States waters* means United States internal waters, the United States territorial sea, and the United States contiguous zone.

*Wrecksite* means the location of a sunken military craft or terrestrial military craft. The craft may be intact, scattered or completely deteriorated, and may presently be on land or in water. The wrecksite includes any physical remains of the craft and all associated contents.

### § 767.4 Prohibited acts.

(a) *Unauthorized activities directed at sunken military craft or terrestrial military craft.* No person shall engage in or attempt to engage in any activity directed at a sunken military craft or terrestrial military craft that disturbs, removes, or injures any sunken military craft or terrestrial military craft, except:

(1) As authorized by a permit issued pursuant to these regulations;

(2) As otherwise authorized by these regulations; or

(3) As otherwise authorized by law.

(b) *Possession of sunken military craft or terrestrial military craft.* No person may possess, disturb, remove, or injure any sunken military craft or terrestrial military craft in violation, where applicable, of:

(1) Section 1402 of the SMCA; or

(2) Any regulation set forth in this part or any permit issued under it; or

(3) Any prohibition, rule, regulation, ordinance, or permit that applies under any other applicable law.

(c) *Limitations on application.* Prohibitions in section 1402 of the SMCA shall not apply to:

(1) Actions taken by, or at the direction of, the United States.

(2) Any action by a person who is not a citizen, national, or resident alien of the United States, except in accordance with:

(i) Generally recognized principles of international law;

(ii) An agreement between the United States and the foreign country of which the person is a citizen;

(iii) In the case of an individual who is a crew member or other individual on a foreign vessel or foreign aircraft,

an agreement between the United States and the flag State of the foreign vessel or aircraft that applies to the individual.

**§ 767.5 Policy.**

(a) As stewards of the DON's sunken military craft and terrestrial military craft, the NHHC is responsible for managing these irreplaceable resources for the continued education and appreciation of present and future generations. To ensure consistent and effective stewardship, the NHHC has developed a comprehensive program that encompasses the following aspects: Preservation planning; wrecksite management; archaeological research; conservation and curation; and public information, interpretation, and education. The NHHC strongly encourages cooperation with other Department of Defense commands, Federal and State agencies, educational institutions, and individuals interested in preserving DON's maritime and aviation heritage.

(b) Subject to operational requirements, sunken military craft and terrestrial military craft will generally be managed in place unless wrecksite disturbance, recovery, or injury is justified and necessary to protect the craft or the environment, to address matters pertaining to human remains or public safety, to mitigate adverse effects, to conduct research, or to provide for public education. While the NHHC prefers non-intrusive in situ research on sunken military craft and terrestrial military craft, it recognizes that wrecksite disturbance, removal, or injury may become necessary or appropriate. At such times, wrecksite disturbance, removal, or injury may be permitted by the NHHC with respect to DON sunken military craft for archaeological, historical, or educational purposes, subject to conditions set forth in accordance with these regulations. Historic shipwrecks under the jurisdiction of the DON that do not qualify as sunken military craft are to be provided the same consideration and treatment as terrestrial military craft.

(c) In addition to managing historic sunken military craft and terrestrial military craft, the NHHC will serve as the permitting authority for the disturbance of non-historic DON sunken military craft. Permit applications will only be issued in instances where there is a clear demonstrable benefit to the DON, and only special use permits can be issued in the case of non-historic sunken military craft. In such instances, prior to issuing a special use permit, the NHHC will consult with appropriate DON offices within affected commands or offices, including, but not limited to, the Naval Sea Systems Command, Naval Air Systems Command, Space and Naval Warfare Systems Command, Naval Supply Systems Command, Naval Facilities Engineering Command, Navy Personnel Command, Military Sealift Command, Supervisor of Salvage and Diving, Office of the Judge Advocate General of the Navy, the Office of the Chief of Naval Operations, or other interested offices.

(d) The NHHC will serve as the permitting authority for disturbance of those foreign state sunken military craft located in U.S. waters addressed in § 767.15. The NHHC, in consultation with the Department of State as appropriate, will make a reasonable effort to inform the applicable agency of a foreign state of the discovery or significant changes to the condition of its sunken military craft upon becoming aware of such information. The NHHC will also serve as the permitting authority for disturbance of those sunken military craft of another military department, or the Department in which the Coast Guard is operating, that have been incorporated into the DON permitting program in accordance with § 767.15(e).

(e) The DON recognizes that, in accordance with section 1402(a)(3) of the Act and other statutes, certain federal agencies have statutory authority to conduct and permit specific activities directed at DON sunken military craft and terrestrial military craft. The NHHC will coordinate, consult, and enter into interagency agreements with those federal agencies to ensure effective management of DON sunken military craft and terrestrial military craft and compliance with applicable law.

(f) Where appropriate, the NHHC will coordinate, consult, and enter into agreements with the appropriate State Historic Preservation Office (SHPO), or

state land or resource manager, to ensure effective management of DON sunken military craft and terrestrial military craft and compliance with applicable law.

(g) Notwithstanding any other section of this part, no act by the owner of a vessel, or authorized agent of the owner of a vessel, under a time charter, voyage charter, or demise charter to the DON and operated on military service at the time of its sinking, provided that the sunken military craft is not considered historic as determined by the NHHC, shall be prohibited by, nor require a permit under, the SMCA or these regulations. This paragraph (g) shall not be construed to otherwise affect any right or remedy of the United States existing at law, in equity, or otherwise, in regard to any such sunken military craft, in regard to cargo owned by the United States on board or associated with any such craft, or in regard to other property or contents owned by the United States on board or associated with any such sunken military craft.

(h) The NHHC reserves the right to deny an applicant a permit if the proposed activity does not meet the permit application requirements; is inconsistent with DON policy or interests; does not serve the best interests of the sunken military craft or terrestrial military craft in question; in the case of foreign sunken military craft, is inconsistent with the desires of a foreign sovereign; is inconsistent with an existing resource management plan; is directed towards a sunken military craft or terrestrial military craft upon which other activities are being considered or have been authorized; will be undertaken in such a manner as will not permit the applicant to meet final report requirements; raises professional ethical conduct concerns or concerns over commercial exploitation; raises concerns over national security, foreign policy, environmental or ordnance issues; or out of respect for any human remains that may be associated with a wrecksite. The NHHC also reserves the right to deny an applicant a permit if the applicant has not fulfilled requirements of permits previously issued by the NHHC to the applicant.

## Subpart B—Permit Requirements

### §767.6 Historic sunken military craft and terrestrial military craft permit application.

(a) Any person seeking to engage in an activity otherwise prohibited by section 1402 of the SMCA with respect to a historic sunken military craft or any activity that might affect a terrestrial military craft under the jurisdiction of the DON shall apply for a permit for the proposed activity and shall not begin the proposed activity until a permit has been issued. The Secretary or his designee may issue a permit to any qualified person, in accordance with these regulations, subject to appropriate terms and conditions.

(b) To request a permit application form, please write to: Department of the Navy, U.S. Naval History and Heritage Command, Underwater Archaeology Branch, 805 Kidder Breese St. SE., Washington Navy Yard, Washington, DC 20374–5060. Application forms and guidelines can also be found on the NHHC's Web site at: *www.history.navy.mil*.

(c) Each applicant must submit a digital (electronic) and two printed copies of their complete application at least 120 days in advance of the requested effective date to allow sufficient time for evaluation and processing. Completed applications should be sent to the Department of the Navy, U.S. Naval History and Heritage Command, Underwater Archaeology Branch, 805 Kidder Breese St. SE., Washington Navy Yard, Washington, DC 20374–5060.

(d) Each permit application shall include:

(1) A statement of research objectives, scientific methods, and significance of the proposed work to the U.S. Navy or the nation's maritime cultural heritage. This should include discussion articulating clearly the archaeological, historical, or educational purposes of the proposed activity;

(2) A summary of significant previous work in the area of interest;

(3) A discussion of how the proposed activity could disturb, remove, or injure the sunken military craft or the terrestrial military craft and the related physical environment;

(4) A discussion of the methodology planned to accomplish the project's objectives. This should include a map showing the study location(s) and a description of the wrecksite(s) of particular interest;

(5) An analysis of the extent and nature of potential environmental impacts from permitted activities and feasible mitigation measures that could reduce, avoid, or reverse environmental impacts, as well as any associated permits or authorizations required by foreign, federal, state, or local law;

(6) A detailed plan for wrecksite restoration and remediation with recommendations on wrecksite preservation and protection of the wrecksite location;

(7) In addition to identification and qualifications of the principal investigator, required by § 767.8, identification of all other members of the research team and their qualifications. Changes to the primary research team subsequent to the issuance of a permit must be authorized via a permit amendment request in accordance with § 767.10(a);

(8) A proposed budget, identification of funding source, and sufficient data to substantiate, to the satisfaction of the NHHC, the applicant's financial capability to complete the proposed research and, if applicable, any conservation and curation costs associated with or resulting from that activity;

(9) A proposed plan for the public interpretation and professional dissemination of the proposed activity's results;

(10) Where the application is for the excavation and/or removal of artifacts from a sunken military craft or terrestrial military craft, or for the excavation and/or removal of a sunken military craft or terrestrial military craft in its entirety, the following must be included:

(i) A conservation plan, estimated cost, and the name of the university, museum, laboratory, or other scientific or educational institution in which the material will be conserved, including written certification, signed by an authorized official of the institution, of willingness to assume conservation responsibilities.

(ii) A plan for applicable post-fieldwork artifact analysis, including an associated timetable.

(iii) The name of the facility in which the recovered materials and copies of associated records derived from the work will be curated. This will include written certification, signed by an authorized official of the institution, of willingness to assume curatorial responsibilities for the collection. The named repository must, at a minimum, meet the standards set forth in 36 CFR part 79, Curation of Federally-Owned and Administered Archaeological Collections, in accordance with § 767.9(h).

(iv) Acknowledgement that the applicant is responsible for all conservation-related and long-term curation costs, unless otherwise agreed upon by NHHC.

(11) A proposed project timetable to incorporate all phases of the project through to the final report and/or any other project-related activities.

(e) If the applicant believes that compliance with one or more of the factors, criteria, or procedures in the regulations contained in this part is not practicable, the applicant should set forth why and explain how the purposes of the SMCA (if applicable), these regulations, and the policies of the DON are better served without compliance with the specified requirements. If the NHHC believes that the policies of the DON are better served without compliance with one or more of the factors, criteria, or procedures in the regulations, or determines that there is merit in an applicant's request and that full compliance is not required to meet these priorities, the NHHC will provide a written waiver to the applicant stipulating which factors, criteria, or procedures may be foregone or amended. In exceptional circumstances, verbal permission may be obtained in cases of unexpected or emergent finds that may require immediate unanticipated disturbance, removal, or injury of a sunken or terrestrial military craft or its associated contents. However, the NHHC will not waive statutory procedures or requirements.

(f) Persons carrying out official NHHC duties under the direction of the NHHC Director, or his/her designee, or conducting activities at the direction

of or in coordination with the NHHC as recognized through express written permission by the NHHC Director, or his/her designee, need not follow the permit application procedures set forth in this section and §§ 767.7 and 767.9 to 767.12 if those duties or activities are associated with the management of sunken military craft or terrestrial military craft. Where appropriate, such persons will coordinate with Federal Land Managers, the Bureau of Ocean Energy Management, State Historic Preservation Offices, or state land or resource managers, as applicable, prior to engaging in the aforementioned activities. The NHHC Director, or his/her designee, shall ensure that the provisions of paragraph (d) of this section and §§ 767.8 and 767.11 have been met by other documented means and that such documents and all resulting data will be archived within the NHHC.

(g) Federal agencies carrying out activities that disturb, remove, or injure sunken military craft or terrestrial military craft need not follow the permit application procedures set forth in this section and §§ 767.7 and 767.9 to 767.12 if those activities are associated with the management of sunken military craft or terrestrial military craft within their areas of responsibility. Where appropriate, Federal agencies will coordinate with the NHHC prior to engaging in the aforementioned activities.

### § 767.7 Evaluation of permit application.

(a) Permit applications are reviewed for completeness, compliance with program policies, and adherence to the regulations of this subpart. Incomplete applications will be returned to the applicant for clarification. Complete applications are reviewed by NHHC personnel who, when appropriate, may seek outside guidance or peer reviews. In addition to the criteria set forth in §§ 767.6(d) and 767.8, applications are also judged on the basis of: Project objectives being consistent with DON policy and the near- and long-term interests of the DON; relevance or importance of the proposed project; archaeological, historical, or educational purposes achieved; appropriateness and environmental consequences of technical approach; conservation and long-term management plan; qualifications of the applicants relative to the type and scope of the work proposed; and funding to carry out proposed activities. The NHHC will also take into consideration the historic, cultural, or other concerns of a foreign state when considering an application to disturb a foreign sunken military craft of that state located within U.S. waters, subsequent to an understanding or agreement with the foreign state in accordance with § 767.15. The same consideration may be applied to U.S. sunken military craft that are brought under the jurisdiction of the DON for permitting purposes following an agreement with the Secretary of any military department, or in the case of the Coast Guard, the Secretary of the Department in which the Coast Guard is operating, as set forth in § 767.15(e).

(b) Prior to issuing a permit, the NHHC will consult with the appropriate federal resource manager when it receives applications for research at wrecksites located in areas that include units of the National Park System, National Wildlife Refuge System, National Marine Sanctuary System, Marine National Monuments, within lease blocks managed by the Bureau of Ocean Energy Management, or within areas of responsibility of other Federal Land Managers.

(c) Prior to issuing a permit, the NHHC will consult with the appropriate SHPO, state land or resource manager or Tribal Historic Preservation Office (THPO) when it receives applications for research at wrecksites located on state lands, including lands beneath navigable waters as defined in the Submerged Lands Act, 43 U.S.C. 1301–1315, or tribal lands.

(d) The applicant is responsible for obtaining any and all additional permits or authorizations, such as but not limited to those issued by another federal or state agency, or foreign government. In the case of U.S. sunken military craft or terrestrial military craft located within foreign jurisdictions, the NHHC may review and issue a conditional permit authorizing activities upon receipt of the appropriate permits and authorizations of the applicable foreign government by the applicant.

The applicant must file a copy of the foreign government authorization with the NHHC when submitting the preliminary report stipulated in § 767.9(d) and final report stipulated in § 767.9(f). Failure to do so will be considered a permit violation.

(e) Based on the findings of the NHHC evaluation, NHHC personnel will recommend an appropriate action to the NHHC Deputy Director. If approved, the NHHC Deputy Director, or his or her designee, will issue the permit; if denied, applicants are notified of the reason for denial and may request reconsideration within 30 days of receipt of the denial. Requests for reconsideration must be submitted in writing to: Director of Naval History, Naval History and Heritage Command, 805 Kidder Breese St. SE., Washington Navy Yard, Washington, DC 20374–5060.

### § 767.8 Credentials of principal investigator.

The principal investigator shall be suitably qualified as evidenced by training, education, and/or experience, and possess demonstrable competence in archaeological theory and method, and in collecting, handling, analyzing, evaluating, and reporting archaeological data, relative to the type and scope of the work proposed. A resume or curriculum vitae detailing the professional qualifications of the principal investigator must be submitted with the permit application. Additionally, the principal investigator will be required to attest that all persons on the project team shall be qualified and have demonstrated competence appropriate to their roles in the proposed activity. The principal investigator must, at a minimum, meet the following requirements:

(a) The minimum professional qualification standards for archaeology as determined by the Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation.

(b) At least one year of full-time professional supervisory experience in the archaeological study of historic maritime resources or historic aviation resources. This experience requirement may concurrently account for certain stipulations of paragraph (a) of this section.

(c) The demonstrated ability to plan, equip, fund, staff, organize, and supervise the type and scope of activity proposed.

(d) If applicable, the demonstrated ability to submit post-operational archaeological or other technical reports in a timely manner.

### § 767.9 Conditions of permits.

(a) Permits are valid for one year from the date of issue.

(b) Upon receipt of a permit, permit holders shall counter-sign the permit and return copies to the NHHC and the appropriate SHPO, state land or resource manager, THPO, or foreign government official, if applicable, prior to conducting permitted activities on the wrecksite. When the sunken military craft or terrestrial military craft is located within federal areas such as a unit of the National Park System, the National Wildlife Refuge System, the National Marine Sanctuary System, or Marine National Monuments, the permit holder shall provide copies of countersigned permits to the applicable federal resource manager. Upon the NHHC confirming receipt of the counter-signed permit, the permitted activities may commence, provided that any other federal or state regulatory and permitting requirements that apply are met.

(c) Permits shall be carried on-site and made available upon request for inspection by federal or state law enforcement officials. Permits are non-transferable. The permit holder, or the activity's authorized principal investigator in the case where a permit holder is not concurrently the authorized principal investigator, is expected to remain on-site for the duration of operations prescribed in the permit. In the event a permit holder or the authorized principal investigator is unable to directly oversee operations, the permit holder must nominate a suitable qualified representative who may only serve in that function upon written approval by the NHHC.

(d) Permit holders must abide by all provisions set forth in the permit as well as applicable state or federal regulations. Permit holders must abide by applicable regulations of a foreign government for activities directed at a

sunken military craft when the sunken military craft is located in the internal waters, territorial sea, contiguous zone, or continental shelf of a foreign State, as defined by customary international law reflected in the United Nations Convention on the Law of the Sea. If the physical environment is to be impacted by the permitted activity, the permit holder will be expected to meet any associated permit or authorization stipulations required by foreign, federal, state, or local law, as well as apply mitigation measures to limit such impacts and where feasible return the physical environment to the condition that existed before the activity occurred.

(e) At least 30 days prior to the expiration of the original permit, the permit holder shall submit to the NHHC a preliminary report that includes a working log and, where applicable, a diving log, listing days spent conducting field research, activities pursued, working area locations including precise coordinates, an inventory of artifacts observed or recovered, and preliminary results and conclusions. The NHHC shall review preliminary reports for thoroughness, accuracy, and quality and shall inform the permit holder of their formal acceptance in writing.

(f) In the case of one or more permit extensions received through the process identified in §767.10(b), a preliminary report that includes all the information stated in paragraph (e) of this section is to be submitted by the permit holder annually at least 30 days prior to the renewed permit's expiration date.

(g) The permit holder shall prepare and submit a final report as detailed in §767.11, summarizing the results of the permitted activity to the NHHC, and any applicable SHPO, THPO, federal or state land or resource manager, or foreign government official within an appropriate time frame as specified in the permit. Failure to submit a final report within the specified time-frame will be considered a permit violation. If the final report is not due to be submitted within two years of commencement of a permitted activity, interim reports must be filed biennially, with the first interim report submitted within two years of commencement of the activity. The interim report must include information required by §767.11 to the maximum extent possible, and an account of both the progress that has been achieved and the objectives remaining to be accomplished. The NHHC shall review interim and final reports for thoroughness, accuracy, and quality and shall inform the permit holder of their formal acceptance in writing.

(h) The permit holder shall agree to protect all sensitive information regarding the location and character of a wrecksite that could potentially expose it to non-professional recovery techniques, looters, or unauthorized salvage. Sensitive information includes specific location data and information about the cargo of a sunken military craft or terrestrial military craft, the existence of armaments, munitions and other hazardous materials, or the presence of, or potential presence of, human remains.

(i) All recovered DON sunken military craft, terrestrial military craft, and their associated contents, remain the property of the United States. These resources and copies of associated archaeological records and data must be preserved by a suitable university, museum, or other scientific or educational institution that, at a minimum, meets the standards set forth in 36 CFR part 79, Curation of Federally-Owned and Administered Archaeological Collections, at the expense of the applicant or facility, unless otherwise agreed upon in writing by the NHHC. The curatorial facility must establish a loan of resources agreement with the NHHC and maintain it in good standing. If a loan of resources agreement is not established, or at the discretion of the NHHC, resources are to be managed, conserved and curated directly by the NHHC at the expense of the applicant, unless otherwise agreed upon in writing by the NHHC. Copies of associated archaeological and conservation records and data will be made available to the NHHC, and to the applicable SHPO, THPO, the federal or state land or resource manager, or foreign government official upon request.

(j) The disposition of foreign sunken military craft or associated contents shall be determined on a case-by-case

basis in coordination with the respective foreign state prior to the issuance of a NHHC permit.

(k) In the event that credible evidence for or actual human remains, unexploded ordnance, hazardous materials or environmental pollutants such as oil are discovered during the course of research, the permit holder shall cease all work and immediately notify the NHHC. Permitted work may not resume until authorized by the NHHC.

(l) The permittee shall purchase and maintain sufficient comprehensive general liability, and such other types of insurance, in an amount consistent with generally accepted industry standards throughout the period covered by the permit, or post an equivalent bond. Such insurance shall cover against any third party claims arising out of activities conducted under the permit. The permittee must further agree to hold the United States harmless against such claims.

### § 767.10 Requests for amendments or extensions of active permits.

(a) Requests for amendments to active permits (e.g., a change in study design or research personnel) must conform to the regulations in this part. All information deemed necessary by the NHHC to make an objective evaluation of the amendment must be included as well as reference to the original application. Requests for amendments must be sent to the Deputy Director, Naval History and Heritage Command, 805 Kidder Breese St. SE., Washington Navy Yard, Washington DC 20374–5060. A pending amendment request does not guarantee approval and proposed activities cannot commence until approval is granted. All requests for permit amendments must be submitted during the period within which an existing permit is active and at least 30 days prior to the desired effect date of the amendment. Time-sensitive or non-substantive amendments must be submitted in writing to the point of contact included in the permit and will be considered and expedited on a case-by-case basis.

(b) Permit holders desiring to continue research activities beyond the original permit expiration date must apply for an extension of a valid permit prior to its expiration. A pending extension request does not guarantee an extension of the original permit. All requests for a permit extension must be sent to the Deputy Director, Naval History and Heritage Command, 805 Kidder Breese St. SE., Washington Navy Yard, Washington, DC 20374–5060, at least 30 days prior to the original permit's expiration date. Reference to the original application may be given in lieu of a new application, provided the scope of work does not change significantly. Applicants may apply for one-year extensions subject to annual review.

(c) Permit holders may appeal denied requests for amendments or extensions to the appeal authority listed in § 767.7(e).

### § 767.11 Content of permit holder's final report.

The permit holder's final report shall at minimum include the following:

(a) A wrecksite history and a contextual history relating the wrecksite to the general history of the region;

(b) A master wrecksite map;

(c) Feature map(s) of any recovered artifacts showing their positions within the wrecksite;

(d) Where environmental conditions allow, photographs of significant wrecksite features and significant artifacts both in situ and after removal;

(e) If applicable, a section that includes an inventory of recovered artifacts, description of conserved artifacts, laboratory conservation records, documentation of analyses undertaken, photographs of recovered artifacts before and after conservation treatment, and recommended curation conditions;

(f) A written report describing the wrecksite's discovery, environment, past and current archaeological fieldwork, results, and analysis;

(g) A summary of the survey and/or excavation process including methods and techniques employed, an account of operational phases, copies of applicable logs, as well as thorough analysis of the recovered data;

(h) An evaluation of the completed permitted activity that includes an assessment of the project's degree of success compared to the goals specified in the permit application;

(i) Recommendations for future activities, if applicable;

(j) An account of how the public interpretation or dissemination plan described in the permit application has been or is being carried out. Additionally, identification of any sensitive information as detailed in § 767.9(g).

**§ 767.12 Special use permit application.**

(a) Any person proposing to engage in an activity to document a sunken military craft utilizing diving methods or remotely-operated or autonomously-operated equipment, or collect data or samples from a wrecksite, whether a sunken military craft or terrestrial military craft, that would result in the wrecksite's disturbance but otherwise be minimally intrusive, may apply for a special use permit. Any person proposing to engage in an activity that would disturb, remove, or injure a non-historic sunken military craft must apply for a special use permit.

(b) To request a special use permit application form, please refer to § 767.6(b) and (c). Special use permit applications must be sent to the Department of the Navy, U.S. Naval History and Heritage Command, Underwater Archaeology Branch, 805 Kidder Breese St. SE., Washington Navy Yard, Washington, DC 20374–5060.

(c) Each special use permit application shall include:

(1) A statement of the project's objectives and an explanation on how they would serve the NHHC's objectives stated in § 767.5;

(2) A discussion of the methodology planned to accomplish the project's objectives. This should include a map showing the study location(s) and a description of the wrecksite(s) of particular interest;

(3) An analysis of the extent and nature of potential direct or indirect impacts on the resources and their surrounding environment from permitted activities, as well as any proposed mitigation measures;

(4) Where appropriate, a plan for wrecksite restoration and remediation with recommendations on wrecksite preservation and protection of the wrecksite location;

(d) The NHHC Deputy Director, or his or her designee, may authorize a special use permit under the following conditions:

(1) The proposed activity is compatible with the NHHC policies and in the case of non-historic sunken military craft is not opposed by consulted DON parties;

(2) The activities carried out under the permit are conducted in a manner that is minimally intrusive and does not purposefully significantly disturb, remove or injure the sunken military craft or wrecksite;

(3) When applicable, the pilot(s) of remotely-operated equipment holds a certificate of operation from a nationally-recognized organization;

(4) The principal investigator must hold a graduate degree in archaeology, anthropology, maritime history, oceanography, marine biology, marine geology, other marine science, closely related field, or possess equivalent training and experience. This requirement may be waived by the NHHC on a case by case basis depending on the activity stipulated in the application.

(e) The permittee shall submit the following information subsequent to the conclusion of the permitted activity within an appropriate time frame as specified in the special use permit:

(1) A summary of the activities undertaken that includes an assessment of the goals specified in the permit application;

(2) Identification of any sensitive information as detailed in § 767.9(h);

(3) Complete and unedited copies of any and all documentation and data collected (photographs, video, remote sensing data, etc.) during the permitted activity and results of any subsequent analyses.

(f) The following additional sections of this subpart shall apply to special use permits: §§ 767.7(e); 767.9(a), (b), (c), (e), (f), (g), (h), (k), and (l); 767.10; 767.13; 767.14; and 767.15(c).

(g) All sections of subpart A of this part shall apply to all special use permits, and all sections of subpart C of this part shall apply to special use permits pertaining to sunken military craft.

(h) Unless stipulated in the special use permit, the recovery of artifacts

associated with any wrecksite is prohibited.

### § 767.13 Monitoring of performance.

Permitted activities will be monitored to ensure compliance with the conditions of the permit. In addition to remotely monitoring operations, NHHC personnel, or other designated authorities, may periodically assess work in progress through on-site monitoring at the location of the permitted activity. The discovery of any potential irregularities in performance under the permit by NHHC on-site personnel, other designated authorities, or the permit holder, must be promptly reported to the NHHC for appropriate action. Adverse action may ensue in accordance with § 767.14. Findings of unauthorized activities will be taken into consideration when evaluating future permit applications.

### § 767.14 Amendment, suspension, or revocation of permits.

The NHHC Deputy Director, or his/her designee may amend, suspend, or revoke a permit in whole or in part, temporarily or indefinitely, if in his/her view the permit holder has acted in violation of the terms of the permit or of other applicable regulations, or for other good cause shown. Any such action will be communicated in writing to the permit holder or the permit holder's representative and will set forth the reason for the action taken. The permit holder may request the Director of the NHHC reconsider the action in accordance with § 767.7(e).

### § 767.15 Application to foreign sunken military craft and U.S. sunken military craft not under the jurisdiction of the Navy.

(a) Sunken military craft are generally entitled to sovereign immunity regardless of where they are located or when they sank. Foreign governments may request, via the Department of State, that the Secretary of the Navy administer a permitting program for a specific or a group of its sunken military craft in U.S. waters. The request must include the following:

(1) The foreign government must assert the sovereign immunity of or ownership over a specified sunken military craft or group of sunken military craft;

(2) The foreign government must request assistance from the United States government;

(3) The foreign government must acknowledge that subparts B and C of this part will apply to the specified sunken military craft or group of sunken military craft for which the request is submitted.

(b) Upon receipt and favorable review of a request from a foreign government, the Secretary of the Navy, or his or her designee, in consultation with the Department of State, will proceed to accept the specified sunken military craft or group of sunken military craft into the present permitting program. The Secretary of the Navy, or his or her designee, in consultation with the Department of State, reserves the right to decline a request by the foreign government. Should there be a need to formalize an understanding with the foreign government in response to a submitted request stipulating conditions such as responsibilities, requirements, procedures, and length of effect, the Secretary of State, or his or her designee, in consultation with the Secretary of Defense, or his or her designee, will proceed to formalize an understanding with the foreign government. Any views on such a foreign government request or understanding expressed by applicable federal, tribal, and state agencies will be taken into account.

(c) Persons may seek a permit to disturb foreign sunken military craft located in U.S. waters that have been accepted into the present permitting program or are covered under a formalized understanding as per paragraph (b) of this section, by submitting a permit application or special use permit application, as appropriate, for consideration by the NHHC in accordance with subparts B and C of this part.

(d) In the case where there is reasonable dispute over the sovereign immunity or ownership status of a foreign sunken military craft, the Secretary of the Navy, or his or her designee, maintains the right to postpone action on §§ 767.6 and 767.12, as well as requests under paragraph (a) of this section, until the dispute over the sovereign

immunity or ownership status is resolved.

(e) The Secretary of any military department, or in the case of the Coast Guard the Secretary of the Department in which the Coast Guard is operating, may request that the Secretary of the Navy administer the DON permitting program with regard to sunken military craft under the cognizance of the Secretary concerned. Upon the agreement of the Secretary of the Navy, or his or her designee, subparts A, B, and C of this part shall apply to those agreed upon craft.

## Subpart C—Enforcement Provisions for Violations of the Sunken Military Craft Act and Associated Permit Conditions

### § 767.16 Civil penalties for violations of Act or permit conditions.

(a) *In general.* Any person who violates the SMCA, or any regulation or permit issued thereunder, shall be liable to the United States for a civil penalty.

(b) *Assessment and amount.* The Secretary may assess a civil penalty under this section of not more than $100,000 for each violation.

(c) *Continuing violations.* Each day of a continuing violation of the SMCA or these regulations or any permit issued hereunder constitutes a separate violation.

(d) *In rem liability.* A vessel used to violate the SMCA shall be liable in rem for a penalty for such violation.

### § 767.17 Liability for damages.

(a) Any person who engages in an activity in violation of section 1402 or any regulation or permit issued under the Act that disturbs, removes, or injures any U.S. sunken military craft shall pay the United States enforcement costs and damages resulting from such disturbance, removal, or injury.

(b) Damages referred to in paragraph (a) of this section may include:

(1) The reasonable costs incurred in storage, restoration, care, maintenance, conservation, and curation of any sunken military craft that is disturbed, removed, or injured in violation of section 1402 or any regulation or permit issued under the Act; and

(2) The cost of retrieving, from the site where the sunken military craft was disturbed, removed, or injured, any information of an archaeological, historical, or cultural nature.

### § 767.18 Notice of Violation and Assessment (NOVA).

(a) A NOVA will be issued by the Director of the NHHC and served in person or by registered, certified, return receipt requested, or express mail, or by commercial express package service, upon the respondent, or in the case of a vessel respondent, the owner of the vessel. A copy of the NOVA will be similarly served upon the permit holder, if the holder is not the respondent. The NOVA will contain:

(1) A concise statement of the facts believed to show a violation;

(2) A specific reference to the provision(s) of the SMCA, regulation, or permit violated;

(3) The findings and conclusions upon which the Director of the NHHC bases the assessment;

(4) The amount of civil penalty, enforcement costs and/or liability for damages assessed; and

(5) An advisement of the respondent's rights upon receipt of the NOVA, including a citation to the regulations governing the proceedings.

(b) The NOVA may also contain a proposal for compromise or settlement of the case.

(c) Prior to assessing a civil penalty or liability for damages, the Director of the NHHC will take into account information available to the Agency concerning any factor to be considered under the SMCA and any other information required by law or in the interests of justice. The respondent will have the opportunity to review information considered and present information, in writing, to the Director of the NHHC. At the discretion of the Director of the NHHC, a respondent will be allowed to present information in person.

### § 767.19 Procedures regarding service.

(a) Whenever this part requires service of a document, such service may effectively be made either in person or

by registered or certified mail (with return receipt requested) on the respondent, the respondent's agent for service of process or on a representative designated by that agent for receipt of service. Refusal by the respondent, the respondent's agent, or other designated representative to be served, or refusal by his or her designated representative of service of a document will be considered effective service of the document as of the date of such refusal. Service will be considered effective on the date the document is mailed to an addressee's last known address.

(b) A document will be considered served and/or filed as of the date of the postmark; or (if not mailed) as of the date actually delivered in person; or as shown by electronic mail transmission.

(c) Time periods begin to run on the day following service of the document or date of the event. Saturdays, Sundays, and Federal holidays will be included in computing such time, except that when such time expires on a Saturday, Sunday, or Federal holiday, such period will be extended to include the next business day. This method of computing time periods also applies to any act, such as paying a civil penalty or liability for damages, required by this part to take place within a specified period of time.

### § 767.20 Requirements of respondent or permit holder upon service of a NOVA.

(a) The respondent or permit holder has 45 days from service receipt of the NOVA in which to reply. During this time the respondent or permit holder may:

(1) Accept the penalty or compromise penalty, if any, by taking the actions specified in the NOVA;

(2) Seek to have the NOVA amended, modified, or rescinded under paragraph (b) of this section;

(3) Request a hearing before a DOHA Administrative Judge under paragraph (f) of this section;

(4) Request an extension of time to respond under paragraph (c) of this section; or

(5) Take no action, in which case the NOVA becomes final in accordance with § 767.22(a).

(b) The respondent or permit holder may seek amendment, modification, or rescindment of the NOVA to conform to the facts or law as that person sees them by notifying the Director of the NHHC in writing at the address specified in the NOVA. If amendment or modification is sought, the Director of the NHHC will either amend the NOVA or decline to amend it, and so notify the respondent, permit holder, or vessel owner, as appropriate.

(c) The respondent or permit holder may, within the 45-day period specified in paragraph (a) of this section, request in writing an extension of time to respond. The Director of the NHHC may grant an extension in writing of up to 30 days unless he or she determines that the requester could, exercising reasonable diligence, respond within the 45-day period.

(d) The Director of the NHHC may, for good cause, grant an additional extension beyond the 30-day period specified in paragraph (c) of this section.

(e) Any denial, in whole or in part, of any request under this section that is based upon untimeliness will be in writing.

(f) If the respondent or permit holder desires a hearing, the request must be in writing, dated and signed, and must be sent by mail to the Director, Defense Office of Hearings and Appeals, 875 North Randolph St., Suite 8000, Arlington, VA 22203. The Director, Defense Office of Hearings and Appeals may, at his or her discretion, treat any communication from a respondent or a permit holder as a proper request for a hearing. The requester must attach a copy of the NOVA. A single hearing will be held for all parties named in a NOVA and who timely request a hearing.

### § 767.21 Hearings.

(a) Hearings before a DOHA Administrative Judge are *de novo* reviews of the circumstances alleged in the NOVA and penalties assessed. Hearings are governed by procedures established by the Defense Office of Hearings and Appeals. Hearing procedures will be provided in writing to the parties and may be accessed on-line at *http://www.dod.mil/dodgc/doha/*. Hearings shall be held at

the Defense Office of Hearings and Appeals, Arlington VA, either in person or by video teleconference. Each party shall bear their own costs.

(b) In any DOHA hearing held in response to a request under § 767.20(f), the Administrative Judge will render a final written Decision which is binding on all parties.

### § 767.22 Final administrative decision.

If no request for a hearing is timely filed as provided in § 767.20(f), the NOVA becomes effective as the final administrative decision and order of the Agency on the 45th day after service of the NOVA or on the last day of any delay period granted.

### § 767.23 Payment of final assessment.

(a) Respondent must make full payment of the civil penalty, enforcement costs and/or liability for damages assessed within 30 days of the date upon which the assessment becomes effective as the final administrative decision and order of the Agency. Payment must be made by mailing or delivering to the Agency at the address specified in the NOVA a check or money order made payable in U.S. currency in the amount of the assessment to the ''Treasurer of the United States'', or as otherwise directed.

(b) Upon any failure to pay the civil penalty, enforcement costs and/or liability for damages assessed, the Agency may request the Department of Justice to recover the amount assessed in any appropriate district court of the United States, or may act under any law or statute that permits any type of recovery, including but not limited to arrest, attachment, seizure, or garnishment, of property and/or funds to satisfy a debt owed to the United States.

### § 767.24 Compromise of civil penalty, enforcement costs and/or liability for damages.

(a) The Director of the NHHC, in his/her sole discretion, may compromise, modify, remit, or mitigate, with or without conditions, any civil penalty or liability for damages imposed, or which is subject to imposition, except as provided in this subpart.

(b) The compromise authority of the Director of the NHHC under this section is in addition to any similar authority provided in any applicable statute or regulation, and may be exercised either upon the initiative of the Director of the NHHC or in response to a request by the respondent or other interested person. Any such request should be sent to the Director of the NHHC at the address specified in the NOVA.

(c) Neither the existence of the compromise authority of the Director of the NHHC under this section nor the Director's exercise thereof at any time changes the date upon which an assessment is final or payable.

### § 767.25 Factors considered in assessing penalties.

(a) Factors to be taken into account in assessing a penalty may include the nature, circumstances, extent, and gravity of the alleged violation; the respondent's degree of culpability; any history of prior offenses; ability to pay; and such other matters as justice may require.

(b) The Director of the NHHC may, in consideration of a respondent's ability to pay, increase or decrease a penalty from an amount that would otherwise be warranted by other relevant factors. A penalty may be increased if a respondent's ability to pay is such that a higher penalty is necessary to deter future violations, or for commercial violators, to make a penalty more than the profits received from acting in violation of the SMCA, or any regulation or permit issued thereunder. A penalty may be decreased if the respondent establishes that he or she is unable to pay an otherwise appropriate penalty amount.

(c) If a respondent asserts that a penalty should be reduced because of an inability to pay, the respondent has the burden of proving such inability by providing verifiable, complete, and accurate financial information to the Director of the NHHC. The Director of the NHHC will not consider a respondent's inability to pay unless the respondent, upon request, submits such financial information as the Director of the NHHC determines is adequate to evaluate the respondent's financial condition. Depending on the circumstances of the case, the Director of the NHHC may require the respondent

to complete a financial information request form, answer written interrogatories, or submit independent verification of his or her financial information. If the respondent does not submit the requested financial information, he or she will be presumed to have the ability to pay the penalty.

(1) Financial information relevant to a respondent's ability to pay includes, but is not limited to, the value of respondent's cash and liquid assets and non-liquid assets, ability to borrow, net worth, liabilities, income, prior and anticipated profits, expected cash flow, and the respondent's ability to pay in installments over time. A respondent will be considered able to pay a penalty even if he or she must take such actions as pay in installments over time, borrow money, liquidate assets, or reorganize his or her business. The Director of the NHHC's consideration of a respondent's ability to pay does not preclude an assessment of a penalty in an amount that would cause or contribute to the bankruptcy or other discontinuation of the respondent's business.

(2) Financial information regarding respondent's ability to pay should be submitted to the Director of the NHHC as soon after receipt of the NOVA as possible. In deciding whether to submit such information, the respondent should keep in mind that the Director of the NHHC may assess de novo a civil penalty, enforcement costs and/or liability for damages either greater or smaller than that assessed in the NOVA.

### § 767.26 Criminal law.

Nothing in these regulations is intended to prevent the United States from pursuing criminal sanctions for plundering of wrecks, larceny of Government property, or violation of applicable criminal law, whether the infringement pertains to a sunken military craft, a terrestrial military craft or other craft under the jurisdiction of the DON.

### § 767.27 References.

References for submission of permit application, including but not limited to, and as may be further amended:

(a) National Historic Preservation Act (NHPA) of 1966, as amended, 54 U.S.C. 300101 *et seq.* (2014), and Protection of Historic Properties, 36 CFR part 800. This statute and its implementing regulations govern the section 106 review process established by the NHPA.

(b) National Environmental Policy Act of 1969, as amended, 42 U.S.C. 4321 *et seq.*, and Protection of the Environment, 40 CFR parts 1500 through 1508. This statute and its implementing regulations require agencies to consider the effects of their actions on the human environment.

(c) Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation available at *http://www.cr.nps.gov/local-law/arch_stnds_0.htm*. These guidelines establish standards for the preservation planning process with guidelines on implementation.

(d) Archaeological Resources Protection Act of 1979, as amended, 16 U.S.C. 470aa–mm, and the Uniform Regulations, 43 CFR part 7, subpart A. This statute and its implementing regulations establish basic government-wide standards for the issuance of permits for archaeological research, including the authorized excavation and/or removal of archaeological resources on public lands or Indian lands.

(e) Secretary of the Interior's regulations, Curation of Federally-Owned and Administered Archaeological Collections, 36 CFR part 79. These regulations establish standards for the curation and display of federally-owned artifact collections.

(f) Antiquities Act of 1906, Public Law 59–209, 34 Stat. 225 (codified at 16 U.S.C. 431 *et seq.* (1999)).

(g) Executive Order 11593, 36 FR 8291, 3 CFR, 1971–1975 Comp., p. 559 (Protection and Enhancement of the Cultural Environment).

(h) Department of Defense Instruction 4140.21M (DoDI 4140.21M, August 1998). Subject: Defense Disposal Manual.

(i) Secretary of the Navy Instruction 4000.35A (SECNAVINST 4000.35A, 9 April 2001). Subject: Department of the Navy Cultural Resources Program.

## PARTS 768–769 [RESERVED]

# PART 770—RULES LIMITING PUBLIC ACCESS TO PARTICULAR INSTALLATIONS

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AUTHORITY: 5 U.S.C. 301; 10 U.S.C. 6011; 32 CFR 700.702; 32 CFR 700.714, unless otherwise noted.

## Subpart A—Hunting and Fishing at Marine Corps Base, Quantico, Virginia

SOURCE: 41 FR 22345, June 3, 1976, unless otherwise noted.

### § 770.1 Purpose.

This subpart provides regulations and related information governing hunting and fishing on the Marine Corps Base Reservation, Quantico, VA.

### § 770.2 Licenses.

(a) Every person who hunts or fishes on Marine Corps Base, Quantico, VA, must possess appropriate valid licenses in compliance with the Laws of the United States and the State of Virginia.

(b) In addition, hunting and fishing privilege cards, issued by the authorities at Marine Corps Base, Quantico, VA, are required for all persons between the ages sixteen and sixty-four, inclusive.

(1) The privilege card may be purchased from the Natural Resources and Environmental Affairs Branch, Building 5–9, Marine Corps Base, Quantico, VA.

(2) The privilege cards are effective for the same period as the Virginia hunting and fishing licenses.

(c) All hunters must obtain a Base hunting permit, and a parking permit, if applicable, from the Game Check Station, Building 5–9 Station (located at the intersection of Russell Road and MCB–1) for each day of hunting. The hunting permit must be carried by the hunter and the parking permit must be displayed on the left dashboard of parked vehicles. The hunting and parking permits must be returned within one hour after either sunset or the hour hunting is secured on holidays or during special season.

(d) Eligibility for a Base hunting permit is predicated on:

(1) Possession of required Federal and State licenses for the game to be hunted including Marine Corps Base hunting privilege card;

(2) Attendance at a safety lecture given daily except Sunday during the hunting season given at the Game Check Station. The lectures commence at the times posted in the Annual Hunting Bulletin and are posted on all base bulletin boards;

(3) Understanding of Federal, State and Base hunting regulations;

(4) And, if civilian, an executed release of U.S. Government responsibility in case of accident or injury.

[41 FR 22345, June 3, 1976, as amended at 48 FR 23205, May 24, 1983; 65 FR 53591, Sept. 5, 2000]

### § 770.3 Fishing regulations.

(a) All persons possessing the proper state license and Base permit are permitted to fish in the areas designated by the Annual Fishing Regulations on Marine Corps Base, Quantico, VA, on any authorized fishing day. A Base Fishing Privilege Card is required for all persons aged 16 to 65.

(b) Fishing is permitted on all waters within the boundaries of Marine Corps Base, Quantico, VA, unless otherwise posted, under the conditions and restrictions and during the periods provided by Marine Corps Base, Quantico, VA. Information regarding specific regulations for each fishing area must be obtained from the Natural Resources and Environmental Affairs Branch, Building 5–9 prior to use of Base fishing facilities.

(c) In addition to the requirements of the Laws of Virginia, the following additional prohibitions and requirements are in effect at Marine Corps Base, Quantico, VA.

(1) No trout lines are permitted in Marine Corps Base waters;

(2) No Large Mouth Bass will be taken, creeled or possessed in a slot limit of 12–15 inches in length. All Large Mouth Bass within this slot will be immediately returned to the water;

(3) No Striped Bass will be taken, creeled or possessed under the size of twenty (20) inches in length. All Striped Bass under this size will be immediately returned to the water.

[41 FR 22345, June 3, 1976, as amended at 48 FR 23205, May 24, 1983; 65 FR 53591, Sept. 5, 2000]

### § 770.4 Hunting regulations.

All persons possessing the proper State, Federal and Base licenses and permits are permitted to hunt in the areas designated daily by the Annual Hunting Bulletin on Marine Corps Base, Quantico, VA, on any authorized hunting day. In addition, a minimum of fifteen percent of the daily hunting spaces will be reserved to civilians on a first come, first served basis until 0600 on each hunting day, at which time, the Game Check Station may fill vacancies from any authorized persons waiting to hunt.

[65 FR 53591, Sept. 5, 2000]

### § 770.5 Safety regulations.

(a) Hunting is not permitted within 200 yards of the following: Ammunition dumps, built-up areas, rifle or pistol ranges, dwelling or other occupied structures, and areas designated by the Annual Hunting Bulletin as recreation areas.

(b) From the end of the special archery season until the end of the regular firearms winter hunting season, except for duck hunters in approved blinds, hunters will wear an outer garment with at least two square foot of blaze orange visible both front and back above the waist and a blaze orange cap while hunting, or while in the woods for any reason, during the hours that hunting is authorized. Any person traveling on foot in or adjacent to an area open for hunting will comply with this requirement.

(c) Weapons will be unloaded while being transported in vehicles, and will be left in vehicles by personnel checking in or out at the Game Check Station. Weapons will not be discharged from vehicles, or within 200 yards of hard surfaced roads.

(d) Certain hunting areas contain numerous unexploded munitions (duds) which are dangerous and must not be removed or disturbed. Hunters should mark such duds with stakes or other means and report their location to the Game Warden.

(e) Hunters must stay in their assigned areas when hunting.

[41 FR 22345, June 3, 1976, as amended at 65 FR 53592, Sept. 5, 2000]

### § 770.6 Restrictions.

(a) There will be no hunting on Christmas Eve, Christmas Day, New Years Day, or after 1200 on Thanksgiving Day.

(b) Hunters under 18 years of age must be accompanied by an adult (21 years of age or older) while hunting or in a hunting area. The adult is limited to a maximum of two underage hunters, and must stay within sight and voice contact and no more than 100 yards away from the underage hunters.

(c) The following practices or actions are expressly forbidden: Use of rifles, except muzzleloaders of .40 caliber or larger as specified below, revolvers or pistols; use of shotguns larger than 10 gauge or crossbows (this prohibition extends to carrying such weapons on the person or in a vehicle while hunting), use of buckshot to hunt any game; use of a light, attached to a vehicle or otherwise, for the purpose of spotting game; use of dogs for hunting or tracking deer; training deer dogs on the Reservation; training or running dogs in hunting areas between 1 March and 1 September; driving deer; baiting or salting traps or blinds; hunting on Sunday; molesting wildlife. Those personnel who are authorized to hunt on Base, desiring to train or exercise dogs other than deer dogs between 2 September and 28 February, may do so by obtaining Walking Pass to enter training areas at the Range Control Office. This Walking Pass is not permission to hunt, and carrying weapons under these conditions is prohibited.

(d) Hunting will not commence before one half hour before sunrise, and will end not later than sunset. The hours of sunrise and sunset are posted daily at the Game Checking Station.

(e) Weapons will not be loaded outside of hunting hours.

(f) There will be no use of a muzzleloader or slug shotgun after obtaining the daily or yearly game bag limits.

(g) There will be no possession or use of drugs or alcohol while checked out to hunt.

[41 FR 22345, June 3, 1976, as amended at 48 FR 23205, May 24, 1983; 65 FR 53592, Sept. 5, 2000]

### § 770.7 Violations and environmental regulations.

Violations of hunting regulations, fishing regulations, safety regulations, or principles of good sportsmanship are subject to administrative restriction of hunting or fishing privileges and possible judicial proceedings in State or Federal courts.

(a) The Marine Corps Base Game Wardens are Federal Game Wardens. They have authority to issue summons to appear in Federal court for game violations.

(b) Offenders in violation of a Federal or State hunting or fishing laws will be referred to a Federal court.

(c) Offenders in violation of a Federal, State or Base hunting or fishing law or regulation will receive the following administrative actions.

(1) The Base Game Warden shall have the authority to temporarily suspend hunting and fishing privileges.

(2) Suspensions of hunting and fishing privileges will be outlined in the Annual Fish and Wildlife Procedures Manual.

(d) Civilians found in violation of a hunting or fishing regulation or law may be permanently restricted from entering the base.

(e) Serious hunting and fishing offenses include, but are not limited to: spotlighting, false statement on a license, hunting under the influence, employment of a light in an area that deer frequent, and taking game or fish during closed seasons.

[41 FR 22345, June 3, 1976, as amended at 65 FR 53592, Sept. 5, 2000]

### § 770.8 Reports.

Upon killing a deer or turkey, a hunter must attach the appropriate tab from his big game license to the carcass before moving the game from the place of kill. The game will then be taken to the Game Checking Station where the tab will be exchanged for an official game tag. All other game, not requiring a tag, killed on the Reservation will be immediately reported to the Game Warden when checking out at the end of a hunt.

[41 FR 22345, June 3, 1976, as amended at 48 FR 23206, May 24, 1983; 65 FR 53592, Sept. 5, 2000]

### § 770.9 Miscellaneous.

Refer to the Annual Fishing and Hunting Bulletins that will cover any annual miscellaneous changes.

[65 FR 53592, Sept. 5, 2000]

## Subpart B—Base Entry Regulations for Naval Submarine Base, Bangor, Silverdale, Washington

AUTHORITY: 50 U.S.C. 797; DoDDir. 5200.8 of April 25, 1991; 5 U.S.C. 301; 10 U.S.C. 6011; 32 CFR 700.702; 32 CFR 700.714.

SOURCE: 44 FR 32368, June 6, 1979, unless otherwise noted.

### § 770.15 Purpose.

The purpose of this subpart is to promulgate regulations governing entry upon Naval Submarine Base (SUBASE), Bangor.

### § 770.16 Definition.

For the purpose of this subpart, SUBASE Bangor shall include that area of land in Kitsap and Jefferson Counties, State of Washington which has been set aside for use of the Federal Government by an Act of the legislature of the State of Washington, approved March 15, 1939 (Session laws of 1939, chapter 126).

### § 770.17 Background.

(a) SUBASE Bangor has been designated as the West Coast home port of the Trident Submarine. Facilities for the repair or overhaul of naval vessels are located at SUBASE Bangor. It is vital to national defense that the operation and use of SUBASE Bangor be continued without undue and unnecessary interruption. Many areas of SUBASE Bangor are of an industrial nature, including construction sites, where inherently dangerous conditions exist.

(b) For prevention of the interruption of the stated use of the base by the presence of any unauthorized person within the boundaries of SUBASE Bangor, and prevention of injury to any such person as a consequence of the dangerous conditions which exist, as well as for other reasons, it is essential to restrict entry upon SUBASE Bangor to authorized persons only.

### § 770.18 Entry restrictions.

Except for military personnel and civilian employees of the United States in the performance of their official duties, entry upon Naval Submarine Base, Bangor, or remaining thereon by any person whatsoever for any purpose without the advance consent of the Commanding Officer, SUBASE Bangor or his authorized representative is prohibited. *See*, 18 U.S.C. 1382; the Internal Security Act of 1950, Section 21 (50 U.S.C. 797); Department of Defense Directive 5200.8 of 25 April 1991; Secretary of the Navy Instruction 5511.36A of 21 July 1992.

[44 FR 32368, June 6, 1979, as amended at 65 FR 53592, Sept. 5, 2000]

### § 770.19 Entry procedures.

(a) Any person or group of persons desiring the advance consent of the Commanding Officer, SUBASE Bangor or his authorized representative shall, in writing, submit a request to the Commanding Officer, Naval Submarine Base, Bangor, 1100 Hunley Road, Silverdale, WA 98315.

(b) Each request for entry will be considered on an individual basis weighing the operational, security, and safety requirements of SUBASE Bangor with the purpose, size of party, duration of visit, destination, and military resources which would be required by the granting of the request.

[44 FR 32368, June 6, 1979, as amended at 65 FR 53592, Sept. 5, 2000]

### § 770.20 Violations.

(a) Any person entering or remaining on SUBASE Bangor, without the consent of the Commanding Officer, SUBASE Bangor or his authorized representative, shall be subject to the penalties prescribed by 18 U.S.C. 1382, which provides in pertinent part:

> Whoever, within the jurisdiction of the United States, goes upon any military, naval * * * reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or lawful regulation * * * shall be fined not more than $5,000 or imprisoned not more than six months or both.

(b) Moreover, any person who willfully violates this subpart is subject to a fine not to exceed $5,000 or imprisonment for not more than one (1) year or both as provided in 50 U.S.C. 797.

[44 FR 32368, June 6, 1979, as amended at 65 FR 53592, Sept. 5, 2000]

## Subpart C—Base Entry Regulations for Naval Installations in the State of Hawaii

AUTHORITY: 50 U.S.C. 797; DoD Dir. 5200.8 of Aug. 20, 1954; 5 U.S.C 301; 10 U.S.C. 6011; 32 CFR 700.702, 770.714.

SOURCE: 44 FR 76279, Dec. 26, 1979, unless otherwise noted.

### § 770.25 Purpose.

The purpose of this subpart is to promulgate regulations governing entry to naval installations in the State of Hawaii.

### § 770.26 Definitions.

For the purpose of this subpart the following definitions apply:

(a) *Naval installations.* A naval installation is a shore activity and is any area of land, whether or not fenced or covered by water, that is administered by the Department of the Navy or by any subordinate naval command. The term ''naval installation'' applies to all such areas regardless of whether the areas are being used for purely military purposes, for housing, for support purposes, or for any other purpose by a naval command. Section 770.31 contains a list of the major naval installations in Hawaii. This list is not considered to be all inclusive and is included only as a representative guide. For the purposes of this subpart the area of water within Pearl Harbor is considered to be within a naval installation.

(b) *Outleased areas.* Certain portions of naval installations in Hawaii which are not for the time needed for public use or for which a dual use is feasible have been outleased to private interests. Examples of such outleased areas are the Moanalua Shopping Center and lands such as Waipio Peninsula, which has been outleased for agricultural purposes. For the purpose of this Subpart, outleased areas which are not within fenced portions of naval installations are not considered to be a part of naval installations. Rules for entry onto the outleased areas are made by the lessees, except in the case of Waipio Peninsula where the lessee (Oahu Sugar Company) is not authorized to allow anyone to enter Waipio Peninsula for any purpose not connected with sugar cane production.

### § 770.27 Background.

(a) Naval installations in Hawaii constitute a significant element of the national defense establishment. It is vital to the national defense that the use of such areas be at all times under the positive control of the Department of the Navy. Strict control must be exercised over access to naval installations in order to preclude damage accidental and intentional to Government property, injury to military personnel, and interference in the orderly accomplishment of the mission of command.

(b) There are several industrial areas within naval installations in Hawaii wherein construction activities and the use of heavy machinery pose grave risk of danger to visitors.

(c) Various types of flammable or incendiary materials and ordnance are stored at a number of locations within naval installations in Hawaii.

(d) Classified documents and equipment requiring protection from unauthorized disclosure by Executive order 12065 for reasons of national security are located at various locations within naval installations in Hawaii.

(e) In order to effect the positive control of the Navy over its installations in Hawaii, it is essential that entry

onto those installations be restricted to authorized persons only.

(f) These entry regulations are being promulgated under the authority of Commander, Naval Base, Pearl Harbor, who has been assigned as immediate area coordinator for all naval installations in the State of Hawaii by Commander-in-Chief, U.S. Pacific Fleet.

### § 770.28 Entry restrictions.

Each commander is responsible for the security of his/her command. Therefore, entry onto a command or into part of a command may be controlled by the commander through the imposition of such restrictions as may be required by attendant circumstances. Within the State of Hawaii, entry into a naval installation is not permitted without the permission of the responsible commander.

### § 770.29 Entry procedures.

(a) Operational, security, and safety considerations take priority over requests by individuals to visit a naval installation. Consistent with such considerations, visits by members of the general public may be authorized at the discretion of the commander. The commitment of resources which would be required to safeguard the persons and property of visitors as well as military property and personnel must of necessity preclude or severely restrict such visiting. The purpose and duration of the visit and the size of the party and areas to be visited are other considerations which may affect the commander's decision whether to permit visiting by members of the public.

(b) Any person or group desiring to enter a particular naval installation or portion thereof, shall submit a written request to the commander of the installation well enough in advance to allow a reasonable time for reply by mail. Mailing addresses for commanders of major installations covered by this subpart are listed in § 770.31. Full compliance with a naval installation's local visitor registration and entry control procedures shall be deemed the equivalent of obtaining the advance consent of the commander for entrance upon the installation for the purpose of this subpart. Authorization to enter one naval installation or a portion of one installation does not necessarily include the authorization to enter any other naval installation or all portions of an installation.

### § 770.30 Violations.

(a) Any person entering or remaining on a naval installation in the State of Hawaii, without consent of the commander or his authorized representative, shall be subject to the penalties of a fine of not more than $500 or imprisonment for not more than six months, or both. See 18 U.S.C. 1382.

(b) Moreover, any person who willfully violates this regulation is subject to a fine not to exceed $5,000 or imprisonment for one year, or both. See 50 U.S.C. 797.

### § 770.31 List of major naval installations in the State of Hawaii and cognizant commanders authorized to grant access under these regulations.

(a) *On Oahu.* (1) Naval Base, Pearl Harbor (including the Naval Station, Naval Submarine Base, Naval Shipyard, Naval Supply Center, Naval Public Works Center, Marine Barracks, Ford Island, Bishop Point Dock Area, Commander-in-Chief Pacific Fleet and Commander Naval Logistics Command Headquarters Areas, Johnson Circle Navy Exchange/Commissary Store Area, Navy-Marine Golf Course, miscellaneous other commands, and areas within the Naval Base, Pearl Harbor complex, and the waters of Pearl Harbor). Contact:

Commander, Naval Base, Pearl Harbor, HI 96860.

(2) Naval Western Oceanography Center, Pearl Harbor. Contact:

Commanding Officer, Naval Western Oceanography Center, Box 113, Pearl Harbor, HI 96860.

(3) Naval Air Station, Barbers Point. Contact:

Commanding Officer, Naval Air Station, Barbers Point, HI 96862.

(4) Naval Communication Area Master Station, Eastern Pacific, Wahiawa. Contact:

Commanding Officer, Naval Communication Area Master Station, Eastern Pacific, Wahiawa, HI 96786.

(5) Naval Magazine (Lualualei, Waikele, and West Loch). Contact:

Commanding Officer, Naval Magazine, Lualualei, HI 96792.

(6) Naval Radio Transmitting Facility, Lualualei. Contact:

Commanding Officer, Naval Base, Pearl Harbor, HI 96860.

(7) Naval and Marine Corps Reserve Training Center, Honolulu. Contact:

Commanding Officer, Naval and Marine Corps Reserve Training Center, Honolulu, 530 Peltier Avenue, Honolulu, HI 96818.

(8) Military Sealift Command Office. Contact:

Commander, Naval Base, Pearl Harbor, HI 96860.

(9) Mauna Kapu (Pacific Missile Range Facility). Contact:

Commanding Officer, Pacific Missile Range Facility, Hawaiian Area, Barking Sands, Kekaha, Kauai, HI 96752.

(10) Kunia Facility; FORACS III Sites; Degaussing Station, Waipio Peninsula; Damon Tract (Remanant) Opana Communciations Site. Contact:

Commander, Naval Base, Pearl Harbor, HI 96860.

(11) Outlying areas of the Naval Supply Center, Pearl Harbor (including the Ewa Junction Storage Area, Ewa Drum Storage Area, Manana Supply Area, Pearl City Supply Area, and the Red Hill Fuel Storage Area). Contact:

Commander, Naval Base, Pearl Harbor, HI 96860.

(12) Pump Stations (Halawa, Waiawa, Red Hill, and Barbers Point). Contact:

Commander, Naval Base, Pearl Harbor, HI 96860.

(13) Halawa Water Storage Area; Barbers Point, Independent Water Supply Reservoir Site; Sewage Treatment Plant; Fort Kam (tri-service); Utility Corridors, Lynch Park (Ohana Nui). Contact:

Commander, Naval Base, Pearl Harbor, HI 96860.

(14) Navy housing areas (including Moanalua Terrace, Radford Terrace, Makalapa, Maloelap, Halsey Terrace, Catlin Park, Hale Moku, Pearl Harbor, Naval Shipyard, McGrew Point, Halawa, Hokulani, Manana, Pearl City Peninsula, Red Hill, Iroquois Point, Puuloa, and Camp Stover). Contact:

Commander, Naval Base, Pearl Harbor, HI 96860.

(b) *On Kauai.* (1) Pacific Missile Range Facility, Barking Sands, Kekaha.

Contact: Commanding Officer, Pacific Missile Range Facility, Hawaiian Area, Barking Sands, Kekaha, HI 96752.

(c) *Other areas.* (1) Kaho'olawe Island. Contact:

Commander Naval Base, Pearl Harbor, HI 96860. Also see 32 CFR part 763.

(2) Kaula. Contact:

Commander Naval Base, Pearl Harbor, HI 96860.

[44 FR 76279, Dec. 26, 1979, as amended at 52 FR 20074, May 29, 1987]

## Subpart D—Entry Regulations for Naval Installations and Property in Puerto Rico

SOURCE: 46 FR 22756, Apr. 21, 1981, unless otherwise noted.

### § 770.35 Purpose.

The purpose of this subpart is to promulgate standard regulations and procedures governing entry upon U.S. Naval installations and properties in Puerto Rico.

### § 770.36 Definitions.

For purposes of these regulations, U.S. Naval installations and properties in Puerto Rico include, but are not limited to, the U.S. Naval Station, Roosevelt Roads (including the Vieques Island Eastern Annexes, consisting of Camp Garcia, the Eastern Maneuver Area, and the Inner Range); the Naval Ammunition Facility, Vieques Island; and the Naval Security Group Activity, Sabana Seca.

### § 770.37 Background.

In accordance with 32 CFR 765.4, Naval installations and properties in Puerto Rico are not open to the general public, *i.e.*, they are ''closed'' military bases. Therefore admission to the

general public is only by the permission of the respective Commanding Officers in accordance with their respective installation instructions.

### § 770.38 Entry restrictions.

Except for duly authorized military personnel and civilian employees, including contract employees, of the United States in the performance of their official duties, entry upon any U.S. Navy installation or property in Puerto Rico at anytime, by any person for any purpose whatsoever without the advance consent of the Commanding Officer of the installation or property concerned, or an authorized representative of that Commanding Officer, is prohibited.

### § 770.39 Entry procedures.

(a) Any person or group of persons desiring to obtain advance consent for entry upon any U.S. Naval installation or property in Puerto Rico from the Commanding Officer of the Naval installation or property, or an authorized representative of that Commanding Officer, shall present themselves at an authorized entry gate at the installation or property concerned or, in the alternative, submit a request in writing to the following respective addresses:

(1) Commanding Officer, U.S. Naval Station, Roosevelt Roads, Box 3001, Ceiba, PR 00635.

(2) Officer in Charge, Naval Ammunition Facility, Box 3027, Ceiba, PR 00635.

(3) Commanding Officer, U.S. Naval Security Group Activity, Sabana Seca, PR 00749.

(b) The above Commanding Officers are authorized to provide advance consent only for installations and properties under their command. Requests for entry authorization to any other facility or property shall be addressed to the following:

Commander, U.S. Naval Forces, Caribbean, Box 3037, Ceiba, PR 00635.

(c) Each request for entry will be considered on an individual basis and consent will be determined by applicable installation entry instructions. Factors that will be considered include the purpose of visit, the size of party, duration of visit, destination, security safeguards, safety aspects, and the military resources necessary if the request is granted.

### § 770.40 Violations.

Any person entering or remaining on U.S. Naval installations and properties in Puerto Rico, without the advance consent of those officials hereinabove enumerated, or their authorized representatives, shall be considered to be in violation of these regulations and therefore subject to the penalties prescribed by 18 U.S.C. 1382, which provides in pertinent part: ''Whoever, within the jurisdiction of the United States, goes upon any military, naval * * * reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or lawful regulation * * * shall be fined not more than $500.00 or imprisoned not more than six months, or both,'' or any other applicable laws or regulations.

## Subpart E—Base Entry Regulations for Naval Submarine Base New London, Groton, Connecticut

AUTHORITY: 50 U.S.C. 797; DoD Directive 5200.8 of July 29, 1980; SECNAVINST 5511.36 of December 20, 1980; OPNAVINST 5510.45 of April 19, 1971; 5 U.S.C. 301; 10 U.S.C. 6011; 32 CFR 700.702; 32 CFR 700.714.

SOURCE: 48 FR 5555, Feb. 7, 1983, unless otherwise noted.

### § 770.41 Purpose.

The purpose of this subpart is to promulgate regulations and procedures governing entry upon Naval Submarine Base New London, and to prevent the interruption of the stated functions and operations of Naval Submarine Base New London, by the presence of any unauthorized person within the boundaries of Naval Submarine Base New London.

### § 770.42 Background.

Naval Submarine Base New London maintains and operates facilities to support training and experimental operations of the submarine force including providing support to submarines, submarine rescue vessels, and assigned

service and small craft; within capabilities, to provide support to other activities of the Navy and other governmental activities in the area; and to perform such other functions as may be directed by competent authority.

### § 770.43 Responsibility.

The responsibility for proper identification and control of personnel and vehicle movement on the Naval Submarine Base New London is vested with the Security Officer.

### § 770.44 Entry restrictions.

Except for military personnel, their authorized dependents, or guests, and employees of the United States in the performance of their official duties, entry upon Naval Submarine Base New London, or remaining thereon by any person for any purpose without the advance consent of the Commanding Officer, Naval Submarine Base New London, or his authorized representative is prohibited. *See* 18 U.S.C. 1382j, the Internal Security Act of 1950 (50 U.S.C. 797); Chief of Naval Operations Instruction 5510.45B of April 19, 1971; and Secretary of the Navy Instruction 5511.36 of December 20, 1980.

### § 770.45 Entry procedures.

(a) Any individual person or group of persons desiring the advance consent of the Commanding Officer, Naval Submarine Base New London, or his authorized representative shall, in writing, submit a request to the Commanding Officer, Naval Submarine Base New London, at the following address: Commanding Officer (Attn: Security Officer), Box 38, Naval Submarine Base New London, Groton, CT 06349.

(b) Each request for entry will be considered on an individual basis weighing the operational, security, and safety requirements of Naval Submarine Base New London with the purpose, size of party, duration of visit, destination, and military resources which would be required by the granting of the request.

### § 770.46 Violations.

(a) Any person entering or remaining on Naval Submarine Base New London, without the consent of the Commanding Officer, Naval Submarine Base New London or his authorized representative, shall be subject to the penalties prescribed in 18 U.S.C. 1382, which provides in pertinent part:

> Whoever, within the jurisdiction of the United States, goes upon any military, naval . . . reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or lawful regulation . . . shall be fined not more than $500 or imprisoned not more than six months or both.

(b) Moreover, any person who willfully violates this subpart is subject to a fine not to exceed $5000 or imprisonment for not more than one (1) year or both as provided in 50 U.S.C. 797.

## Subpart F—Base Entry Regulations for Puget Sound Naval Shipyard, Bremerton, Washington

AUTHORITY: 5 U.S.C. 301; 10 U.S.C. 6011; 50 U.S.C. 797; DoD Directive 5200.8 of April 25, 1991; SECNAVINST 5511.36A of July 21, 1992; OPNAVINST 5530.14C of December 10, 1998; 32 CFR 700.702; 32 CFR 700.714.

SOURCE: 65 FR 53592, Sept. 5, 2000, unless otherwise noted.

### § 770.47 Purpose.

To promulgate regulations and procedures governing entry upon Puget Sound Naval Shipyard, and to prevent the interruption of the functions and operations of Puget Sound Naval Shipyard by the presence of any unauthorized person within the boundaries of the Puget Sound Naval Shipyard.

### § 770.48 Definition.

For the purpose of this subpart, Puget Sound Shipyard shall include that area of land, whether or not fenced or covered by water, in Kitsap County in the State of Washington under the operational control of the Commander, Puget Sound Naval Shipyard or any tenant command. This includes all such areas regardless of whether the areas are being used for purely military purposes, for housing, for support purposes, or for any other purpose by a naval command or other Federal agency.

### § 770.49 Background.

(a) Puget Sound Naval Shipyard is a major naval ship repair facility, with operational requirements to complete repairs and overhaul of conventionally powered and nuclear powered naval vessels. It is vital to national defense that the operation and use of the shipyard be continued without interruption. Additionally, most of Puget Sound Naval Shipyard is dedicated to heavy industrial activity where potentially hazardous conditions exist.

(b) For prevention of the interruption of the stated use of Puget Sound Naval Shipyard and prevention of injury to any unsupervised or unauthorized person as a consequence of the hazardous conditions that exist, as well as for other reasons, it is essential to restrict entry upon Puget Sound Naval Shipyard to authorized persons only.

### § 770.50 Entry restrictions.

Except for military personnel and civilian employees of the United States in the performance of their official duties, entry upon Puget Sound Naval Shipyard, or remaining thereon by any person for any purpose without advance consent of the Commander, Puget Sound Naval Shipyard or his/her authorized representative, is prohibited.

### § 770.51 Entry procedures.

(a) Any person or group of persons desiring the advance consent of the Commander, Puget Sound Naval Shipyard, or his authorized representative, shall, in writing, submit a request to the Commander, Puget Sound Naval Shipyard, at the following address: Commander, Puget Sound Naval Shipyard, 1400 Farragut Avenue, Bremerton, WA 98314–5001.

### § 770.52 Violations.

(a) Any person entering or remaining on Puget Sound Naval Shipyard, without the consent of the Commander, Puget Sound Naval Shipyard, or an authorized representative, shall be subject to the penalties prescribed by 18 U.S.C. 1382, which provides in pertinent part:

> Whoever, within the jurisdiction of the United States, goes upon any military, naval * * * reservation, post, fort, arsenal, yard, station or installation, for any purpose prohibited by law or lawful regulation * * * shall be fined not more than $500.00 or imprisoned not more than six months or both.

(b) Moreover, any person who willfully violates this subpart is subject to a fine not to exceed $5000.00 or imprisonment for not more than one year or both as provided in 50 U.S.C. 797.

## Subpart G—Entry Regulations for Portsmouth Naval Shipyard, Portsmouth, New Hampshire

AUTHORITY: 5 U.S.C. 301; 10 U.S.C. 6011; 50 U.S.C. 797; DoD Directive 5200.8 of April 25, 1991; SECNAVINST 5511.36A of July 21, 1992; NAVCOMSYSCOMINST 5510.2B of April 18, 1990; 32 CFR 700.702; 32 CFR 700.714.

SOURCE: 49 FR 34003, Aug. 28, 1984, unless otherwise noted.

### § 770.53 Purpose.

To promulgate regulations and procedures governing entry upon Portsmouth Naval Shipyard, and to prevent the interruption of the functions and operations of Portsmouth Naval Shipyard by the presence of any unauthorized person within the boundaries of Portsmouth Naval Shipyard.

### § 770.54 Background.

(a) Portsmouth Naval Shipyard maintains and operates facilities ''to provide logistic support for assigned ships and service craft; to perform authorized work in connection with construction, conversion, overhaul, repair, alteration, drydocking, and outfitting of ships and craft, as assigned; to perform manufacturing, research, development, and test work, as assigned; and to provide services and material to other activities and units, as directed by competent authority.''

(b) Portsmouth Naval Shipyard is a major naval ship repair facility, with operational requirements to complete repairs and overhaul of conventionally powered and nuclear-powered naval vessels. It is vital to national defense that the operation and use of the shipyard be continued without undue or unnecessary interruptions. Additionally, most of Portsmouth Naval Shipyard is dedicated to heavy industrial

activity where potentially hazardous conditions exist.

(c) For prevention of interruption of the stated use of the base by the presence of any unauthorized person within the boundaries of Portsmouth Naval Shipyard, and prevention of injury to any such unsupervised person as a consequence of the dangerous conditions which exist, as well as for other reasons, it is essential to restrict entry upon Portsmouth Naval Shipyard to authorized persons only.

### § 770.55 Responsibility.

The responsibility for proper identification and control of personnel and vehicle movement on the Portsmouth Naval Shipyard is vested with the Shipyard Security Manager (Code 1700).

[49 FR 34003, Aug. 28, 1984, as amended at 65 FR 53593, Sept. 5, 2000]

### § 770.56 Entry restrictions.

Except for military personnel, their authorized dependents, or guests, and civilian employees of the United States in the performance of their official duties, entry upon Portsmouth Naval Shipyard, or remaining thereon by any person for any purpose without the advance consent of the Commander, Portsmouth Naval Shipyard, or his authorized representative, is prohibited. In many instances, Commander, Naval Sea Systems Command, approval is required.

### § 770.57 Entry procedures.

(a) Any person or group desiring the advance consent of the Commander, Portsmouth Naval Shipyard, or his authorized representative, shall, in writing, submit a request to the Commander, Portsmouth Naval Shipyard, at the following address: Commander, Portsmouth Naval Shipyard, Portsmouth, NH 03801, Attention: Security Manager (Code 1700). For groups, foreign citizens, and news media, the request must be forwarded to the Commander, Naval Sea Systems Command, for approval.

(b) Each request for entry will be considered on an individual basis, weighing the operational, security, and safety requirements of Portsmouth Naval Shipyard, with the purpose, size of party, duration of visit, destination, and military resources which would be required by the granting of the request.

[49 FR 34003, Aug. 28, 1984, as amended at 65 FR 53593, Sept. 5, 2000]

### § 770.58 Violations.

(a) Any person entering or remaining on Portsmouth Naval Shipyard without the consent of the Commander, Portsmouth Naval Shipyard, or his authorized representative, shall be subject to the penalties prescribed in 18 U.S.C. 1382, which provides in pertinent part:

> Whoever, within the jurisdiction of the United States, goes upon any military, naval . . . reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or lawful regulation . . . Shall be fined not more than $500 or imprisoned not more than six months, or both.

(b) Moreover, any person who willfully violates this instruction is subject to a fine not to exceed $5000 or imprisonment for not more than one (1) year, or both, as provided by 50 U.S.C. 797.

## PARTS 771–774 [RESERVED]

## PART 775—PROCEDURES FOR IMPLEMENTING THE NATIONAL ENVIRONMENTAL POLICY ACT

Sec.

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AUTHORITY: 5 U.S.C. 301; 42 U.S.C. 4321–4361; 40 CFR parts 1500–1508.

SOURCE: 55 FR 33899, Aug. 20, 1990, unless otherwise noted.

### § 775.1 Purpose and scope.

(a) To implement the provisions of the National Environmental Policy Act

(NEPA), 42 U.S.C. 4321 *et seq.*, the Council on Environmental Quality Regulations for Implementing the Procedural Provisions of NEPA, 40 CFR 1500–1508, and the Department of Defense Instruction on Environmental Planning and Analysis, DODINST 4715.9, and to assign responsibilities within the Department of the Navy (DON) for preparation, review, and approval of environmental documents prepared under NEPA.

(b) The policies and responsibilities set out in this part apply to the DON, including the Office of the Secretary of the Navy, and Navy and Marine Corps commands, operating forces, shore establishments, and reserve components. This part is limited to the actions of these elements with environmental effects in the United States, its territories, and possessions.

[69 FR 8109, Feb. 23, 2004]

### § 775.2 Definitions.

(a) *Action proponent*. The commander, commanding officer, or civilian director of a unit, activity, or organization who initiates a proposal for action, as defined in 40 CFR 1508.23, and who has command and control authority over the action once it is authorized. For some actions, the action proponent will also serve as the decision-making authority for that action. In specific circumstances, the action proponent and decision maker may be identified in Navy Regulations, other SECNAV Instructions, operational instructions and orders, acquisition instructions, and other sources which set out authority and responsibility within the DON.

(b) *Environmental Impact Statement (EIS)*. An environmental document prepared according to the requirements of Council on Environmental Quality (CEQ) regulations (40 CFR parts 1500–1508) for a major action that will have a significant effect on the quality of the human environment.

(c) *Environmental Assessment (EA)*. A concise document prepared according to the requirements of 40 CFR parts 1500–1508 that briefly provides sufficient evidence and analysis for determining whether to prepare an EIS. An EA aids compliance with NEPA when no EIS is necessary and facilitates preparation of an EIS when one is necessary.

(d) *Categorical Exclusion (CATEX)*. A published category of actions that do not individually or cumulatively have a significant impact on the human environment under normal circumstances, and, therefore, do not require either an environmental assessment or an environmental impact statement.

(e) *Record of Decision (ROD)*. An environmental document signed by an appropriate official of the DON. A ROD sets out a concise summary of the final decision and selected measures for mitigation (if any) of adverse environmental impacts of the alternative chosen from those considered in an EIS.

(f) *Finding of No Significant Impact (FONSI)*. A document that sets out the reasons why an action not otherwise categorically excluded will not have a significant impact on the human environment, and for which an EIS will not therefore be prepared. A FONSI will include the EA or a summary of it and shall note any other environmental documents related to it. A FONSI may be one result of review of an EA.

[69 FR 8109, Feb. 23, 2004]

### § 775.3 Policy.

(a) It is the DON policy regarding NEPA, consistent with its mission and regulations and the environmental laws and regulations of the United States, to:

(1) Initiate the NEPA processes at the earliest possible time to be an effective decision making tool in the course of identifying a proposed action.

(2) Develop and carefully consider a reasonable range of alternatives for achieving the purpose(s) of proposed actions.

(3) Assign responsibility for preparation of action specific environmental analysis under NEPA to the action proponent. The action proponent should understand the plans, analyses, and environmental documents related to that action.

(b) NEPA is intended to ensure that environmental issues are fully considered and incorporated into the Federal decision making process. Consequently, actions for which the DON has no decision-making authority and

no discretion in implementing the action, such as those carried out under a non discretionary mandate from Congress (e.g., congressional direction to transfer Federal property to a particular entity for a particular purpose that leaves DON no discretion in how the transfer will be implemented) or as an operation of law (e.g., reversionary interests in land recorded at the time the property was obtained and that provide no discretion in whether to trigger the reversion or how the reversion will be implemented), require no analysis or documentation under NEPA or its implementing regulations.

[69 FR 8109, Feb. 23, 2004]

**§ 775.4 Responsibilities.**

(a) The Assistant Secretary of the Navy (Installations and Environment) (ASN (I&E)) shall:

(1) Act as principal liaison with the Office of the Secretary of Defense, the Council on Environmental Quality, the Environmental Protection Agency, other Federal agencies, Congress, state governments, and the public with respect to significant NEPA matters.

(2) Direct the preparation of appropriate environmental analysis and documentation and, with respect to those matters governed by SECNAV Instruction 5000.2 series, advise the Assistant Secretary of the Navy (Research Development and Acquisition) (ASN (RD&A)) concerning environmental issues and the appropriate level of environmental analysis and NEPA documentation needed in any particular circumstance.

(3) Except for proposed acquisition-related actions addressed in paragraph (b)(2) of this section, review, sign, and approve for publication, as appropriate, documents prepared under NEPA.

(4) Establish and publish a list of categorical exclusions for the DON.

(b) The Assistant Secretary of the Navy (Research, Development and Acquisition (ASN (RD&A)) shall, in accordance with SECNAV Instruction 5000.2 series:

(1) Ensure that DON acquisition programs, research programs, and procurements comply with NEPA.

(2) Review, sign, and approve for publication, as appropriate, environmental documents prepared under NEPA for proposed acquisition or research and development related actions.

(c) The General Counsel of the Navy and the Judge Advocate General of the Navy shall:

(1) Ensure that legal advice for compliance with environmental planning requirements is available to all decision-makers.

(2) Advise the Secretary of the Navy, the Chief of Naval Operations, and the Commandant of the Marine Corps as to the legal requirements that must be met, and the conduct and disposition of all legal matters arising in the context of environmental planning.

(d) The Chief of Naval Operations (CNO) and the Commandant of the Marine Corps (CMC) shall:

(1) Implement effective environmental planning throughout their respective services.

(2) Prepare and issue instructions or orders to implement environmental planning policies of the DON. Forward proposed CNO/CMC environmental planning instructions or orders to ASN (I&E) and, when appropriate, ASN (RD&A) for review and comment prior to issuance.

(3) Make decisions on environmental assessments as to whether a Finding of No Significant Impact is appropriate or preparation of an environmental impact statement is required.

(4) Ensure that subordinate commands establish procedures for implementing mitigation measures described in NEPA documents.

(5) Provide coordination as required for the preparation of NEPA documents for actions initiated by non-DON/DOD entities, state or local agencies and/or private individuals for which service involvement may be reasonably foreseen.

(6) Bring environmental planning matters that involve controversial issues or which may affect environmental planning policies or their implementation to the attention of ASN (I&E) and, where appropriate, ASN (RD&A) for coordination and determination.

(7) Notify ASN (I&E), and when appropriate, ASN (RD&A) of any proposed EIS, and of any EA that may involve potentially sensitive public interest issues. EIS notification shall

occur prior to commencing NEPA document preparation or receiving any public or regulatory agency involvement. EA notification shall be made as soon as it becomes apparent that potentially sensitive public issues are involved.

[69 FR 8109, Feb. 23, 2004]

### § 775.5 Classified actions.

(a) The fact that a proposed action is of a classified nature does not relieve the proponent of the action from complying with NEPA and the CEQ regulations. Therefore, environmental documents shall be prepared, safeguarded and disseminated in accordance with the requirements applicable to classified information. When feasible, these documents shall be organized in such a manner that classified portions are included as appendices so that unclassified portions can be made available to the public. Review of classified NEPA documentation will be coordinated with the Environmental Protection Agency (EPA) to fulfill requirements of section 309 of the Clean Air Act (42 U.S.C. 7609 *et seq.*).

(b) It should be noted that a classified EA/EIS serves the same ''informed decisionmaking'' purpose as does a published unclassified EA/EIS. Even though the classified EA/EIS does not undergo general public review and comment, it must still be part of the information package to be considered by the decisionmaker for the proposed action. The content of a classified EA/EIS (or the classified portion of a public EA/EIS) will therefore meet the same content requirements applicable to a published unclassified EA/EIS.

### § 775.6 Planning considerations.

(a) An EIS must be prepared for proposed major Federal actions that will have significant impacts on the human environment. The agency decision in the case of an EIS is reflected in a ROD.

(b) Where a proposed major Federal action has the potential for significantly affecting the human environment, but it is not clear whether the impacts of that particular action will in fact be significant, or where the nature of an action precludes use of a categorical exclusion, an EA may be used to assist the agency in determining whether to prepare an EIS. If the agency determination in the case of an EA is that there is no significant impact on the environment, the findings will be reflected in a FONSI. If the EA determines that the proposed action is likely to significantly affect the environment (even after mitigation), then an EIS will be prepared. An EA also may be used where it otherwise will aid compliance with NEPA.

(c) CEQ regulations (40 CFR 1508.18(a)) define major federal actions subject to evaluation under NEPA to include, among other things, ''new and continuing activities''. The term *new activities* is intended to encompass future actions, *i.e.*, those which are not ongoing at the time of the proposal. The term *continuing activities* which may necessitate the preparation of a NEPA document will be applied by the Department of Navy to include activities which are presently being carried out in fulfillment of the Navy mission and function, including existing training functions, where:

(1) The currently occurring environmental effects of which have not been previously evaluated in a NEPA document, and there is a discovery that substantial environmental degradation is occurring, or is likely to occur, as a result of ongoing operations (e.g., a discovery that significant beach erosion is occurring as a result of continuing amphibious exercises, new designation of wetland habitat, or discovery of an endangered species residing in the area of the activity), or

(2) There is a discovery that the environmental effects of an ongoing activity are significantly and qualitatively different or more severe than predicted in a NEPA document prepared in connection with the commencement of the activity.

A substantial change in a continuing activity (such as a substantial change in operational tempo, area of use, or in methodology/equipment) which has the potential for significant environmental impacts should be considered a proposal for a new action and be documented accordingly. Preparation of a NEPA document is not a necessary prerequisite, nor a substitute, for compliance with other environmental laws.

(d) Where emergency circumstances require immediate action, for the protection of lives and for public health and safety, which could result in significant harm to the environment, the activity Commanding Officer or his designee shall report the emergency action to CNO (OP–44E)/CMC (LFL) who will facilitate the appropriate consultation with CEQ as soon as practicable.

(e) A categorical exclusion (CATEX), as defined and listed in this regulation, may be used to exclude a proposed action from further analysis. Even though a proposed action generally is covered by a listed categorical exclusion, a categorical exclusion will not be used if the proposed action:

(1) Would adversely affect public health or safety;

(2) Involves effects on the human environment that are highly uncertain, involve unique or unknown risks, or which are scientifically controversial;

(3) Establishes precedents or makes decisions in principle for future actions that have the potential for significant impacts;

(4) Threatens a violation of Federal, state, or local environmental laws applicable to the Department of the Navy; or

(5) Involves an action that, as determined in coordination with the appropriate resource agency, may:

(i) Have an adverse effect on Federally listed endangered/threatened species or marine mammals;

(ii) Have an adverse effect on coral reefs or on Federally designated wilderness areas, wildlife refuges, marine sanctuaries, or parklands;

(iii) Adversely affect the size, function or biological value of wetlands and is not covered by a nation-wide or regional permit;

(iv) Have an adverse effect on archaeological resources or resources (including but not limited to ships, aircraft, vessels and equipment) listed or determined eligible for listing on the National Register of Historic Places; or

(v) Result in an uncontrolled or unpermitted release of hazardous substances or require a conformity determination under standards of the Clean Air Act General Conformity Rule.

(f) *Categorical exclusions.* Subject to the criteria in paragraph (e) above, the following categories of actions are excluded from further analysis under NEPA. The CNO and CMC shall determine whether a decision to forego preparation of an EA or EIS on the basis of one or more categorical exclusions must be documented in an administrative record and the format for such record.

(1) Routine fiscal and administrative activities, including administration of contracts;

(2) Routine law and order activities performed by military personnel, military police, or other security personnel, including physical plant protection and security;

(3) Routine use and operation of existing facilities, laboratories, and equipment;

(4) Administrative studies, surveys, and data collection;

(5) Issuance or modification of administrative procedures, regulations, directives, manuals, or policy;

(6) Military ceremonies;

(7) Routine procurement of goods and services conducted in accordance with applicable procurement regulations, executive orders, and policies;

(8) Routine repair and maintenance of buildings, facilities, vessels, aircraft, and equipment associated with existing operations and activities (e.g., localized pest management activities, minor erosion control measures, painting, refitting);

(9) Training of an administrative or classroom nature;

(10) Routine personnel actions;

(11) Routine movement of mobile assets (such as ships and aircraft) for homeport reassignments, for repair/overhaul, or to train/perform as operational groups where no new support facilities are required;

(12) Routine procurement, management, storage, handling, installation, and disposal of commercial items, where the items are used and handled in accordance with applicable regulations (e.g., consumables, electronic components, computer equipment, pumps);

(13) Routine recreational/welfare activities;

(14) Alteration of and additions to existing buildings, facilities, structures, vessels, aircraft, and equipment to conform or provide conforming use specifically required by new or existing applicable legislation or regulations (e.g., hush houses for aircraft engines, scrubbers for air emissions, improvements to storm water and sanitary and industrial wastewater collection and treatment systems, and installation of fire fighting equipment);

(15) The modification of existing systems or equipment when the environmental effects will remain substantially the same and the use is consistent with applicable regulations;

(16) Routine movement, handling and distribution of materials, including hazardous materials/wastes that are moved, handled, or distributed in accordance with applicable regulations;

(17) New activities conducted at established laboratories and plants (including contractor-operated laboratories and plants) where all airborne emissions, waterborne effluent, external ionizing and non-ionizing radiation levels, outdoor noise, and solid and bulk waste disposal practices are in compliance with existing applicable Federal, state, and local laws and regulations;

(18) Studies, data, and information gathering that involve no permanent physical change to the environment (e.g., topographic surveys, wetlands mapping, surveys for evaluating environmental damage, and engineering efforts to support environmental analyses);

(19) Temporary placement and use of simulated target fields (e.g., inert mines, simulated mines, or passive hydrophones) in fresh, estuarine, and marine waters for the purpose of non-explosive military training exercises or research, development, test and evaluation;

(20) Installation and operation of passive scientific measurement devices (e.g., antennae, tide gauges, weighted hydrophones, salinity measurement devices, and water quality measurement devices) where use will not result in changes in operations tempo and is consistent with applicable regulations;

(21) Short-term increases in air operations up to 50 percent of the typical operation rate, or increases of 50 operations per day, whichever is greater. Frequent use of this CATEX at an installation requires further analysis to determine there are no cumulative impacts;

(22) Decommissioning, disposal, or transfer of Navy vessels, aircraft, vehicles, and equipment when conducted in accordance with applicable regulations, including those regulations applying to removal of hazardous materials;

(23) Non-routine repair and renovation, and donation or other transfer of structures, vessels, aircraft, vehicles, landscapes or other contributing elements of facilities listed or eligible for listing on the National Register of Historic Places which will result in no adverse effect;

(24) Hosting or participating in public events (e.g., air shows, open houses, Earth Day events, and athletic events) where no permanent changes to existing infrastructure (e.g., road systems, parking and sanitation systems) are required to accommodate all aspects of the event;

(25) Military training conducted on or over nonmilitary land or water areas, where such training is consistent with the type and tempo of existing non-military airspace, land, and water use (e.g., night compass training, forced marches along trails, roads and highways, use of permanently established ranges, use of public waterways, or use of civilian airfields);

(26) Transfer of real property from DON to another military department or to another Federal agency;

(27) Receipt of property from another Federal agency when there is no anticipated or proposed substantial change in land use;

(28) Minor land acquisitions or disposals where anticipated or proposed land use is similar to existing land use and zoning, both in type and intensity;

(29) Disposal of excess easement interests to the underlying fee owner;

(30) Renewals and minor amendments of existing real estate grants for use of Government-owned real property where no significant change in land use is anticipated;

(31) Land withdrawal continuances or extensions that merely establish time

periods and where there is no significant change in land use;

(32) Renewals and/or initial real estate in grants and out grants involving existing facilities and land wherein use does not change significantly (e.g., leasing of federally-owned or privately-owned housing or office space, and agricultural out leases);

(33) Grants of license, easement, or similar arrangements for the use of existing rights-of-way or incidental easements complementing the use of existing rights-of-way for use by vehicles (not to include significant increases in vehicle loading); electrical, telephone, and other transmission and communication lines; water, wastewater, storm water, and irrigation pipelines, pumping stations, and facilities; and for similar utility and transportation uses;

(34) New construction that is similar to existing land use and, when completed, the use or operation of which complies with existing regulatory requirements (e.g., a building within a cantonment area with associated discharges/runoff within existing handling capacities);

(35) Demolition, disposal, or improvements involving buildings or structures when done in accordance with applicable regulations including those regulations applying to removal of asbestos, PCBs, and other hazardous materials;

(36) Acquisition, installation, and operation of utility (e.g., water, sewer, electrical) and communication systems (e.g., data processing cable and similar electronic equipment) which use existing rights of way, easements, distribution systems, and/or facilities;

(37) Decisions to close facilities, decommission equipment, and/or temporarily discontinue use of facilities or equipment, where the facility or equipment is not used to prevent/control environmental impacts);

(38) Maintenance dredging and debris disposal where no new depths are required, applicable permits are secured, and disposal will be at an approved disposal site;

(39) Relocation of personnel into existing Federally-owned or commercially leased space that does not involve a substantial change affecting the supporting infrastructure (e.g., no increase in vehicular traffic beyond the capacity of the supporting road network to accommodate such an increase);

(40) Pre-lease upland exploration activities for oil, gas or geothermal reserves, (e.g., geophysical surveys);

(41) Installation of devices to protect human or animal life (e.g., raptor electrocution prevention devices, fencing to restrict wildlife movement onto airfields, and fencing and grating to prevent accidental entry to hazardous areas);

(42) Reintroduction of endemic or native species (other than endangered or threatened species) into their historic habitat when no substantial site preparation is involved;

(43) Temporary closure of public access to DON property in order to protect human or animal life;

(44) Routine testing and evaluation of military equipment on a military reservation or an established range, restricted area, or operating area; similar in type, intensity and setting, including physical location and time of year, to other actions for which it has been determined, through NEPA analysis where the DON was a lead or cooperating agency, that there are no significant impacts; and conducted in accordance with all applicable standard operating procedures protective of the environment;

(45) Routine military training associated with transits, maneuvering, safety and engineering drills, replenishments, flight operations, and weapons systems conducted at the unit or minor exercise level; similar in type, intensity and setting, including physical location and time of year, to other actions for which it has been determined, through NEPA analysis where the DON was a lead or cooperating agency, that there are no significant impacts; and conducted in accordance with all applicable standard operating procedures protective of the environment.

[55 FR 33899, Aug. 20, 1990, as amended at 55 FR 39960, Oct. 1, 1990; 69 FR 8110, Feb. 23, 2004]

### § 775.7 Time limits for environmental documents.

(a) The timing of the preparation, circulation, submission and public

availability of environmental documents is important in achieving the purposes of NEPA. Therefore, the NEPA process shall begin as early as possible in the decisionmaking process.

(b) The EPA publishes a weekly notice in the FEDERAL REGISTER of environmental impact statements filed during the preceding week. The minimum time periods set forth below shall be calculated from the date of publication of notices in the FEDERAL REGISTER. No decision on the proposed action may take place until the later of the following dates:

(1) Ninety days after publication of the notice of availability for a draft environmental impact statement (DEIS). Draft statements shall be available to the public for 15 days prior to any public hearing on the DEIS (40 CFR 1506.6(c)(2)).

(2) Thirty days after publication of the notice of availability for a final environmental impact statement (FEIS). If the FEIS is available to the public within ninety days from the availability of the DEIS, the minimum thirty day period and the minimum nintey day period may run concurrently. However, not less than 45 days from publication of notice of filing shall be allowed for public comment on draft statements prior to filing of the FEIS (40 CFR 1506.10(c)).

### § 775.8 Scoping.

As soon as practicable after the decision to prepare an EIS is made, an early and open process called ''scoping'' shall be used to determine the scope of issues to be addressed and to identify the significant issues to be analyzed in depth related to the proposed action (40 CFR 1501.7). This process also serves to deemphasize insignificant issues, narrowing the scope of the EIS process accordingly (40 CFR 1500.4(g)). Scoping results in the identification by the proponent of the range of actions, alternatives, and impacts to be considered in the EIS (40 CFR 1508.25). For any action, this scope may depend on the relationship of the proposed action to other existing environmental documentation.

### § 775.9 Documentation and analysis.

(a) Environmental documentation and analyses required by this rule should be integrated as much as practicable with any environmental studies, surveys and impact analyses required by other environmental review laws and executive orders (40 CFR 1502.25). When a cost-benefit analysis has been prepared in conjunction with an action which also requires a NEPA analysis, the cost-benefit analysis shall be integrated into the environmental documentation.

(b) CEQ regulations encourage the use of tiering whenever appropriate to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for discussion at each level of environmental review (40 CFR 1502.20). Tiering is accomplished through the preparation of a broad programmatic environmental impact statement discussing the impacts of a wide ranging or long term stepped program followed by narrower statements or environmental assessments concentrating solely on issues specific to the analysis subsequently prepared (40 CFR 1508.28).

(1) *Appropriate use of tiering:* Tiering is appropriate when it helps the lead agency to focus on issues which are ripe for decision and exclude from consideration issues already decided or not yet ripe. (40 CFR 1508.28(b).) The sequence of statements or analyses is:

(i) From a broad program, plan, or policy environmental impact statement (not necessarily site specific) to a subordinate/smaller scope program, plan, or policy statement or analysis (usually site specific) (40 CFR 1508.28 (a)).

(ii) From an environmental impact statement on a specific action at an early stage (such as need and site selection) to a supplement (which is preferred) or a subsequent statement or analysis at a later stage (such as environmental mitigation) (40 CFR 1508.28(b)).

(iii) In addition to the discussion required by these regulations for inclusion in environmental impact statements, the programmatic environmental impact statement shall also discuss:

(A) A description of the subsequent stages or sites that may ultimately be proposed in as much detail as presently possible;

(B) All of the implementing factors of the program that can be ascertained at the time of impact statement preparation;

(C) All of the environmental impacts that will result from establishment of the overall program itself that will be similar for subsequent stages or sites as further implementation plans are proposed; and

(D) All of the appropriate mitigation measures that will be similarly proposed for subsequent stages or sites.

(iv) The analytical document used for stage or site specific analysis subsequent to the programmatic environmental impact statement shall also be an environmental impact statement when the subsequent tier itself may have a significant impact on the quality of the human environment or when an impact statement is otherwise required. Otherwise, it is appropriate to document the tiered analysis with an environmental assessment to fully assess the need for further documentation or whether a FONSI would be appropriate.

(2) [Reserved]

### § 775.10 Relations with state, local and regional agencies.

Close and harmonious planning relations with local and regional agencies and planning commissions of adjacent cities, counties, and states, for cooperation and resolution of mutual land use and environment-related problems should be established. Additional coordination may be obtained from state and area-wide planning and development ''clearinghouses''. These are agencies which have been established pursuant to Executive Order 12372 of July 14, 1982 (3 CFR, 1982 Comp., p. 197). The clearinghouses serve a review and coordination function for Federal activities and the proponent may gain insights on other agencies' approaches to environmental assessments, surveys, and studies in relation to any current proposal. The clearinghouses would also be able to assist in identifying possible participants in scoping procedures for projects requiring an EIS.

### § 775.11 Public participation.

The importance of public participation (40 CFR 1501.4(b)) in preparing environmental assessments is clearly recognized and it is recommended that commands proposing an action develop a plan to ensure appropriate communication with affected and interested parties. The command Public Affairs Office can provide assistance with developing and implementing this plan. In determining the extent to which public participation is practicable, the following are among the factors to be weighed by the command:

(a) The magnitude of the environmental considerations associated with the proposed action;

(b) The extent of anticipated public interest; and

(c) Any relevant questions of national security and classification.

### § 775.12 Delegation of authority.

(a) The ASN (I&E) may delegate his/her responsibilities under this instruction for review, approval and/or signature of EISs and RODs to appropriate Executive Schedule/Senior Executive Service civilians or flag/general officers. ASN (I&E), CNO, and CMC may delegate all other responsibilities assigned in this instruction as deemed appropriate.

(b) The ASN (RD&A) delegation of authority for approval and signature of documents under NEPA is contained in SECNAV Instruction 5000.2 series, which sets out policies and procedures for acquisition programs.

(c) Previously authorized delegations of authority are continued until revised or withdrawn.

[69 FR 8112, Feb. 23, 2004]

## PART 776—PROFESSIONAL CONDUCT OF ATTORNEYS PRACTICING UNDER THE COGNIZANCE AND SUPERVISION OF THE JUDGE ADVOCATE GENERAL

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AUTHORITY: 10 U.S.C. 806, 806a, 826, 827, 1044; Manual for Courts-Martial, United States, 2012; U.S. Navy Regulations, 1990; Department of Defense Instruction 1442.02 (series); Secretary of the Navy Instruction 5430.27 (series), Responsibility of the Judge Advocate General of the Navy and the Staff Judge Advocate to the Commandant of the Marine Corps for Supervision and Provision of Certain Legal Services.

SOURCE: 80 FR 68389, Nov. 4, 2015; 80 FR 73991, Nov. 27, 2015, unless otherwise noted.

## Subpart A—General

### § 776.1 Purpose.

In furtherance of the authority citations (which, if not found in local libraries, are available from the Office of the Judge Advocate General, 1322 Patterson Avenue SE., Suite 3000, Washington Navy Yard DC 20374–5066), which require the Judge Advocate General of the Navy (JAG) to supervise the performance of legal services under JAG cognizance throughout the Department of the Navy (DoN), this part is promulgated:

(a) To establish Rules of Professional Conduct (subpart B of this part) for attorneys subject to this part;

(b) To establish procedures for receiving, processing, and taking action on complaints of professional misconduct made against attorneys practicing under the supervision of the JAG, whether arising from professional legal activities in DoN proceedings and matters, or arising from other, non-U.S. Government related professional legal activities or personal misconduct that suggests the attorney is ethically, professionally, or morally unqualified to perform legal services within the DoN;

(c) To prescribe limitations on and procedures for processing requests to engage in the outside practice of law by those DoN attorneys practicing under the supervision of the JAG; and

(d) To ensure quality legal services at all proceedings under the cognizance and supervision of the JAG.

### § 776.2 Applicability.

(a) This part applies to all ''covered attorneys'' as defined herein.''

(b) ''Covered attorneys'' include:

(1) The following U.S. Government (USG) attorneys, referred to collectively as ''covered USG attorneys'' throughout this part:

(i) All active-duty Navy judge advocates (designator 2500 or 2505) or Marine Corps judge advocates (Military Occupational Specialty (MOS) 4402 or 9914).

(ii) All active-duty judge advocates of other U.S. armed forces who practice law or provide legal services under the cognizance and supervision of the JAG.

(iii) All civil service and contracted civilian attorneys who practice law or perform legal services under the cognizance and supervision of the JAG. This includes civilian attorneys employed by the DoN as Executive Agent for Combatant Commands, and for whom the JAG serves as the ''qualifying authority'' under the authority citations.

(iv) All Reserve or Retired judge advocates of the Navy or Marine Corps (and any other U.S. armed force), who, while performing official DoN duties, practice law, provide legal services under the cognizance and supervision of the JAG or are serving in non-legal MOS billets.

(v) All other attorneys appointed by the JAG (or the Staff Judge Advocate to the Commandant of the Marine Corps (SJA to CMC) in Marine Corps matters) to serve in billets or to provide legal services normally provided by Navy or Marine Corps judge advocates. This policy applies to officer and enlisted Reservists, active-duty personnel, and any other personnel who are licensed to practice law by any Federal or state authority but who are not members of the Judge Advocate General's Corps or who do not hold the 4402 or 9914 MOS designation in the Marine Corps.

(vi) All qualified volunteer attorneys that have been certified as legal assistance attorneys by the JAG, or his designee, pursuant to the authority citations.

(2) The following non-U.S. Government attorneys, referred to collectively as ''covered non-USG attorneys'' throughout this part:

(i) All civilian attorneys representing individuals in any matter for which the JAG is charged with supervising the provision of legal services. These matters include, but are not limited to, courts-martial, administrative separation boards or hearings, boards of inquiry, and disability evaluation proceedings.

(3) The term ''covered attorney'' does not include those civil service or civilian attorneys who practice law or perform legal services under the cognizance and supervision of the General Counsel of the Navy.

(c) Professional or personal misconduct unrelated to a covered attorney's DoN activities, while normally outside the ambit of Subpart B of this part, may be reviewed under procedures established herein and may provide the basis for decisions by the JAG regarding the covered attorney's continued qualification to provide legal services in DoN matters.

(d) Although subpart B of this part do not apply to non-attorneys, they do define the type of ethical conduct that the public and the military community have a right to expect from DoN legal personnel. Accordingly, Subpart B of this part shall serve as the model of ethical conduct for the following personnel when involved with the delivery of legal services under the supervision of the JAG:

(1) Navy Legalmen and Marine Corps legal administrative officers, legal service specialists, and legal services reporters;

(2) Limited duty officers (LAW);

(3) Legal interns; and

(4) civilian support personnel including paralegals, legal secretaries, legal technicians, secretaries, court reporters, and other personnel holding similar positions. Covered USG attorneys who supervise non-attorney DON employees are responsible for their ethical conduct to the extent provided for in § 776.55 of this part.

### § 776.3 Policy.

(a) Covered attorneys shall maintain the highest standards of professional ethical conduct. Loyalty and fidelity to the United States, the law, clients, both institutional and individual, and the rules and principles of professional ethical conduct set forth in subpart B of this part must come before private gain or personal interest.

(b) Subpart B of this part and related procedures set forth herein concern matters solely under the purview of the JAG. Whether conduct or failure to act constitutes a violation of the professional duties imposed by this part is a matter within the sole discretion of the JAG or officials authorized to act for the JAG. Subpart B of this part are not substitutes for, and do not take the place of, other rules and standards governing DoN personnel, such as the Department of Defense Joint Ethics Regulation, the Code of Conduct for members of the Armed Forces, the Uniform Code of Military Justice (UCMJ), and the general precepts of ethical conduct to which all DoN service members and employees are expected to adhere. Similarly, action taken per this part is not supplanted or barred by, and does not, even if the underlying misconduct is the same, supplant or bar the following action from being taken by authorized officials:

(1) Punitive or disciplinary action under the UCMJ; or

(2) Administrative action under the Manual for Courts-Martial (MCM), U.S. Navy Regulations, or under other applicable authority.

(c) Inquiries into allegations of professional misconduct will normally be held in abeyance until any related criminal investigation or proceeding is complete. However, a pending criminal investigation or proceeding does not bar the initiation or completion of a professional misconduct investigation stemming from the same or related conduct or prevent the JAG from imposing professional disciplinary sanctions as provided for in this part.

### § 776.4 Attorney-client relationships.

(a) The executive agency to which the covered USG attorney is assigned (DoN in most cases) is the client served by the covered USG attorney unless detailed to represent another client by competent authority. Specific guidelines are contained in § 776.32 of this part.

(b) Covered USG attorneys will not establish attorney-client relationships with any individual unless detailed, assigned, or otherwise authorized to do so by competent authority. Wrongfully establishing an attorney-client relationship may subject the attorney to discipline administered per this part. See § 776.21 of this part.

(c) Employment of a non-USG attorney by an individual client does not alter the professional responsibilities of a covered USG attorney detailed or otherwise assigned by competent authority to represent that client. Specific guidance is set forth in subpart E.

### § 776.5 Judicial conduct.

To the extent that it does not conflict with statutes, regulations, or this part, the current version of the American Bar Association Model Code of Judicial Conduct (as amended), hereafter referred to as the 'Code of Judicial Conduct,' applies to all military and appellate judges and to all other covered USG attorneys performing judicial functions under the JAG's supervision within the DoN.

### § 776.6 Conflict.

(a) To the extent that a conflict exists between this part and the rules of other jurisdictions that regulate the professional conduct of attorneys, this part will govern the conduct of covered attorneys engaged in legal functions under JAG cognizance and supervision. Specific and significant instances of conflict between the rules contained in subpart B of this part and the rules of other jurisdictions shall be reported promptly to the Rules Counsel (see § 776.9 of this part), via the supervisory attorney. See § 776.53 of this part.

(b) In the case of Navy and Marine Corps personnel engaged in legal functions under Department of Defense (DoD) vice JAG cognizance and supervision (e.g., DoD Office of Military Commissions), this part and the applicable DoD professional responsibility rules apply. In such a case, to the extent that a conflict exists between Subpart B of this part and applicable DoD professional responsibility rules, the DoD rules shall take precedence.

### § 776.7 Reporting requirements.

Covered USG attorneys shall report promptly to the Rules Counsel (see § 776.9 of this part) any disciplinary or administrative action, including initiation of investigation, by any licensing authority or Federal, State, or local bar, possessing the power to revoke, suspend, or in any way limit the authority to practice law in that jurisdiction, upon himself, herself, or another covered attorney. Failure to report such discipline or administrative action may subject the covered USG attorney to discipline administered per this part. See § 776.71 of this part.

### § 776.8 Professional Responsibility Committee.

(a) *Composition*. This standing committee will consist of the Assistant Judge Advocate General (AJAG) for Military Justice; the Deputy Chiefs of Staff for Naval Legal Service Offices (or Defense Services Offices, effective 1 October 2012), and Region Legal Service Offices; the Chief Judge, Navy-Marine Corps Trial Judiciary; and in cases involving Marine Corps judge advocates, the Deputy Staff Judge Advocate to the Commandant of the Marine Corps (DSJA to CMC); and such other personnel as the JAG from time-to-time may appoint. A majority of the members constitutes a quorum. The Chairman of the Committee shall be the AJAG for Military Justice. The Chairman may excuse members disqualified for cause, illness, or exigencies of military service, and may appoint additional or alternate members on a permanent basis.

(b) *Purpose*. (1) When requested by the JAG, the SJA to CMC, or the Rules Counsel, the Committee will provide formal advisory opinions to the JAG regarding application of subpart B of this part to individual or hypothetical cases.

(2) On its own motion, the Committee may also issue formal advisory opinions on ethical issues of importance to the DoN legal community.

(3) Upon written request, the Committee may also provide formal advisory opinions to covered attorneys about the propriety of proposed courses of action under subpart B of this part. If such requests are predicated upon full disclosure of all relevant facts, and if the Committee advises that the proposed course of conduct does not violate subpart B of this part, then no adverse action under this rule may be taken against a covered attorney who acts consistently with the Committee's advice. Such requests must be made via the Rules Counsel.

(4) The Chairman will forward copies of all opinions issued by the Committee to the Rules Counsel.

(c) *Limitation*. The Committee will not normally provide ethics advice or opinions concerning professional responsibility matters that are then the subject of litigation.

**§ 776.9 Rules Counsel.**

Appointed by JAG to act as special assistants for the administration of subpart B of this part, the Rules Counsel derive authority from JAG and, as detailed in this part, have ''by direction'' authority. The Rules Counsel shall cause opinions issued by the Professional Responsibility Committee of general interest to the DoN legal community to be published in summarized, non-personal form in suitable publications. Unless another officer is appointed by JAG to act in individual cases, the following officers shall act as Rules Counsel:

(a) The SJA to CMC, for cases involving Marine Corps judge advocates, or civil service and contracted civilian attorneys who perform legal services under his cognizance;

(b) Assistant Judge Advocate General, Chief Judge, DoN (AJAG–CJ) for cases involving Navy and Marine Corps trial and appellate judges; and

(c) AJAG (Civil Law), in all other cases.

**§ 776.10 Informal ethics advice.**

(a) *Advisors.* Covered attorneys may seek informal ethics advice either from the officers named below or from supervisory attorneys in the field. Within the Office of the Judge Advocate General (OJAG) and the Office of the SJA to CMC, the following officials are designated to respond, either orally or in writing, to informal inquiries concerning this rule in the areas of practice indicated:

(1) Director, Criminal Law Division (OJAG Code 20): Military justice matters;

(2) Director, Trial Counsel Assistance Program (TCAP): Trial counsel matters;

(3) Director, Defense Counsel Assistance Program (DCAP): Defense counsel matters;

(4) Director, Legal Assistance Division (OJAG Code 16): Legal assistance matters;

(5) The DSJA to CMC and Head, Research and Civil Law Branch (JAR), Judge Advocate (JA) Division, Headquarters United States Marine Corps (HQMC): Cases involving Marine Corps judge advocates, or civil service and contracted civilian attorneys who perform legal services under the cognizance and supervision of SJA to CMC;

(6) Deputy Chief Judge, Navy-Marine Corps Trial Judiciary: Judicial matters; and

(7) Professional Responsibility Coordinator, Administrative Law Division (OJAG Code 13): All other matters.

(b) *Limitation.* Informal ethics advice will not normally be provided by JAG/HQMC advisors concerning professional responsibility matters that are then the subject of litigation.

(c) *Written advice.* A request for informal advice does not relieve the requester of the obligation to comply with subpart B of this part. Although covered attorneys are encouraged to seek advice when in doubt as to their responsibilities, they remain personally accountable for their professional conduct. If, however, an attorney receives written advice on an ethical matter after full disclosure of all relevant facts and reasonably relies on such advice, no adverse action under this part will be taken against the attorney. Written advice may be sought from either a supervisory attorney or the appropriate advisor in paragraph (a) of this section. The JAG is not bound by unwritten advice or by advice provided by personnel who are not supervisory attorneys or advisors. See §§ 776.8(b)(3) and 776.54(c) of this part.

**§ 776.11 Outside practice of law.**

A covered USG attorney's primary professional responsibility is to the client, as defined by § 776.4 of this part, and he or she is expected to ensure that representation of such client is free from conflicts of interest and otherwise conforms to the requirements of Subpart B of this part and other regulations concerning the provision of legal services within the DoN. The outside practice of law, therefore, must be carefully monitored. Covered USG attorneys who wish to engage in the outside practice of law, including while on terminal leave, must first obtain permission from the JAG. Failure to obtain permission before engaging in the outside practice of law may subject the covered USG attorney to administrative or disciplinary action, including professional sanctions administered

per subpart C of this part. Further details are contained in § 776.57 and subpart D of this part.

### § 776.12 Maintenance of files.

Pursuant to SECNAVINST 5211.5 (series) and SECNAVINST 5212.5 (series) ethics complaint records and outside practice of law request files shall be maintained by the Office of the Chief Judge, DoN (Code 05) for judicial conduct matters; the Research and Civil Law Branch, JA Division, HQMC (JAR) for Marine matters; and the Office of the JAG, Administrative Law Division (Code 13) for all other matters.

(a) Requests for access to such records should be referred to the Office of the Chief Judge, Washington Navy Yard, 1254 Charles Morris Street SE., Suite 320 Washington, DC, 20374–5124; Deputy Assistant Judge Advocate General (Administrative Law), Office of the Judge Advocate General (Code 13), 1322 Patterson Avenue SE Suite 3000, Washington Navy Yard, DC, 20374–5066; or to Head, Research and Civil Law Branch, Office of the Staff Judge Advocate to the Commandant of the Marine Corps, Headquarters United States Marine Corps, 3000 Marine Corps Pentagon (Room 4D556), Washington DC, 20350–3000, as appropriate.

(b) Local command files regarding professional responsibility complaints will not be maintained. Commanding officers and other supervisory attorneys may, however, maintain personal files but must not share their contents with others.

(c) All records maintained under this part shall be maintained in accordance with the following procedures established by JAGINST 5801.2 (series) and DON Privacy Act Notice N05813–1:

(1) Records shall be maintained for a minimum of two years;

(2) Records shall be maintained for as long as an attorney remains subject to JAG-imposed limitations on practice; and

(3) Records pertaining to unsubstantiated complaints, or to attorneys who are no longer subject to limitation on practice, shall be destroyed after 10 years.

### §§ 776.13–776.17 [Reserved]

## Subpart B—Rules of Professional Conduct

### § 776.18 Preamble.

(a) A covered attorney is a representative of clients, an officer of the legal system, an officer of the Federal Government, and a public citizen who has a special responsibility for the quality of justice and legal services provided to the DoN and to individual clients. These Rules of Professional Conduct (Subpart B of this part) govern the ethical conduct of covered attorneys practicing under the Uniform Code of Military Justice, the MCM, 10 U.S.C. 1044 (Legal Assistance), other laws of the United States, and regulations of the DoN.

(b) Subpart B of this part not only address the professional conduct of judge advocates, but also apply to all other covered attorneys who practice under the cognizance and supervision of the Navy JAG.

(c) All covered attorneys are subject to professional disciplinary action, as outlined in this part, for violation of subpart B of this part. Action on allegations of professional or personal misconduct undertaken per subpart B of this part does not prevent other Federal, state, or local bar associations, or other licensing authorities, from taking professional disciplinary or other administrative action for the same or similar conduct.

### § 776.19 Principles.

Subpart B of this part is based on the following principles. Interpretation of subpart B of this part should flow from their common meaning. To the extent that any ambiguity or conflict exists, subpart B of this part should be interpreted consistent with these general principles.

(a) Covered attorneys shall:

(1) Obey the law and applicable military regulations, and counsel clients to do so.

(2) Follow all applicable ethics rules.

(3) Protect the legal rights and interests of clients, organizational and individual.

(4) Be honest and truthful in all dealings.

(5) Not derive personal gain, except as authorized, for the performance of legal services.

(6) Maintain the integrity of the legal profession.

(b) Ethical rules should be consistent with law. If law and ethics conflict, the law prevails unless an ethical rule is constitutionally based.

(c) The military criminal justice system is a truth-finding process consistent with constitutional law.

**§ 776.20 Competence.**

(a) A covered attorney shall provide competent, diligent, and prompt representation to a client. Competent representation requires the legal knowledge, skill, access to evidence, thoroughness, and expeditious preparation reasonably necessary for representation. Initial determinations as to competence of a covered USG attorney for a particular assignment shall be made by a supervising attorney before case or issue assignments; however, assigned attorneys may consult with supervisors concerning competence in a particular case.

(b) [Reserved]

**§ 776.21 Establishment and scope of representation.**

(a) Formation of attorney-client relationships by covered USG attorneys with, and representation of, clients is permissible only when the attorney is authorized to do so by competent authority. For purposes of this part, Military Rules of Evidence 502, the Manual of the Judge Advocate General (JAGINST 5800.7 series), and the Naval Legal Service Command Manual (COMNAVLEGSVCCOMINST 5800.1 series), generally define when an attorney-client relationship is formed between a covered USG attorney and a client servicemember, dependent, or employee.

(b) Generally, the subject matter scope of a covered attorney's representation will be consistent with the terms of the assignment to perform specific representational or advisory duties. A covered attorney shall inform clients at the earliest opportunity of any limitations on representation and professional responsibilities of the attorney towards the client.

(c) A covered attorney shall follow the client's well-informed and lawful decisions concerning case objectives, choice of counsel, forum, pleas, whether to testify, and settlements.

(d) A covered attorney's representation of a client does not constitute an endorsement of the client's political, economic, social, or moral views or activities.

(e) A covered attorney shall not counsel or assist a client to engage in conduct that the attorney knows is criminal or fraudulent, but a covered attorney may discuss the legal and moral consequences of any proposed course of conduct with a client, and may counsel or assist a client in making a good faith effort to determine the validity, scope, meaning, or application of the law.

(f) [Reserved]

**§ 776.22 Diligence.**

(a) A covered attorney shall act with reasonable diligence and promptness in representing a client, and shall consult with a client as soon as practicable and as often as necessary upon being assigned to the case or issue.

(b) [Reserved]

**§ 776.23 Communication.**

(a) A covered attorney shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A covered attorney shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

(c) [Reserved]

**§ 776.24 Fees.**

(a) A covered USG attorney shall not accept any salary, fee, compensation, or other payments or benefits, directly or indirectly, other than Government compensation, for services provided in the course of the covered USG attorney's official duties or employment.

(b) A covered USG attorney shall not accept any salary or other payments as compensation for legal services rendered, by that covered USG attorney in a private capacity, to a client who is eligible for assistance under the DoN

Legal Assistance Program, unless so authorized by the JAG. This rule does not apply to Reserve or Retired judge advocates not then serving on extended active-duty.

(c) A Reserve or Retired judge advocate, whether or not serving on extended active-duty, who has initially represented or interviewed a client or prospective client concerning a matter as part of the attorney's official Navy or Marine Corps duties, shall not accept any salary or other payments as compensation for services rendered to that client in a private capacity concerning the same general matter for which the client was seen in an official capacity, unless so authorized by the JAG.

(d) Covered non-USG attorneys may charge fees. Fees shall be reasonable. Factors considered in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the attorney;

(3) The fee customarily charged in the locality for similar legal services;

(4) The amount involved and the results obtained;

(5) The time limitations imposed by the client or by the circumstances;

(6) The nature and length of the professional relationship with the client;

(7) The experience, reputation, and ability of the attorney or attorneys performing the services; and

(8) Whether the fee is fixed or contingent.

(e) When the covered non-USG attorney has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

(f) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (a)(7) of this section or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the covered non-USG attorney in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the covered non-USG attorney shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(g) A covered non-USG attorney shall not enter into an arrangement for, charge, or collect a contingent fee for representing an accused in a criminal case.

(h) A division of fees between covered non-USG attorneys who are not in the same firm may be made only if:

(1) The division is in proportion to the services performed by each attorney or, by written agreement with the client, each attorney assumes joint responsibility for the representation;

(2) The client is advised of and does not object to the participation of all the attorneys involved; and

(3) The total fee is reasonable.

(i) Covered Non-USG Attorneys. Paragraphs (d) through (h) of this section apply only to private civilian attorneys practicing in proceedings conducted under the cognizance and supervision of the JAG. The primary purposes of paragraphs (d) through (h) of this section are not to permit the JAG to regulate fee arrangements between civilian attorneys and their clients but to provide guidance to covered USG attorneys practicing with non-USG attorneys and to supervisory attorneys who may be asked to inquire into alleged fee irregularities. Absent paragraphs (d) through (h) of this section, such supervisory attorneys have no readily available standard against which to compare allegedly questionable conduct of a civilian attorney.

### § 776.25 Confidentiality of information.

(a) A covered attorney shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure

is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b) of this section.

(b) A covered attorney shall reveal information relating to the representation of a client to the extent the covered attorney reasonably believes necessary:

(1) To prevent reasonably certain death or substantial bodily harm; or

(2) To prevent the client from committing a criminal act that the covered attorney reasonably believes is likely to result in the significant impairment of national security or the readiness or capability of a military unit, vessel, aircraft, or weapon system.

(c) A covered attorney may reveal such information to the extent the covered attorney reasonably believes necessary:

(1) To secure legal advice about the covered attorney's compliance with subpart B of this part;

(2) To establish a claim or defense on behalf of the covered attorney in a controversy between the covered attorney and the client, to establish a defense to a criminal charge or civil claim against the covered attorney based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the attorney's representation of the client; and/or

(3) To comply with other law or a court order.

(d) Examples of conduct likely to result in the significant impairment of national security or the readiness or capability of a military unit, vessel, aircraft, or weapon system include: Divulging the classified location of a special operations unit such that the lives of members of the unit are placed in immediate danger; sabotaging a vessel or aircraft to the extent that the vessel or aircraft could not conduct an assigned mission, or that the vessel or aircraft and crew could be lost; and compromising the security of a weapons site such that the weapons are likely to be stolen or detonated. Paragraph (b) of this section is not intended to and does not mandate the disclosure of conduct that may have a slight impact on the readiness or capability of a unit, vessel, aircraft, or weapon system. Examples of such conduct are: Absence without authority from a peacetime training exercise; intentional damage to an individually assigned weapon; and intentional minor damage to military property.

### § 776.26 Conflict of interest: General rule.

(a) Except as provided by paragraph (b) of this section, a covered attorney shall not represent a client if the representation of that client involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) The representation of one client will be directly adverse to another client; or

(2) There is a significant risk that the representation of one or more clients will be materially limited by the covered attorney's responsibilities to another client, a former client or a third person or by a personal interest of the covered attorney.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a) of this section, a covered attorney may represent a client if:

(1) The covered attorney reasonably believes that the covered attorney will be able to provide competent and diligent representation to each affected client;

(2) The representation is not prohibited by law or regulation;

(3) The representation does not involve the assertion of a claim by one client against another client represented by the covered attorney in the same litigation or other proceeding before a tribunal; and

(4) Each affected client gives informed consent, confirmed in writing.

(c) These conflict-of-interest rules apply to Reservists only while they are actually drilling or on active-duty-for-training, or, as is the case with Retirees, on extended active-duty or when performing other duties subject to JAG supervision. Therefore, unless otherwise prohibited by criminal conflict-of-interest statutes, Reserve or Retired attorneys providing legal services in their civilian capacity may represent clients, or work in firms whose attorneys represent clients, with interests adverse to the United States. Reserve judge advocates who, in their civilian

capacities, represent persons whose interests are adverse to the DoN will provide written notification to their supervisory attorney and commanding officer, detailing their involvement in the matter. Reserve judge advocates shall refrain from undertaking any official action or representation of the DoN with respect to any particular matter in which they are providing representation or services to other clients.

### § 776.27 Conflict of interests: Prohibited transactions.

(a) Covered USG attorneys shall strictly adhere to current DoD Ethics Regulations and shall not:

(1) Knowingly enter into any business transactions on behalf of, or adverse to, a client's interest that directly or indirectly relate to or result from the attorney-client relationship; or

(2) Provide any financial assistance to a client or otherwise serve in a financial or proprietorial fiduciary or bailment relationship, unless otherwise specifically authorized by competent authority.

(b) No covered attorney shall:

(1) Use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation, except as permitted or required by subpart B of this part;

(2) Prepare an instrument giving the covered attorney or a person related to the covered attorney as parent, child, sibling, or spouse any gift from a client, including a testamentary gift, except where the client is related to the donee;

(3) In the case of covered non-USG attorneys, accept compensation for representing a client from one other than the client unless the client consents after consultation, there is no interference with the covered attorney's independence of professional judgment or with the attorney-client relationship, and information relating to representation of a client is protected as required by § 776.25 of this part;

(4) Negotiate any settlement on behalf of multiple clients in a single matter unless each client provides fully informed consent;

(5) Prior to the conclusion of representation of the client, make or negotiate an agreement giving a covered attorney literary or media rights for a portrayal or account based in substantial part on information relating to representation of a client;

(6) Represent a client in a matter directly adverse to a person whom the covered attorney knows is represented by another attorney who is related as parent, child, sibling, or spouse to the covered attorney, except upon consent by the client after consultation regarding the relationship; or

(7) Acquire a proprietary interest in the cause of action or subject matter of litigation the covered attorney is conducting for a client.

(c) [Reserved]

### § 776.28 Conflict of interest: Former client.

(a) A covered attorney who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client, unless the former client gives informed consent, confirmed in writing.

(b) A covered attorney who has formerly represented a client in a matter shall not thereafter:

(1) Use information relating to the representation to the disadvantage of the former client or to the covered attorney's own advantage, except as Subpart B of this part would permit or require with respect to a client, or when the information has become generally known; or

(2) Reveal information relating to the representation except as subpart B of this part would permit or require with respect to a client.

(c) [Reserved]

### § 776.29 Imputed disqualification: General rule.

(a) *Imputed disqualification: General rule.* Covered USG attorneys working in the same military law office are not automatically disqualified from representing a client because any of them practicing alone would be prohibited from doing so by § 776.26, § 776.27, § 776.28, or § 776.38 of this part. Covered

non-USG attorneys must consult their federal, state, and local bar rules governing the representation of multiple or adverse clients within the same office before such representation is initiated, as such representation may expose them to disciplinary action under the rules established by their licensing authorities.

(b) *Comment.* (1) The circumstances of military (or Government) service may require representation of opposing sides by covered USG attorneys working in the same law office. Such representation is permissible so long as conflicts of interests are avoided and independent judgment, zealous representation, and protection of confidences are not compromised. Thus, the principle of imputed disqualification is not automatically controlling for covered USG attorneys. The knowledge, actions, and conflicts of interests of one covered USG attorney are not imputed to another simply because they operate from the same office. For example, the fact that a number of defense attorneys operate from one office and normally share clerical assistance would not prohibit them from representing co-accused at trial by court-martial. Imputed disqualification rules for non-USG attorneys are established by their individual licensing authorities and may well proscribe all attorneys from one law office from representing a co-accused, or a party with an adverse interest to an existing client, if any attorney in the same office were so prohibited.

(2) Whether a covered USG attorney is disqualified requires a functional analysis of the facts in a specific situation. The analysis should include consideration of whether the following will be compromised: Preserving attorney-client confidentiality; maintaining independence of judgment; and avoiding positions adverse to a client. See, e.g., U.S. v. Stubbs, 23 M.J. 188 (CMA 1987).

(3) Preserving confidentiality is a question of access to information. Access to information, in turn, is essentially a question of fact in a particular circumstance, aided by inferences, deductions, or working presumptions that reasonably may be made about the way in which covered USG attorneys work together. A covered USG attorney may have general access to files of all clients of a military law office (e.g., legal assistance attorney) and may regularly participate in discussions of their affairs; it may be inferred that such a covered USG attorney in fact is privy to all information about all the office's clients. In contrast, another covered USG attorney (e.g., military defense counsel) may have access to the files of only a limited number of clients and participate in discussion of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a covered USG attorney in fact is privy to information about the clients actually served but not to information of other clients. Additionally, a covered USG attorney changing duty stations or changing assignments within a military office has a continuing duty to preserve confidentiality of information about a client formerly represented. See § 776.25 and § 776.28 of this part.

(4) In military practice, where covered USG attorneys representing adverse interests are sometimes required to share common spaces, equipment, and clerical assistance, inadvertent disclosure of confidential or privileged material may occur. A covered attorney who mistakenly receives any such confidential or privileged materials should refrain from reviewing them (except for the limited purpose of ascertaining ownership or proper routing), notify the attorney to whom the material belongs that he or she has such material, and either follow instructions of the attorney with respect to the disposition of the materials or refrain from further reviewing or using the materials until a definitive resolution of the proper disposition of the materials is obtained from a court. A covered attorney's duty to provide his or her client zealous representation does not justify a rule allowing the receiving attorney to take advantage of inadvertent disclosures of privileged and/or confidential materials. This policy recognizes and reinforces the principles of: Confidentiality and the attorney-client privilege; analogous principles governing the inadvertent waiver of the attorney-client privilege; the law governing bailments and missent

property; and considerations of common sense, reciprocity, and professional courtesy.

(5) Maintaining independent judgment allows a covered USG attorney to consider, recommend, and carry out any appropriate course of action for a client without regard to the covered USG attorney's personal interests or the interests of another. When such independence is lacking or unlikely, representation cannot be zealous.

(6) Another aspect of loyalty to a client is the general obligation of any attorney to decline subsequent representations involving positions adverse to a former client in substantially related matters. This obligation normally requires abstention from adverse representation by the individual covered attorney involved, but, in the military legal office, abstention is not required by other covered USG attorneys through imputed disqualification.

**§ 776.30 Successive Government and private employment.**

(a) Except as the law or regulations may otherwise expressly permit, a former covered USG attorney, who has information known to be confidential Government information about a person that was acquired while a covered USG attorney, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. The former covered USG attorney may continue association with a firm, partnership, or association representing any such client only if the disqualified covered USG attorney is screened from any participation in the matter and is apportioned no part of the fee or any other benefit therefrom.

(1) The disqualified former covered USG attorney must ensure that he or she is screened from any participation in the matter and is apportioned no part of the fee or any other benefit therefrom; and,

(2) Must provide written notice promptly to the appropriate Government agency to enable it to ascertain compliance with the provisions of applicable law and regulations.

(b) Except as the law or regulations may otherwise expressly permit, a former covered USG attorney, who has information known to be confidential Government information about a person which was acquired while a covered USG attorney, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. The former covered USG attorney may continue association with a firm, partnership, or association representing any such client only if the disqualified covered USG attorney is screened from any participation in the matter and is apportioned no part of the fee or any other benefit therefrom.

(c) Except as the law or regulations may otherwise expressly permit, a covered USG attorney shall not:

(1) Participate in a matter in which the covered USG attorney participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the covered USG attorney's stead in the matter; or,

(2) Negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the covered USG attorney is participating personally and substantially.

(d) As used in this paragraph (d), the term ''matter'' includes:

(1) Any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party or parties, and

(2) Any other matter covered by the conflict-of-interest rules of the DoD, DoN, or other appropriate Government agency.

(e) As used in the rule, the term ''confidential Governmental information'' means information that has been obtained under Governmental authority and that, at the time this Rule is applied, the Government is prohibited by law or regulations from disclosing to the public or has a legal privilege not to disclose, and that is not otherwise available to the public.

(f) [Reserved]

### § 776.31 Former judge or arbitrator.

(a) Except as stated in paragraph (c) of this section, a covered USG attorney shall not represent anyone in connection with a matter in which the covered USG attorney participated personally and substantially as a judge or other adjudicative officer, arbitrator, or law clerk to such a person, unless all parties to the proceeding give informed consent, confirmed in writing.

(b) A covered USG attorney shall not negotiate for employment with any person who is involved as a party or as attorney for a party in a matter in which the covered USG attorney is participating personally and substantially as a judge or other adjudicative officer. A covered USG attorney serving as law clerk to a judge, other adjudicative officer, or arbitrator may negotiate for employment with a party or attorney involved in a matter in which the clerk is participating personally and substantially, but only after the covered USG attorney has notified the judge, other adjudicative officer, or arbitrator, and been disqualified from further involvement in the matter.

(c) An arbitrator selected as a partisan of a party in a multi-member arbitration panel is not prohibited from subsequently representing that party.

(d) [Reserved]

### § 776.32 Department of the Navy as client.

(a) Except when representing an individual client pursuant to paragraph (f) of this section, a covered USG attorney represents the DoN (or the Executive agency to which assigned) acting through its authorized officials. These officials include the heads of organizational elements within the naval service, such as the commanders of fleets, divisions, ships and other heads of activities. When a covered USG attorney is assigned to such an organizational element and designated to provide legal services to the head of the organization, an attorney-client relationship exists between the covered attorney and the DoN as represented by the head of the organization as to matters within the scope of the official business of the organization. The head of the organization may not invoke the attorney-client privilege or the rule of confidentiality for the head of the organization's own benefit but may invoke either for the benefit of the DoN. In invoking either the attorney-client privilege or attorney-client confidentiality on behalf of the DoN, the head of the organization is subject to being overruled by higher authority.

(b) If a covered USG attorney knows that an officer, employee, or other member associated with the organizational client is engaged in action, intends to act or refuses to act in a matter related to the representation that is either adverse to the legal interests or obligations of the DoN or a violation of law that reasonably might be imputed to the DoN, the covered USG attorney shall proceed as is reasonably necessary in the best interest of the naval service. In determining how to proceed, the covered USG attorney shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the covered USG attorney's representation, the responsibility in the naval service and the apparent motivation of the person involved, the policies of the naval service concerning such matters, and any other relevant considerations. Any measures taken shall be designed to minimize prejudice to the interests of the naval service and the risk of revealing information relating to the representation to persons outside the service. Such measures shall include:

(1) Asking for reconsideration of the matter by the acting official;

(2) Advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the naval service;

(3) Referring the matter to, or seeking guidance from, higher authority in the chain of command including, if warranted by the seriousness of the matter, referral to the supervisory attorney assigned to the staff of the acting official's next superior in the chain of command; or

(4) Advising the acting official that his or her personal legal interests are at risk and that he or she should consult counsel as there may exist a conflict of interest for the covered USG attorney, and the covered USG attorney's responsibility is to the organization.

(c) If, despite the covered USG attorney's efforts per paragraph (b) of this section, the highest authority that can act concerning the matter insists upon action or refuses to act, in clear violation of law, the covered USG attorney shall terminate representation with respect to the matter in question. In no event shall the attorney participate or assist in the illegal activity. In this case, a covered USG attorney shall report such termination of representation to the attorney's supervisory attorney or attorney representing the next superior in the chain of command.

(d) In dealing with the officers, employees, or members of the naval service a covered USG attorney shall explain the identity of the client when it is apparent that the naval service's interests are adverse to those of the officer, employee, or member.

(e) A covered USG attorney representing the naval service may also represent any of its officers, employees, or members, subject to the provisions of § 776.26 of this part and other applicable authority. If the DoN's consent to dual representation is required by § 776.26 of this part, the consent shall be given by an appropriate official of the DoN other than the individual who is to be represented.

(f) A covered USG attorney who has been duly assigned to represent an individual who is subject to criminal or disciplinary action or administrative proceedings, or to provide legal assistance to an individual, has, for those purposes, an attorney-client relationship with that individual.

(g) [Reserved]

### § 776.33 Client with diminished capacity.

(a) When a client's capacity to make adequately considered decisions in connection with the representation is diminished, whether because of minority, mental impairment, or for some other reason, the covered attorney shall, as far as reasonably possible, maintain a normal attorney-client relationship with the client.

(b) When the covered attorney reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial, or other harm unless action is taken and cannot adequately act in the client's own interest, the covered attorney may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client.

(c) Information relating to the representation of a client with diminished capacity is protected by § 776.25 of this part. When taking protective action pursuant to paragraph (b) of this section, the covered attorney is impliedly authorized under § 776.25(a) of this part to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

(d) [Reserved]

### § 776.34 Safekeeping property.

(a) Covered USG attorneys shall not normally hold or safeguard property of a client or third persons in connection with representational duties. See § 776.27 of this part.

(b) [Reserved]

### § 776.35 Declining or terminating representation.

(a) Except as stated in paragraph (c) of this section, a covered attorney shall not represent a client or, when representation has commenced, shall seek to withdraw from the representation of a client if:

(1) The representation will result in violation of subpart B of this part or other law or regulation;

(2) The covered attorney's physical or mental condition materially impairs his or her ability to represent the client; or

(3) The covered attorney is dismissed by the client.

(b) Except as stated in paragraph (c) of this section, a covered attorney may seek to withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

(1) The client persists in a course of action involving the covered attorney's services that the covered attorney reasonably believes is criminal or fraudulent;

(2) The client has used the covered attorney's services to perpetrate a crime or fraud;

(3) The client insists upon pursuing an objective that the covered attorney considers repugnant or imprudent;

(4) In the case of covered non-USG attorneys, the representation will result in an unreasonable financial burden on the attorney or has been rendered unreasonably difficult by the client; or

(5) Other good cause for withdrawal exists.

(c) A covered attorney must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal or other competent authority, a covered attorney shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a covered attorney shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for assignment or employment of other counsel, and surrendering papers and property to which the client is entitled and, where a non-USG attorney provided representation, refunding any advance payment of fee that has not been earned. The covered attorney may retain papers relating to the client to the extent permitted by law.

(e) [Reserved]

### § 776.36 Prohibited sexual relations.

(a) A covered attorney shall not have sexual relations with a current client. A covered attorney shall not require, demand, or solicit sexual relations with a client incident to any professional representation.

(b) A covered attorney shall not engage in sexual relations with another attorney currently representing a party whose interests are adverse to those of a client currently represented by the covered attorney.

(c) A covered attorney shall not engage in sexual relations with a judge who is presiding or who is likely to preside over any proceeding in which the covered attorney will appear in a representative capacity.

(d) A covered attorney shall not engage in sexual relations with other persons involved in the particular case, judicial or administrative proceeding, or other matter for which representation has been established, including but not limited to witnesses, victims, co-accused, and court-martial or board members.

(e) For purposes of this paragraph (e), ''sexual relations'' means:

(1) Sexual intercourse; or

(2) Any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or other intimate parts of the covered attorney for the purpose of arousing or gratifying the sexual desire of either party.

(f) [Reserved]

### § 776.37 Advisor.

(a) In representing a client, a covered attorney shall exercise independent professional judgment and render candid advice. In rendering advice, a covered attorney may refer not only to law but to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation.

(b) [Reserved]

### § 776.38 Mediation.

(a) A covered attorney may act as a mediator between individuals if:

(1) The covered attorney consults with each individual concerning the implications of the mediation, including the advantages and risks involved, and the effect on the attorney-client confidentiality, and obtains each individual's consent to the mediation;

(2) The covered attorney reasonably believes that the matter can be resolved on terms compatible with each individual's best interests, that each individual will be able to make adequately informed decisions in the matter, and that there is little risk of material prejudice to the interests of any of the individuals if the contemplated resolution is unsuccessful; and,

(3) The covered attorney reasonably believes that the mediation can be undertaken impartially and without improper effect on other responsibilities the covered attorney has to any of the individuals.

(b) While acting as a mediator, the covered attorney shall consult with

each individual concerning the decisions to be made and the considerations relevant in making them, so that each individual can make adequately informed decisions.

(c) A covered attorney shall withdraw as a mediator if any of the individuals so requests, or if any of the conditions stated in paragraph (a)(1) of this section is no longer satisfied. Upon withdrawal, the covered attorney shall not represent any of the individuals in the matter that was the subject of the mediation unless each individual consents.

(d) [Reserved]

**§ 776.39 Evaluation for use by third persons.**

(a) A covered attorney may provide an evaluation of a matter affecting a client for the use of someone other than the client if:

(1) The covered attorney reasonably believes that making the evaluation is compatible with other aspects of the covered attorney's relationship with the client; and

(2) The client provides informed consent, confirmed in writing.

(b) Except as disclosure is required in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by § 776.25 of this part.

(c) [Reserved]

**§ 776.40 Meritorious claims and contentions.**

(a) A covered attorney shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law. A covered attorney representing an accused in a criminal proceeding or the respondent in an administrative proceeding, that could result in incarceration, discharge from the Naval service, or other adverse personnel action, may nevertheless defend the client at the proceeding as to require that every element of the case is established.

(b) [Reserved]

**§ 776.41 Expediting litigation.**

(a) A covered attorney shall make reasonable efforts to expedite litigation or other proceedings consistent with the interests of the client.

(b) [Reserved]

**§ 776.42 Candor and obligations toward the tribunal.**

(a) A covered attorney shall not knowingly:

(1) Make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the covered attorney;

(2) Fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the covered attorney to be directly adverse to the position of the client and not disclosed by opposing counsel;

(3) Offer evidence that the covered attorney knows to be false. If a covered attorney, the attorney's client, or a witness called by the covered attorney, has offered material evidence and the covered attorney comes to know of its falsity, the covered attorney shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A covered attorney may refuse to offer evidence, other than the testimony of an accused in a criminal matter, that the covered attorney reasonably believes is false; or

(4) Disobey an order imposed by a tribunal unless done openly before the tribunal in a good faith assertion that no valid order should exist.

(b) A covered attorney who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraph (a) of this section continue to the conclusion of the proceedings, and apply even if compliance requires disclosure of information otherwise protected by § 776.25 of this part.

(d) In an ex parte proceeding, a covered attorney shall inform the tribunal

of all material facts known to the covered attorney that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

(e) [Reserved]

### § 776.43 Fairness to opposing party and counsel.

(a) A covered attorney shall not:

(1) Unlawfully obstruct a party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. A covered attorney shall not counsel or assist another person to do any such act;

(2) Falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(3) Knowingly disobey an order of the tribunal except for an open refusal based on an assertion that no valid obligation exists;

(4) In pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by a party;

(5) In trial, allude to any matter that the covered attorney does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused; or

(6) Request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(i) The person is a relative, an employee, or other agent of a client; and

(ii) The covered attorney reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

(b) [Reserved]

### § 776.44 Impartiality and decorum of the tribunal.

(a) A covered attorney shall not:

(1) Seek to influence a judge, court member, member of a tribunal, prospective court member or member of a tribunal, or other official by means prohibited by law or regulation;

(2) Communicate ex parte with such a person except as permitted by law or regulation; or

(3) Engage in conduct intended to disrupt a tribunal.

(b) [Reserved]

### § 776.45 Extra-tribunal statements.

(a) A covered attorney shall not make an extrajudicial statement about any person or case pending investigation or adverse administrative or disciplinary proceedings that a reasonable person would expect to be disseminated by means of public communication if the covered attorney knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding or an official review process thereof.

(b) A statement referred to in paragraph (a) of this section ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter (including before a military tribunal or commission), or any other proceeding that could result in incarceration, discharge from the naval service, or other adverse personnel action, and the statement relates to:

(1) The character, credibility, reputation, or criminal record of a party, suspect in a criminal investigation, victim, or witness, or the identity of a victim or witness, or the expected testimony of a party, suspect, victim, or witness;

(2) The possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by an accused or suspect or that person's refusal or failure to make a statement;

(3) The performance or results of any forensic examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) Any opinion as to the guilt or innocence of an accused or suspect in a criminal case or other proceeding that could result in incarceration, discharge from the naval service, or other adverse personnel action;

(5) Information the covered attorney knows or reasonably should know is likely to be inadmissible as evidence before a tribunal and would, if disclosed, create a substantial risk of materially prejudicing an impartial proceeding;

(6) The fact that an accused has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the accused is presumed innocent until and unless proven guilty; or

(7) The credibility, reputation, motives, or character of civilian or military officials of the DoD.

(c) Notwithstanding paragraphs (a) and (b)(1) through (7) of this section, a covered attorney involved in the investigation or litigation of a matter may state without elaboration:

(1) The general nature of the claim, offense, or defense;

(2) The information contained in a public record;

(3) That an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law or regulation, the identity of the persons involved;

(4) The scheduling or result of any step in litigation;

(5) A request for assistance in obtaining evidence and information necessary thereto;

(6) A warning of danger concerning the behavior of the person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) In a criminal case, in addition to paragraphs (c)(1) through (6) of this section:

(i) The identity, duty station, occupation, and family status of the accused;

(ii) If the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) The fact, time, and place of apprehension; and

(iv) The identity of investigating and apprehending officers or agencies and the length of the investigation.

(d) Notwithstanding paragraphs (a) and (b)(1) through (7) of this section, a covered attorney may make a statement that a reasonable covered attorney would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the covered attorney or the attorney's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(e) The protection and release of information in matters pertaining to the DoN is governed by such statutes as the Freedom of Information Act and the Privacy Act, in addition to those governing protection of national defense information. In addition, other laws and regulations may further restrict the information that can be released or the source from which it is to be released (e.g., the Manual of the Judge Advocate General).

(f) [Reserved]

### § 776.46 Attorney as witness.

(a) A covered attorney shall not act as advocate at a trial in which the covered attorney is likely to be a necessary witness except when:

(1) The testimony relates to an uncontested issue;

(2) The testimony relates to the nature and quality of legal services rendered in the case; or

(3) Disqualification of the covered attorney would work substantial hardship on the client.

(b) A covered attorney may act as advocate in a trial in which another attorney in the covered attorney's office is likely to be called as a witness, unless precluded from doing so by § 776.26 or § 776.28 of this part.

(c) [Reserved]

### § 776.47 Special responsibilities of a trial counsel and other government counsel.

(a) A trial counsel in a criminal case shall:

(1) Recommend to the convening authority that any charge or specification not supported by probable cause be withdrawn;

(2) Make reasonable efforts to assure that the accused has been advised of

the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(3) Not seek to obtain from an unrepresented accused a waiver of important pretrial rights;

(4) Make timely disclosure to the defense of all evidence or information known to the trial counsel that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense all unprivileged mitigating information known to the trial counsel, except when the trial counsel is relieved of this responsibility by a protective order or regulation;

(5) Exercise reasonable care to prevent investigators, law enforcement personnel, employees, or other persons assisting or associated with the trial counsel from making an extrajudicial statement that the trial counsel would be prohibited from making under § 776.45 of this part; and

(6) Except for statements that are necessary to inform the public of the nature and extent of the trial counsel's actions and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused.

(b) Trial counsel and other government counsel shall exercise reasonable care to avoid intercepting, seizing, copying, viewing, or listening to communications protected by the attorney-client privilege during investigation of a suspected offense (particularly when conducting government-sanctioned searches where attorney-client privileged communications may be present), as well as in the preparation or prosecution of a case. Such communications expressly include, but are not limited to, land-line telephone conversations, facsimile transmissions, U.S. mail, and Email. Trial counsel and other government counsel must not infringe upon the confidential nature of attorney-client privileged communications and are responsible for the actions of their agents or representatives when they induce or assist them in intercepting, seizing, copying, viewing, or listening to such privileged communications.

(c)(1) The trial counsel represents the United States in the prosecution of special and general courts-martial. See Article 38(a), UCMJ; see also R.C.M. 103(16), 405(d)(3)(A), and 502(d)(5). Accordingly, a trial counsel has the responsibility of administering justice and is not simply an advocate. This responsibility carries with it specific obligations to see that the accused is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Paragraph (a)(1) of this section recognizes that the trial counsel does not have all the authority vested in modern civilian prosecutors. The authority to convene courts-martial, and to refer and withdraw specific charges, is vested in convening authorities. Trial counsel may have the duty, in certain circumstances, to bring to the court's attention any charge that lacks sufficient evidence to support a conviction. See United States v. Howe, 37 M.J. 1062 (NMCMR 1993). Such action should be undertaken only after consultation with a supervisory attorney and the convening authority. See also § 776.42(d) of this part (governing ex parte proceedings). Applicable law may require other measures by the trial counsel. Knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of § 776.69 of this part.

(2) Paragraph (a)(3) of this section does not apply to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of a suspect who has knowingly waived the rights to counsel and to remain silent.

(3) The exception in paragraph (a)(4) of this section recognizes that a trial counsel may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or organization or to the public interest. This exception also recognizes that applicable statutes and regulations may proscribe the disclosure of certain information without proper authorization.

(4) A trial counsel may comply with paragraph (a)(5) of this section in a

number of ways. These include personally informing others of the trial counsel's obligations under § 776.46 of this part, conducting training of law enforcement personnel, and appropriately supervising the activities of personnel assisting the trial counsel.

(5) Paragraph (a)(6) of this section supplements § 776.45 of this part, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. A trial counsel can, and should, avoid comments that have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements that a trial counsel may make that comply with § 776.45 of this part.

(6) The ''ABA Standards for Criminal Justice: The Prosecution Function,'' (3d ed. 1993), has been used by appellate courts in analyzing issues concerning trial counsel conduct. To the extent consistent with these Rules, the ABA standards may be used to guide trial counsel in the prosecution of criminal cases. See United States v. Howe, 37 M.J. 1062 (NMCRS 1993); United States v. Dancy, 38 M.J. 1 (CMA 1993); United States v. Hamilton, 41 M.J. 22 (CMA 1994); United States v. Meek, 44 M.J. 1 (CMA 1996).

(d) [Reserved]

### § 776.48 Advocate in nonadjudicative proceedings.

(a) A covered attorney representing a client before a legislative or administrative tribunal in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of §§ 776.42 (a) through (d), 776.43, and 776.44 of this part.

(b) [Reserved]

### § 776.49 Truthfulness in statements to others.

(a) In the course of representing a client a covered attorney shall not knowingly;

(1) Make a false statement of material fact or law to a third person; or

(2) Fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by § 776.25 of this part.

(b) [Reserved]

### § 776.50 Communication with person represented by counsel.

(a) In representing a client, a covered attorney shall not communicate about the subject of the representation with a party the covered attorney knows to be represented by another attorney in the matter, unless the covered attorney has the consent of the other attorney or is authorized by law to do so.

(b) [Reserved]

### § 776.51 Dealing with an unrepresented person.

(a) When dealing on behalf of a client with a person who is not represented by counsel, a covered attorney shall not state or imply that the covered attorney is disinterested. When the covered attorney knows or reasonably should know that the unrepresented person misunderstands the covered attorney's role in the matter, the covered attorney shall make reasonable efforts to correct the misunderstanding.

(b) [Reserved]

### § 776.52 Respect for rights of third persons.

(a) In representing a client, a covered attorney shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) [Reserved]

### § 776.53 Responsibilities of the Judge Advocate General and supervisory attorneys.

(a) The JAG and supervisory attorneys shall make reasonable efforts to ensure that all covered attorneys conform to subpart B of this part.

(b) A covered attorney having direct supervisory authority over another covered attorney shall make reasonable efforts to ensure that the other attorney conforms to subpart B of this part.

(c) A supervisory attorney shall be responsible for another subordinate

covered attorney's violation of subpart B of this part if:

(1) The supervisory attorney orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) The supervisory attorney has direct supervisory authority over the other attorney and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

(d) A supervisory attorney is responsible for ensuring that the subordinate covered attorney is properly trained and is competent to perform the duties to which the subordinate covered attorney is assigned.

(e) [Reserved]

### § 776.54 Responsibilities of a subordinate attorney.

(a) A covered attorney is bound by this part notwithstanding that the covered attorney acted at the direction of another person.

(b) In recognition of the judge advocate's unique dual role as a commissioned officer and attorney, subordinate judge advocates shall obey lawful directives and regulations of supervisory attorneys when not inconsistent with this part or the duty of a judge advocate to exercise independent professional judgment as to the best interest of an individual client.

(c) A subordinate covered attorney does not violate this part if that covered attorney acts in accordance with a supervisory attorney's written and reasonable resolution of an arguable question of professional duty.

(d) [Reserved]

### § 776.55 Responsibilities regarding non-attorney assistants.

(a) With respect to a non-attorney acting under the authority, supervision, or direction of a covered attorney:

(1) The senior supervisory attorney in an office shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of a covered attorney;

(2) A covered attorney having direct supervisory authority over the non-attorney shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of a covered attorney; and

(3) A covered attorney shall be responsible for conduct of such a person that would be a violation of this part if engaged in by a covered attorney if:

(i) The covered attorney orders or, with the knowledge of the specific conduct, explicitly or impliedly ratifies the conduct involved; or

(ii) The covered attorney has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

(b) [Reserved]

### § 776.56 Professional independence of a covered USG attorney.

(a) Notwithstanding a judge advocate's status as a commissioned officer subject, generally, to the authority of superiors, a judge advocate detailed or assigned to represent an individual member or employee of the DoN is expected to exercise unfettered loyalty and professional independence during the representation consistent with subpart B of this part and remains ultimately responsible for acting in the best interest of the individual client.

(b) Notwithstanding a civilian USG attorney's status as a Federal employee subject, generally, to the authority of superiors, a civilian USG attorney detailed or assigned to represent an individual member or employee of the DoN is expected to exercise unfettered loyalty and professional independence during the representation consistent with this part and remains ultimately responsible for acting in the best interest of the individual client.

(c) The exercise of professional judgment in accordance with paragraph (a) or (b) of this section shall not, standing alone, be a basis for an adverse evaluation or other prejudicial action.

(1) Subpart B of this part recognizes that a judge advocate is a military officer required by law to obey the lawful orders of superior officers. It also recognizes the similar status of a civilian USG attorney. Nevertheless, the practice of law requires the exercise of judgment solely for the benefit of the

client and free of compromising influences and loyalties. Thus, when a covered USG attorney is assigned to represent an individual client, neither the attorney's personal interests, the interests of other clients, nor the interests of third persons should affect loyalty to the individual client.

(2) Not all direction given to a subordinate covered attorney is an attempt to influence improperly the covered attorney's professional judgment. Each situation must be evaluated by the facts and circumstances, giving due consideration to the subordinate's training, experience, and skill. A covered attorney subjected to outside pressures should make full disclosure of them to the client. If the covered attorney or the client believes the effectiveness of the representation has been or will be impaired thereby, the covered attorney should take proper steps to withdraw from representation of the client.

(3) Additionally, a judge advocate has a responsibility to report any instances of unlawful command influence. See R.C.M. 104, MCM, 1998.

### § 776.57 Unauthorized practice of law.

(a) A covered USG attorney shall not:

(1) Except as authorized by an appropriate military department, practice law in a jurisdiction where doing so is prohibited by the regulations of the legal profession in that jurisdiction; or

(2) Assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

(3) Engage in the outside practice of law without receiving proper authorization from the JAG.

(b) Limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. A covered USG attorney's performance of legal duties pursuant to a military department's authorization, however, is considered a Federal function and not subject to regulation by the states. Thus, a covered USG attorney may perform legal assistance duties even though the covered attorney is not licensed to practice in the jurisdiction within which the covered attorney's duty station is located. Paragraph (a)(2) of this section does not prohibit a covered USG attorney from using the services of non-attorneys and delegating functions to them, so long as the covered attorney supervises the delegated work and retains responsibility for it. See § 776.55 of this part. Likewise, it does not prohibit covered USG attorneys from providing professional advice and instruction to non-attorneys whose employment requires knowledge of law; for example, claims adjusters, social workers, accountants and persons employed in Government agencies. In addition, a covered USG attorney may counsel individuals who wish to proceed pro se or non-attorneys authorized by law or regulation to appear and represent themselves or others before military proceedings.

### §§ 776.58–776.65 [Reserved]

### § 776.66 Bar admission and disciplinary matters.

(a) A covered attorney, in connection with any application for bar admission, appointment as a judge advocate, employment as a civilian USG attorney, certification by the JAG or his designee, or in connection with any disciplinary matter, shall not:

(1) Knowingly make a false statement of fact; or

(2) Fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this part does not require disclosure of information otherwise protected by § 776.25 of this part.

(b) The duty imposed by subpart B of this part extends to covered attorneys and other attorneys seeking admission to a bar, application for appointment as a covered USG attorney (military or civilian) or certification by the JAG or his designee. Hence, if a person makes a false statement in connection with an application for admission or certification (e.g., misstatement by a civilian attorney before a military judge regarding qualifications under R.C.M. 502), it may be the basis for subsequent

disciplinary action if the person is admitted, and in any event may be relevant in a subsequent admission application. The duty imposed by subpart B of this part applies to a covered attorney's own admission or discipline as well as that of others. Thus, it is a separate professional offense for a covered attorney to make a knowing misrepresentation or omission in connection with a disciplinary investigation of the covered attorney's own conduct. Subpart B of this part also requires affirmative clarification of any misunderstanding on the part of the admissions, certification, or disciplinary authority of which the person involved becomes aware.

### § 776.67 Judicial and legal officers.

(a) A covered attorney shall not make a statement that the covered attorney knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, investigating officer, hearing officer, adjudicatory officer, or public legal officer, or of a candidate for election or appointment to judicial or legal office.

(b) [Reserved]

### § 776.68 Reporting professional misconduct.

(a) A covered attorney having knowledge that another covered attorney has committed a violation of subpart B of this part that raises a substantial question as to that covered attorney's honesty, trustworthiness, or fitness as a covered attorney in other respects, shall report such violation in accordance with the procedures set forth in this part.

(b) A covered attorney having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall report such violation in accordance with the procedures set forth in this part.

(c) This part does not require disclosure of information otherwise protected by § 776.25 of this part.

(d) [Reserved]

### § 776.69 Misconduct.

(a) It is professional misconduct for a covered attorney to:

(1) Violate or attempt to violate subpart B of this part, knowingly assist or induce another to do so, or do so through the acts of another;

(2) Commit a criminal act that reflects adversely on the covered attorney's honesty, trustworthiness, or fitness as an attorney in other respects;

(3) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;

(4) Engage in conduct that is prejudicial to the administration of justice;

(5) State or imply an ability to influence improperly a government agency or official; or

(6) Knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

(b)(1) Judge advocates hold a commission as an officer in the Navy or Marine Corps and assume legal responsibilities going beyond those of other citizens. A judge advocate's abuse of such commission can suggest an inability to fulfill the professional role of judge advocate and attorney. This concept has similar application to civilian USG attorneys.

(2) Covered non-USG attorneys, Reservists, and Retirees (acting in their civilian capacity), like their active-duty counterparts, are expected to demonstrate model behavior and exemplary integrity at all times. The JAG may consider any and all derogatory or beneficial information about a covered attorney, for purposes of determining the attorney's qualification, professional competence, or fitness to practice law in DoN matters, or to administer discipline under this rule. Such consideration shall be made, except in emergency situations necessitating immediate action, according to the procedures established in this rule.

### § 776.70 Jurisdiction.

(a) All covered attorneys shall be governed by this part.

(b)(1) Many covered USG attorneys practice outside the territorial limits

of the jurisdiction in which they are licensed. While covered attorneys remain subject to the governing authority of the jurisdiction in which they are licensed to practice, they are also subject to subpart B of this part.

(2) When covered USG attorneys are engaged in the conduct of Navy or Marine Corps legal functions, whether serving the Navy or Marine Corps as a client or serving an individual client as authorized by the Navy or Marine Corps, the provisions contained in subpart B of this part supersede any conflicting rules applicable in jurisdictions in which the covered attorney may be licensed. However, covered attorneys practicing in State or Federal civilian court proceedings will abide by the rules adopted by that State or Federal civilian court during the proceedings. As for covered non-USG attorneys practicing under the supervision of the JAG, violation of the provisions contained in subpart B of this part may result in suspension from practice in DoN proceedings.

(3) Covered non-USG attorneys, Reservists, or Retirees (acting in their civilian capacity) who seek to provide legal services in any DoN matter under JAG cognizance and supervision, may be precluded from such practice of law if, in the opinion of the JAG (as exercised through this rule) the attorney's conduct in any venue renders that attorney unable or unqualified to practice in DoN programs or proceedings.

### § 776.71 Requirement to remain in good standing with licensing authorities.

(a) Each officer of the Navy appointed as a member of the JAG Corps, each officer of the Marine Corps designated a judge advocate, and each civil service and contracted civilian attorney who practices law under the cognizance and supervision of the JAG shall maintain a status considered ''in good standing'' at all times with the licensing authority admitting the individual to the practice of law before the highest court of at least one State, Territory, Commonwealth, or the District of Columbia.

(b) The JAG, the Staff Judge Advocate to the Commandant of the Marine Corps, or any other supervisory attorney may require any covered USG attorney over whom they exercise authority to establish that the attorney continues to be in good standing with his or her licensing authority. Representatives of the JAG or of the Staff Judge Advocate to the Commandant of the Marine Corps may also inquire directly of any such covered USG attorney's licensing authority to establish whether he or she continues to be in good standing and has no disciplinary action pending.

(c) Each covered USG attorney shall immediately report to the JAG if any jurisdiction in which the covered USG attorney is or has been a member in good standing commences disciplinary investigation or action against him or her or if the covered USG attorney is disciplined, suspended, or disbarred from the practice of law in any jurisdiction.

(d) Each covered non-USG attorney representing an accused in any court-martial or administrative separation proceeding shall be a member in good standing with, and authorized to practice law by, the bar of a Federal court or of the bar of the highest court of a State, or a lawyer otherwise authorized by a recognized licensing authority to practice law and found by the military judge to be qualified to represent the accused.

(e)(1) Generally, the JAG relies on the licensing authority granting the certification or privilege to practice law to define the phrase ''good standing.'' However, as circumstances require, the JAG may, instead, use separate criteria to determine compliance. At a minimum, ''good standing'' means the individual:

(i) Is subject to the jurisdiction's disciplinary review process;

(ii) Has not been suspended or disbarred from the practice of law within the jurisdiction;

(iii) Is current in the payment of all required fees;

(iv) Has met applicable continuing legal education requirements that the jurisdiction has imposed (or the cognizant authority has waived); and

(v) Has met such other requirements as the cognizant authority has set for eligibility to practice law. So long as these conditions are met, a covered

USG attorney may be ''inactive'' as to the practice of law within a particular jurisdiction and still be ''in good standing'' for purposes of subpart B of this part.

(2) Rule for Court-Martial 502(d)(3)(A) requires that any civilian defense counsel representing an accused in a court-martial be a member of the bar of a Federal court or of the bar of the highest court of a State. This civilian defense counsel qualification only has meaning if the attorney is a member ''in good standing,'' and is then authorized to practice law within that jurisdiction. See United States v. Waggoner, 22 M.J. 692 (AFCMR 1986). It is appropriate for the military judge, in each and every case, to ensure that a civilian defense counsel is qualified to represent the accused.

(3) Failure of a judge advocate to comply with the requirements of subpart B of this part may result in professional disciplinary action as provided for in this rule, loss of certification under Articles 26 and/or 27(b), UCMJ, adverse entries in military service records, and administrative separation under SECNAVINST 1920.6 (series) based on the officer's failure to maintain professional qualifications. In the case of civil service and contracted civilian attorneys practicing under the JAG's cognizance and supervision, failure to maintain good standing or otherwise to comply with the requirements of subpart B of this part may result in adverse administrative action under applicable personnel regulations, including termination of employment.

(4) A covered USG attorney need only remain in good standing in one jurisdiction. If admitted to the practice of law in more than one jurisdiction, however, and any jurisdiction commences disciplinary action against or disciplines, suspends or disbars the covered USG attorney from the practice of law, the covered USG attorney must so advise the JAG.

(5) An essential time to verify that a judge advocate is currently in good standing is upon accession. Other appropriate times for verification are before a judge advocate is promoted to a higher grade, detailed to a new command, or assigned to duties where there is a statutory requirement to be a member of the bar, such as a military judge per 10 U.S.C. 826(b). The JAG, the SJA to CMC, or any other supervisory attorney may need to verify the professional qualifications of a judge advocate, either periodically or on an occasional basis. JAGINST 5803.2 (series) establishes a biennial requirement for all covered attorneys to provide proof of good standing.

(6) Certification by the United States Court of Appeals for the Armed Forces that a judge advocate is in good standing with that court will not satisfy the requirement of this section, since such status is normally dependent on Article 27, UCMJ, certification.

**§§ 776.72–776.75 [Reserved]**

## Subpart C—Complaint Processing Procedures

### § 776.76 Policy.

(a) It is JAG's policy to investigate and resolve, expeditiously and fairly, all allegations of professional impropriety lodged against covered attorneys under JAG supervision.

(b) Rules Counsel approval will be obtained before conducting any preliminary inquiry or formal investigation into an alleged violation of the Rules of Professional Conduct (subpart B of this part) or the ABA Model Code of Judicial Conduct (Code of Judicial Conduct). The Rules Counsel will notify the JAG prior to the commencement of any preliminary inquiry or investigation. The preliminary inquiry and any subsequent investigation will be conducted according to the procedures set forth in this subpart.

### § 776.77 Related investigations and actions.

Acts or omissions by covered attorneys may constitute professional misconduct, criminal misconduct, poor performance of duty, or a combination of all three. Care must be taken to characterize appropriately the nature of a covered attorney's conduct to determine who may and properly should take official action.

(a) Questions of legal ethics and professional misconduct by covered attorneys are within the exclusive province of the JAG. Ethical or professional

misconduct will not be attributed to any covered attorney in any official record without a final JAG determination, made in accordance with this part that such misconduct has occurred.

(b) Criminal misconduct is properly addressed by the covered USG attorney's commander through the disciplinary process provided under the UCMJ and implementing regulations, or through referral to appropriate civil authority.

(c) Poor performance of duty is properly addressed by the covered USG attorney's reporting senior through a variety of administrative actions, including documentation in fitness reports or employee appraisals.

(d) Prior JAG approval is not required to investigate allegations of criminal conduct or poor performance of duty involving covered attorneys. When, however, investigations into criminal conduct or poor performance reveal conduct that constitutes a violation of this part or of the Code of Judicial Conduct in the case of judges, such conduct shall be reported to the Rules Counsel immediately.

(e) Generally, professional responsibility complaints will be processed in accordance with this part upon receipt. Rules Counsel may, however, on a case-by-case basis, delay such processing to await the outcome of pending related criminal, administrative, or investigative proceedings.

(f) Nothing in this part prevents a military judge or other appropriate official from removing a covered attorney from acting in a particular court-martial or prevents the JAG, the SJA to CMC, or the appropriate official from reassigning a covered attorney to different duties prior to, during, or subsequent to proceedings conducted under the provision of this part.

### § 776.78 Informal complaints.

Informal, anonymous, or ''hot line'' type complaints alleging professional misconduct must be referred to the appropriate authority (such as the JAG Inspector General or the concerned supervisory attorney) for inquiry. Such complaints are not, by themselves, cognizable under this subpart but may, if reasonably confirmed, be the basis of a formal complaint described in § 776.79 of this part.

### § 776.79 The formal complaint.

(a) The formal complaint shall:

(1) Be in writing and be signed by the complainant;

(2) State that the complainant has personal knowledge, or has otherwise received reliable information indicating, that:

(i) The covered attorney concerned is, or has been, engaged in misconduct that demonstrates a lack of integrity, that constitutes a violation of this part or the Code of Judicial Conduct or a failure to meet the ethical standards of the profession; or

(ii) The covered attorney concerned is ethically, professionally, or morally unqualified to perform his or her duties; and

(3) Contain a complete, factual statement of the acts or omissions constituting the substance of the complaint, as well as a description of any attempted resolution with the covered attorney concerned. Supporting statements, if any, should be attached to the complaint.

(b) A complaint may be initiated by any person, including the Administrative Law Division of the Office of the Judge Advocate General (OJAG) Administrative Law Division (Code 13) or the Judge Advocate Research and Civil Law Branch, Office of the SJA to CMC, HQMC (JAR).

### § 776.80 Initial screening.

(a) Complaints involving conduct of a Navy or Marine Corps trial or appellate judge shall be forwarded to OJAG (Code 05). All other complaints shall be forwarded to OJAG (Code 13) or, in cases involving Marine Corps judge advocates or civil service and contracted civilian attorneys who perform legal services under the cognizance and supervision of the SJA to CMC, to JAR. In cases involving Marine judge advocates, including trial and appellate judges, where the SJA to CMC is not the Rules Counsel, the cognizant Rules Counsel will notify the SJA to CMC when a complaint is received.

(b) OJAG (Code 05), OJAG (Code 13), and JAR shall log all formal complaints received and will ensure a copy

of the complaint and allied papers is provided to the covered attorney who is the subject of the complaint. Service of the formal complaint and other materials on the covered attorney must be accomplished through personal service or registered/certified mail sent to the covered attorney's last known address reflected in official Navy and Marine Corps records or in the records of the state bar(s) that licensed the attorney to practice law. The covered attorney's supervisory attorney must also be provided notice of the complaint.

(c) The covered attorney concerned may elect to provide an initial statement, normally within ten calendar days from receipt, regarding the complaint for the Rules Counsel's consideration. The covered attorney will promptly inform OJAG (Code 05), OJAG (Code 13), or JAR if he or she intends to submit any such statement. At this screening stage, forwarding of the complaint to the Rules Counsel will not be unduly delayed to await the covered attorney's submission.

(d) The cognizant Rules Counsel shall initially review the complaint, and any statement submitted by the covered attorney complained of, to determine whether it complies with the requirements set forth in paragraph (4) of this section. The Rules Counsel is not required to delay the initial review of the complaint awaiting the covered attorney's submission.

(1) Complaints that do not comply with the requirements may be returned to the complainant for correction or completion, and resubmission to OJAG (Code 05), OJAG (Code 13), or JAR. If the complaint is not corrected or completed and resubmitted within 30 days of the date of its return, the Rules Counsel may close the file without further action. OJAG (Code 05), OJAG (Code 13), and JAR will maintain copies of all correspondence relating to the return and resubmission of a complaint, and shall notify the covered attorney concerned, as well as the supervisory attorney, if and when the Rules Counsel takes action to close the file.

(2) Complaints that comply with the requirements shall be further reviewed by the cognizant Rules Counsel to determine whether the complaint establishes probable cause to believe that a violation of subpart B of this part or Code of Judicial Conduct has occurred.

(e) The cognizant Rules Counsel shall close the file without further action if the complaint does not establish probable cause to believe a violation has occurred. The Rules Counsel shall notify the complainant, the covered attorney concerned, and the supervisory attorney, that the file has been closed. OJAG (Code 05), OJAG (Code 13), and JAR will maintain copies of all correspondence related to the closing of the file.

(f) The cognizant Rules Counsel may close the file if there is a determination that the complaint establishes probable cause but the violation is of a minor or technical nature appropriately addressed through corrective counseling. The Rules Counsel shall report any such decision, to include a brief summary of the case, to the JAG. (In cases relating to Marine judge advocates, including trial and appellate judges, in which the SJA to CMC is not the cognizant Rules Counsel, an information copy shall be forwarded to the SJA to CMC.) The Rules Counsel shall ensure the covered attorney concerned receives appropriate counseling and shall notify the complainant, the covered attorney concerned, and the supervisory attorney that the file has been closed. OJAG (Code 05), OJAG (Code 13), and JAR will maintain copies of all correspondence related to the closing of the file. The covered attorney concerned is responsible, under these circumstances, to determine if his or her Federal, state, or local licensing authority requires reporting of such action.

### § 776.81 Forwarding the complaint.

(a) If the Rules Counsel determines there is probable cause to believe that a violation of subpart B of this part or of the Code of Judicial Conduct has occurred, and the violation is not of a minor or technical nature, the Rules Counsel shall notify the JAG. (In cases relating to Marine Corps judge advocates, including trial and appellate judges, in which the SJA to CMC is not the cognizant Rules Counsel, the SJA to CMC shall also be notified.) The Rules Counsel shall forward the complaint and any allied papers, as follows:

(1) In cases involving a military trial judge, if practicable, to a covered attorney with experience as a military trial judge (normally senior to and of the same Service (Navy or Marine Corps) as the covered attorney complained of and not previously involved in the case) and assign the officer to conduct a preliminary inquiry into the matter;

(2) In cases involving a military appellate judge, if practicable, to a covered attorney with experience as a military appellate judge (normally senior to and of the same Service (Navy or Marine Corps) as the covered attorney complained of and not previously involved in the case) and assign the officer to conduct a preliminary inquiry into the matter;

(3) In all other cases, to such covered attorney as the cognizant Rules Counsel may designate (normally senior to the covered attorney complained of and not previously involved in the case), and assign the officer to conduct a preliminary inquiry into the matter.

(b) The Rules Counsel shall provide notice of the complaint (if not previously informed) as well as notice of the preliminary inquiry:

(1) To the covered attorney against whom the complaint is made as well as the supervisory attorney;

(2) In cases involving a covered USG attorney on active duty or in civilian Federal service, to the commanding officer, or equivalent, of the covered USG attorney concerned;

(3) In cases involving Navy or Marine Corps judge advocates serving in Naval Legal Service Command (NLSC) units, to Commander, NLSC;

(4) In cases involving Navy attorneys serving in Marine Corps units, involving Marine Corps attorneys serving in Navy units, or involving Marine Corps trial and appellate judges, to the SJA to CMC (Attn: JAR);

(5) In cases involving trial or appellate court judges, to either the Chief Judge, Navy-Marine Corps Trial Judiciary or Chief Judge, Navy-Marine Corps Court of Criminal Appeals, as appropriate; and

(6) In cases involving covered attorneys certified by the Judge Advocates General/Chief Counsel of the other uniformed services, to the appropriate military service attorney discipline section.

**§ 776.82 Interim suspension.**

(a) Where the Rules Counsel determines there is probable cause to believe that a covered attorney has committed misconduct and poses a substantial threat of irreparable harm to his or her clients or the orderly administration of military justice, the Rules Counsel shall so advise the JAG. Examples of when a covered attorney may pose a ''substantial threat of irreparable harm'' include, but are not limited to:

(1) When charged with the commission of a crime which involves moral turpitude or reflects adversely upon the covered attorney's fitness to practice law, and where substantial evidence exists to support the charge;

(2) When engaged in the unauthorized practice of law (e.g., failure to maintain good standing in accordance with § 776.71 of this part); or

(3) Where unable to represent client interests competently.

(b) Upon receipt of information from the Rules Counsel, JAG may order the covered attorney to show cause why he or she should not face interim suspension, pending completion of a professional responsibility investigation. The covered attorney shall have 10 calendar days in which to respond. Notice of the show cause order shall be provided as outlined in § 776.81(b) of this part.

(c) If an order to show cause has been issued under paragraph (b) of this section, and the period for response has passed without a response, or after consideration of any response and finding sufficient evidence demonstrating probable cause to believe that the covered attorney is guilty of misconduct and poses a substantial threat of irreparable harm to his or her client or the orderly administration of military justice, the JAG may direct an interim suspension of the covered attorney's certification under Articles 26(b) or 27(b), UCMJ, or R.C.M. 502(d)(3), or the authority to provide legal assistance, pending the results of the investigation and final action under this part. Notice of such action shall be provided as outlined in § 776.81(b) of this part.

(d) Within 10 days of the JAG's decision to impose an interim suspension, the covered attorney may request an opportunity to be heard before an impartial officer designated by the JAG. Where so requested, that opportunity will be scheduled within 10 calendar days of the request. The designated officer shall receive any information that the covered attorney chooses to submit on the limited issue of whether to continue the interim suspension. The designated officer shall submit a recommendation to the JAG within 5 calendar days of conclusion.

(e) A covered attorney may, based upon a claim of changed circumstances or newly discovered evidence, petition for dissolution or amendment of the JAG's imposition of interim suspension.

(f) Any professional responsibility investigation involving a covered attorney who has been suspended pursuant to subpart B of this part shall proceed and be concluded without appreciable delay. However, the JAG may determine it necessary to await completion of a related criminal investigation or proceeding, or completion of a professional responsibility action initiated by other licensing authorities. In such cases, the JAG shall cause the Rules Counsel to so notify the covered attorney under interim suspension as well as those officials outlined in § 776.81(b) of this part. Where necessary, continuation of the interim suspension shall be reviewed by the JAG every 6 months.

### § 776.83 Preliminary inquiry.

(a) The purpose of the preliminary inquiry is to determine whether, in the opinion of the officer appointed to conduct the preliminary inquiry (PIO), the questioned conduct occurred and, if so, whether the preponderance of the evidence demonstrates that such conduct constitutes a violation of subpart B of this part or the Code of Judicial Conduct. The PIO is to recommend appropriate action in cases of substantiated violations.

(b) Upon receipt of the complaint, the PIO shall promptly investigate the allegations, generally following the format and procedures set forth in the Manual of the Judge Advocate General (JAGMAN) for the conduct of command investigations. Reports of relevant investigations by other authorities including, but not limited to, the command, the Inspector General, and State licensing authorities should be used. The PIO should also:

(1) Identify and obtain sworn affidavits or statements from all relevant and material witnesses to the extent practicable;

(2) Identify, gather, and preserve all other relevant and material evidence; and

(3) Provide the covered attorney concerned an opportunity to review all evidence, affidavits, and statements collected and a reasonable period of time (normally not exceeding 10 calendar days) to submit a written statement or any other written material that the covered attorney wishes considered.

(c) The PIO may appoint and use such assistants as may be necessary to conduct the preliminary inquiry.

(d) The PIO shall personally review the results of the preliminary inquiry to determine whether, by a preponderance of the evidence, a violation of subpart B of this part or of the Code of Judicial Conduct has occurred.

(1) If the PIO determines that no violation has occurred or that the violation is minor or technical in nature and warrants only corrective counseling, then he or she may recommend that the file be closed.

(2) If the PIO determines by a preponderance of the evidence that a violation did occur, and that corrective action greater than counseling may be warranted, he or she shall:

(i) Draft a list of substantiated violations of these Rules of Professional Conduct or the Code of Judicial Conduct;

(ii) Recommend appropriate action; and

(iii) Forward the preliminary inquiry to the Rules Counsel, providing copies to the covered attorney concerned and the supervisory attorney.

(e) The Rules Counsel shall review all preliminary inquiries. If the report is determined by the Rules Counsel to be

incomplete, the Rules Counsel shall return it to the PIO, or to another inquiry officer, for further or supplemental inquiry. If the report is complete, then:

(1) If the Rules Counsel determines, either consistent with the PIO recommendation or through the Rules Counsel's own review of the report, that a violation of this part has not occurred and that further action is not warranted, the Rules Counsel shall close the file and notify the complainant, the covered attorney concerned, and all officials previously provided notice of the complaint. OJAG (Code 05), OJAG (Code 13), and/or JAR, as appropriate, will maintain copies of all correspondence related to the closing of the file.

(2) If the Rules Counsel determines, either consistent with a PIO recommendation or through the Rules Counsel's own review of the report, that a violation of subpart B of this part has occurred but that the violation is of a minor or technical nature, then the Rules Counsel may determine that corrective counseling is appropriate and close the file. The Rules Counsel shall report any such decision, to include a brief summary of the case, to the JAG. The Rules Counsel shall ensure that the covered attorney concerned receives appropriate counseling and shall notify the complainant, the covered attorney concerned, and all officials previously provided notice of the complaint that the file has been closed. OJAG (Code 05), OJAG (Code 13), and/or JAR, as appropriate, will maintain copies of all correspondence related to the closing of the file. The covered attorney concerned is responsible, under these circumstances, to determine if his or her Federal, state, or local licensing authority requires reporting such action.

(3) If the Rules Counsel determines, either consistent with a PIO recommendation or through the Rules Counsel's own review of the report, that further professional discipline or corrective action may be warranted, the Rules Counsel shall notify the JAG and take the following action:

(i) In cases involving a military trial judge, if practicable, forward the recommendation to a covered attorney with experience as a military trial judge (normally senior to and of the same Service (Navy or Marine Corps) as the covered attorney complained of and not previously involved in the case) and assign the officer to conduct an ethics investigation into the matter (see R.C.M. 109 of the Manual for Courts-Martial);

(ii) In cases involving a military appellate judge, forward the recommendation to a covered attorney with experience as a military appellate judge (normally senior to and of the same Service (Navy or Marine Corps) as the covered attorney complained of and not previously involved in the case) and assign the officer to conduct an ethics investigation into the matter (see R.C.M. 109 of the Manual for Courts-Martial); or

(iii) In all other cases, assign a covered attorney (normally senior to the covered attorney complained of and not previously involved in the case) to conduct an ethics investigation.

### § 776.84 Ethics investigation.

(a) When an ethics investigation is initiated, the covered attorney concerned shall be so notified, in writing, by the Rules Counsel. Notice of such action shall also be provided as outlined in § 776.81(b) of this part.

(b) The covered attorney concerned will be provided written notice of the following rights in connection with the ethics investigation:

(1) To request a hearing before the investigating officer (IO);

(2) To inspect all evidence gathered;

(3) To present written or oral statements or materials for consideration;

(4) To call witnesses at his or her own expense (local military witnesses should be made available at no cost);

(5) To be assisted by counsel (see paragraph (c) of this section);

(6) To challenge the IO for cause (such challenges must be made in writing and sent to the Rules Counsel via the challenged officer); and

(7) To waive any or all of these rights. Failure to affirmatively elect any of the rights included in this section shall be deemed a waiver by the covered attorney.

(c) If a hearing is requested, the covered attorney may be represented by

counsel at the hearing. Such counsel may be:

(1) A civilian attorney retained at no expense to the Government; or,

(2) In the case of a covered USG attorney, another USG attorney:

(i) Detailed by the cognizant Naval Legal Service Office (NLSO), (or Defense Services Office (DSO), effective October 1, 2012), Law Center, or Legal Service Support Section (LSSS); or

(ii) Requested by the covered attorney concerned, if such counsel is deemed reasonably available in accordance with the provisions regarding individual military counsel set forth in Chapter I of the JAGMAN. There is no right to detailed counsel if requested counsel is made available.

(d) If a hearing is requested, the IO will conduct the hearing after reasonable notice to the covered attorney concerned. The hearing will not be unreasonably delayed. The hearing is not adversarial in nature and there is no right to subpoena witnesses. Rules of evidence do not apply. The covered attorney concerned or his or her counsel may question witnesses that appear. The proceedings shall be recorded but no transcript of the hearing need be made. Evidence gathered during, or subsequent to, the preliminary inquiry and such additional evidence as may be offered by the covered attorney shall be considered.

(e) The IO may appoint and use such assistants as may be necessary to conduct the ethics investigation.

(f) The IO shall prepare a report which summarizes the evidence, to include information presented at any hearing.

(1) If the IO believes that no violation has occurred or, by clear and convincing evidence, that the violation has occurred but the violation is minor or technical in nature and warrants only corrective counseling, then he or she may recommend that the file be closed.

(2) If the IO believes by clear and convincing evidence that a violation did occur, and that corrective action greater than counseling is warranted, he or she shall:

(i) Modify, as necessary, the list of substantiated violations of this part or, in the case of a military trial or appellate judge, the Code of Judicial Conduct;

(ii) Recommend appropriate action; and

(iii) Forward the ethics investigation to the Rules Counsel with a copy to the attorney investigated.

(g) The Rules Counsel shall review all ethics investigations. If the report is determined by the Rules Counsel to be incomplete, the Rules Counsel shall return it to the IO, or to another inquiry officer, for further or supplemental inquiry. If the report is complete, then:

(1) If the Rules Counsel determines, either consistent with the IO recommendation or through the Rules Counsel's own review of the investigation, that a violation of subpart B of this part or Code of Judicial Conduct has not occurred and that further action is not warranted, the Rules Counsel shall close the file and notify the complainant, the covered attorney concerned, and all officials previously notified of the complaint. OJAG (Code 05), OJAG (Code 13) and/or JAR, as appropriate, will maintain copies of all correspondence related to the closing of the file.

(2) If the Rules Counsel determines, either consistent with the IO recommendation or through the Rules Counsel's own review of the investigation, that a violation of this part or Code of Judicial Conduct has occurred but that the violation is of a minor or technical nature, then the Rules Counsel may determine that corrective counseling is appropriate and close the file. The Rules Counsel shall report any such decision, to include a brief summary of the case, to the JAG. (In cases relating to Marine judge advocates, including trial and appellate judges, in which the SJA to CMC is not the cognizant Rules Counsel, an information copy shall be forwarded to the SJA to CMC.) The Rules Counsel shall ensure that the covered attorney concerned receives appropriate counseling and shall notify the complainant, the covered attorney concerned, and all officials previously notified of the complaint that the file has been closed. OJAG (Code 05), OJAG (Code 13), and/or JAR, as appropriate, will maintain copies of all correspondence related to the

closing of the file. The covered attorney concerned is responsible, under these circumstances, to determine if his or her Federal, state, or local licensing authority requires reporting such action.

(3) If the Rules Counsel believes, either consistent with the IO recommendation or through the Rules Counsel's own review of the inquiry report, that professional disciplinary action greater than corrective counseling is warranted, the Rules Counsel shall forward the investigation, with recommendations as to appropriate disposition, to the JAG. (In cases relating to Marine judge advocates, including trial and appellate judges, in which the SJA to CMC is not the cognizant Rules Counsel, an information copy shall be forwarded to the SJA to CMC.)

### § 776.85 Effect of separate proceeding.

(a) For purposes of this section, the term ''separate proceeding'' includes, but is not limited to, court-martial, non-judicial punishment, administrative board, or similar civilian or military proceeding.

(b) In cases in which a covered attorney is determined, at a separate proceeding determined by the Rules Counsel to afford procedural protection equal to that provided by a preliminary inquiry under this part, to have committed misconduct that forms the basis for ethics charges under this part, the Rules Counsel may dispense with the preliminary inquiry and proceed directly with an ethics investigation.

(c) In those cases in which a covered attorney is determined to have committed misconduct at a separate proceeding which the Rules Counsel determines has afforded procedural protection equal to that provided by an ethics investigation under this part, the previous determination regarding the underlying misconduct is res judicata with respect to that issue during an ethics investigation. A subsequent ethics investigation based on such misconduct shall afford the covered attorney a hearing into whether the underlying misconduct constitutes a violation of subpart B of this part, whether the violation affects his or her fitness to practice law, and what sanctions, if any, are appropriate.

(d) Notwithstanding paragraphs (b) and (c) in this section, the Rules Counsel may dispense with the preliminary inquiry and ethics investigation and, after affording the covered attorney concerned written notice and an opportunity to be heard in writing, recommend to the JAG that the covered attorney concerned be disciplined under this part when the covered attorney has been:

(1) Decertified or suspended from the practice of law or otherwise subjected to professional responsibility discipline by the JAG or Chief Counsel of another Military Department;

(2) Disbarred or suspended from the practice of law or otherwise subjected to professional responsibility discipline by the Court of Appeals for the Armed Forces or by any Federal, State, or local bar; or

(3) Convicted of a felony (or any offense punishable by one year or more of imprisonment) in a civilian or military court that, in the opinion of the Rules Counsel, renders the attorney unqualified or incapable of properly or ethically representing the DoN or a client when the Rules Counsel has determined that the attorney was afforded procedural protection equal to that provided by an ethics investigation under this part.

### § 776.86 Action by the Judge Advocate General.

(a) The JAG is not bound by the recommendation rendered by the Rules Counsel, IO, PIO, or any other interested party, but will base any action on the record as a whole. Nothing in this part limits the JAG's authority to suspend from the practice of law in DoN matters any covered attorney alleged or found to have committed professional misconduct or violated subpart B of this part, either in DoN or civilian proceedings, as detailed in this part.

(b) The JAG may, but is not required to, refer any case to the Professional Responsibility Committee for an advisory opinion on interpretation of subpart B of this part or its application to the facts of a particular case.

(c) Upon receipt of the ethics investigation, and any requested advisory opinion, the JAG will take such action as the JAG considers appropriate in

the JAG's sole discretion. The JAG may, for example:

(1) Direct further inquiry into specified areas.

(2) Determine the allegations are unfounded, or that no further action is warranted, and direct the Rules Counsel to make appropriate file entries and notify the complainant, covered attorney concerned, and all officials previously notified of the complaint.

(3) Determine the allegations are supported by clear and convincing evidence, and take appropriate corrective action including, but not limited to:

(i) Limiting the covered attorney to practice under direct supervision of a supervisory attorney;

(ii) Limiting the covered attorney to practice in certain areas or forbidding him or her from practice in certain areas;

(iii) Suspending or revoking, for a specified or indefinite period, the covered attorney's authority to provide legal assistance;

(iv) Finding that the misconduct so adversely affects the covered attorney's ability to practice law in the naval service or so prejudices the reputation of the DoN legal community, the administration of military justice, the practice of law under the cognizance of the JAG, or the armed services as a whole, that certification under Article 27(b), UCMJ, or R.C.M. 502(d)(3), should be suspended or is no longer appropriate, and directing such certification to be suspended for a prescribed or indefinite period or permanently revoked;

(v) In the case of a judge, finding that the misconduct so prejudices the reputation of military trial and/or appellate judges that certification under Article 26(b), UCMJ (10 U.S.C. 826(b)), should be suspended or is no longer appropriate, and directing such certification to be suspended for a prescribed or indefinite period or to be permanently revoked; and

(vi) Directing the Rules Counsel to contact appropriate authorities such as the Chief of Naval Personnel or the Commandant of the Marine Corps so that pertinent entries in appropriate DoN records may be made; notifying the complainant, covered attorney concerned, and any officials previously provided copies of the complaint; and notifying appropriate tribunals and authorities of any action taken to suspend, decertify, or limit the practice of a covered attorney as counsel before courts-martial or the U.S. Navy-Marine Corps Court of Criminal Appeals, administrative boards, as a legal assistance attorney, or in any other legal proceeding or matter conducted under JAG cognizance and supervision.

### § 776.87 Finality.

Any action taken by the JAG is final.

### § 776.88 Report to licensing authorities.

Upon determination by the JAG that a violation of subpart B of this part or the Code of Judicial Conduct has occurred, the JAG may cause the Rules Counsel to report that fact to the Federal, State, or local bar or other licensing authority of the covered attorney concerned. If so reported, notice to the covered attorney shall be provided by the Rules Counsel. This decision in no way diminishes a covered attorney's responsibility to report adverse professional disciplinary action as required by the attorney's Federal, State, and local bar or other licensing authority.

## Subpart D—Outside Practice of Law by Covered USG Attorneys

### § 776.89 Background.

(a) A covered USG attorney's primary professional responsibility is to the DoN, and he or she is expected to devote the required level of time and effort to satisfactorily accomplish assigned duties. Covered USG attorneys engaged in the outside practice of law, including while on terminal leave, must comply with local bar rules governing professional responsibility and conduct and obtain proper authorization from the JAG as required by §§ 776.57 and 776.88 of this part.

(b) Outside employment of DoN personnel, both military and civilian, is limited by the UCMJ, MCM, and 10 U.S.C. 1044. A covered USG attorney may not provide compensated legal services, while working in a private capacity, to persons who are eligible for

legal assistance, unless specifically authorized by the JAG. See § 776.24. Because of the appearance of misuse of public office for private gain, this prohibition is based upon the status of the proposed client and applies whether or not the services provided are actually available in a DoN/DoD legal assistance office.

(c) Additionally, DoN officers and employees are prohibited by 18 U.S.C. 209 from receiving pay or allowances from any source other than the United States for the performance of any official service or duty unless specifically authorized by law. Furthermore, 18 U.S.C. 203 and 205 prohibit Federal officers and employees from personally representing or receiving, directly or indirectly, compensation for representing any other person before any Federal agency or court on matters in which the United States is a party or has an interest.

(d) These limitations are particularly significant when applied to covered USG attorneys who intend to engage concurrently in a civilian law practice. In such a situation, the potential is high for actual or apparent conflict arising from the mere opportunity to obtain clients through contacts in the course of official business. Unique conflicts or adverse appearances may also develop because of a covered USG attorney's special ethical responsibilities and loyalties.

**§ 776.90 Definition.**

(a) Outside practice of law is defined as any provision of legal advice, counsel, assistance or representation, with or without compensation, that is not performed pursuant or incident to duties as a covered USG attorney (including while on terminal leave). Occasional uncompensated assistance rendered to relatives or friends is excluded from this definition (unless otherwise limited by statute or regulation). Teaching a law course as part of a program of education or training offered by an institution of higher education is not practicing law for purposes of this rule.

(b) The requirement to seek permission prior to engaging in the outside practice of law does not apply to non-USG attorneys, or to Reserve or Retired judge advocates unless serving on active duty for more than 30 consecutive days.

**§ 776.91 Policy.**

(a) As a general rule, the JAG will not approve requests by covered USG attorneys to practice law in association with attorneys or firms which represent clients with interests adverse to the DoN.

(b) The JAG's approval of a particular request does not constitute DoN certification of the requesting attorney's qualifications to engage in the proposed practice or DoN endorsement of activities undertaken after such practice begins. Moreover, because any outside law practice is necessarily beyond the scope of a covered USG attorney's official duties, the requesting attorney should consider obtaining personal malpractice insurance coverage.

**§ 776.92 Action.**

(a) Covered USG attorneys, who contemplate engaging in the outside practice of law, including while on terminal leave, must first obtain approval from the JAG. Requests should be forwarded in the form prescribed in appendix to subpart D of part 776 to OJAG (Code 05), JAG (Code 13), or JAR, as appropriate, via the attorney's chain of command.

(b) The requesting attorney's commanding officer may:

(1) Disapprove and return the request if he or she perceives actual or apparent conflicts of interests;

(2) Recommend disapproval of the request and forward it, along with his or her rationale for such a recommendation; or

(3) Forward the request recommending approval and providing such other information as may be relevant.

(c) The JAG will review the request and advise applicants in writing of the decision, and of any conditions and limitations under which a particular practice may be undertaken. Until permission is granted, applicants will not commence any outside law practice.

**§ 776.93 Revalidation.**

(a) Covered USG attorneys to whom permission is given to engage in the outside practice of law will notify the

JAG in writing, via their chain of command, within 30 days of any material change in:

(1) The nature or scope of the outside practice described in their requests, including termination, or

(2) Their DoN assignment or responsibilities.

(b) Covered USG attorneys to whom permission is given to engage in the outside practice of law will annually resubmit an application to continue the practice, with current information, by October 1 each year.

## APPENDIX TO SUBPART D OF PART 776—OUTSIDE LAW PRACTICE QUESTIONNAIRE AND REQUEST.

DATE

From: (Attorney Requesting Outside Practice of Law)

To: Deputy Chief Judge, Navy-Marine Corps Trial Judiciary/Deputy Assistant Judge Advocate General (Administrative Law)/Head, Judge Advocate Research and Civil Law Branch, Judge Advocate Division

Via: (Chain of Command)

Subj: OUTSIDE PRACTICE OF LAW REQUEST ICO (Name of attorney)

### 1. Background Data

a. Name, rank/pay grade:

b. Current command and position:

c. Description of duties and responsibilities (including collateral duty assignments):

d. Describe any DoN responsibilities that require you to act officially in any way with respect to any matters in which your anticipated outside employer or clients have interests:

e. Normal DoN working hours:

### 2. Proposed Outside Practice of Law Information

a. Mailing address and phone number:

b. Working hours:

c. Number of hours per month:

d. Description of proposed practice (indicate the type of clientele you anticipate serving, as well as the type of work that you will perform):

e. Describe whether you will be a sole practitioner, or collocated, renting from, or otherwise affiliated or associated in any matter with other attorneys:

f. Describe, in detail, any anticipated representation of any client before the United States or in any matter in which the United States has an interest:

g. Describe the manner in which you will be compensated (hourly, by case, fixed salary, and how much of your fees will be related in any way to any representational services before the Federal Government by yourself or by another):

h. Provide a description of any military-related work to which your proposed practice may be applied including, but not limited to, courts-martial, administrative discharge boards, claims against the Department of the Navy, and so forth:

### 3. Attorneys With Whom Outside Practice Is/Will Be Affiliated, Collocated, or Otherwise Associated

a. Identify the type of organization with which you will be affiliated (sole practitioner, partnership, and so forth), the number of attorneys in the firm, and the names of the attorneys with whom you will be working:

b. Identify the attorneys in the firm who are associated in any way with the military legal community (e.g., active, Reserve, or retired judge advocate), and specify their relationship to any of the military services:

c. Identify the nature of your affiliation with the organization with which you intend to be associated (staff attorney, partner, associate, space-sharing, rental arrangement, other):

d. Provide a brief description of the type of legal practice engaged in by the organization with which you intend to affiliate, including a general description of the practice, as well as the clientele:

e. Describe the clientele who are military personnel or their dependents, and the number and type of cases handled:

f. Describe whether your affiliates will refer clients to you, and the anticipated frequency of referral:

g. Describe

(1) Whether your associates will assist or represent clients with interests adverse to the United States or in matters in which the United States has an interest:

(2) Those clients, matters, and interests in detail:

(3) What support will you provide in such cases:

(4) What compensation, in any form, you will receive related to such cases:

### 4. Desired Date of Commencement of Outside Practice

a. Identify if this is your first request or an annual submission for re-approval:

b. If this is an annual submission, indicate when your outside practice began:

c. If this is your first request, indicate when you wish to begin your practice:

### 5. Conflicts of Interest and Professional Conduct (Include the following statement in your request)

''I certify that I have read and understand my obligations under enclosure (3) to JAGINST 5803.1 (series), DOD 5500.7–R, Joint

Ethics Regulation, JAGMAN Chapter VII, the Legal Assistance Manual, and Title 18, U.S.C. 203, 205, and 209. I certify that no apparent or actual conflict of interests or professional improprieties are presented by my proposed initiation/continuation of an outside law practice. I also certify that if an apparent conflict of interest or impropriety arises during such outside practice, I will report the circumstances to my supervisory attorney immediately.''

6. Privacy Act Statement. I understand that the preceding information is gathered per the Privacy Act as follows:

Authority: Information is solicited per Executive Order 12731 and DOD 5500.7–R.

Primary purpose: To determine whether outside employment presents conflicts of interest with official duties.

Routine use: Information will be treated as sensitive and used to determine propriety of outside employment.

Disclosure: Disclosure is voluntary. Failure to provide the requested information will preclude the Judge Advocate General from approving your outside practice of law request.

Signature

## Subpart E—Relations With Non-USG Counsel

### § 776.94 Relations with Non-USG Counsel.

(a) This part applies to non-USG attorneys representing individuals in any matter for which the JAG is charged with supervising the provision of legal services, including but not limited to, courts-martial, administrative separation boards or hearings, boards of inquiry, and disability evaluation proceedings. Employment of a non-USG attorney by an individual client does not alter the responsibilities of a covered USG attorney to that client. Although a non-USG attorney is individually responsible for adhering to the contents of this part, the covered USG attorney detailed or otherwise assigned to that client shall take reasonable steps to inform the non-USG attorney:

(1) Of the contents of this part;

(2) That subpart B of this part apply to civilian counsel practicing before military tribunals, courts, boards, or in any legal matter under the supervision of the JAG as a condition of such practice; and

(3) That subpart B of this part take precedence over other rules of professional conduct that might otherwise apply, but that the attorney may still be subject to rules and discipline established by the attorney's Federal, state, or local bar association or other licensing authority.

(b) If an individual client designates a non-USG attorney as chief counsel, the detailed USG attorney must defer to civilian counsel in any conflict over trial tactics. If, however, the attorneys have ''co-counsel'' status, then conflict in proposed trial tactics requires the client to be consulted to resolve the conflict.

(c) If the non-USG attorney has, in the opinion of the involved covered USG attorney, acted or failed to act in a manner which is contrary to subpart B of this part, the matter should be brought to the attention of the civilian attorney. If the matter is not resolved with the civilian counsel, the covered USG attorney should discuss the situation with the supervisory attorney. If not resolved between counsel, the client must be informed of the matter by the covered USG attorney. If, after being apprised of possible misconduct, the client approves of the questioned conduct, the covered USG attorney shall attempt to withdraw from the case in accordance with § 776.35 of this part. The client shall be informed of such intent to withdraw prior to action by the covered USG attorney.

## Subpart F [Reserved]

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# FINDING AIDS

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For changes to this volume of the CFR prior to this listing, consult the annual edition of the monthly List of CFR Sections Affected (LSA). The LSA is available at *www.fdsys.gov*. For changes to this volume of the CFR prior to 2001, see the ''List of CFR Sections Affected, 1949–1963, 1964–1972, 1973–1985, and 1986–2000'' published in 11 separate volumes. The ''List of CFR Sections Affected 1986–2000'' is available at *www.fdsys.gov*.

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